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## WRITING TIPS ...

### PUNCTUATION MATTERS

BY MARTHA FAULK

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“Punctuation plays a critical role in the modern writing system, yet its significance is regularly underestimated,” says David Crystal in his comprehensive study of the history, structure, and use of the English language.<sup>1</sup> Crystal explains that punctuation marks appeared first in classical texts as a guide to phrasing in oratory. Standardization emerged only after the introduction of the printing press, but even then punctuation was never bound by rules to the same extent as spelling. Although “scribes and publishing houses have always varied in their practices ... today punctuation remains to some extent a matter of personal preference.”<sup>2</sup> For legal writers, however, that observation may prove disconcerting.

#### Punctuation as Personal Preference

Most of us have argued with our colleagues, teachers, editors, and friends about the placement of the comma. Because certainty is valued in the legal profession, we look to authoritative publications for guidance. But, as Crystal suggests, “scribes and publishing houses”<sup>3</sup> often vary in their preferences just as individuals do. In my experience as a teacher of both legal and business writing, one of the most argued-about comma rules deals with a series of three or more words, phrases, or clauses connected by a coordinating conjunction—the “serial comma” rule.

<sup>1</sup> *The Cambridge Encyclopedia of the English Language* 278 (1995).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

#### The Serial Comma

Although the standard guide to legal citations does not address the serial comma rule specifically, it shows the placement of the comma before the coordinating conjunction by illustration, as in this example: “Once a full citation is given, you may use a short form for cases, statutes, regulations, legislative materials, books, articles, periodical materials, and so forth. ...”<sup>4</sup>

Other reference books address the serial comma issue directly. *The Publication Manual of the American Psychological Association*, which is used by many academic editors, states that a comma must be used “between elements (including before *and* and *or*) in a series of three or more items.”<sup>5</sup> Thus, a sentence describing the “height, width, or depth” of an object properly sets off each element with a comma. The *Manual* offers no explanation for its rule, nor do most other authorities.<sup>6</sup> It might seem that the only rationale for the particular punctuation is simply one of consistency.

#### Conflicting Advice

The *Associated Press Stylebook*, in contrast to the *APA Manual*, follows a different rule of punctuation for a series: “Use commas to separate elements in a series, but do not put a comma before the conjunction in a simple series.”<sup>7</sup> This treatise begins its discussion of punctuation with a stern warning: “There is no alternative to correct punctuation. Incorrect punctuation can change the meaning of a sentence, the results of which could be far-reaching.” The book continues that aside from unclear meaning, “bad punctuation, however inconsequential, can cause the reader to lose track of what is being said and give up reading a sentence.”<sup>8</sup>

<sup>4</sup> *The Bluebook: A Uniform System of Citation* 15 (17th ed. 2000).

<sup>5</sup> *Publication Manual of the American Psychological Association* 78 (2001).

<sup>6</sup> Other authorities following the APA rule include Joseph Gibaldi, *MLA Handbook for Writers of Research Papers* 81 (6th ed. 2003); *The Chicago Manual of Style* 173 (14th ed. 1993).

<sup>7</sup> *The Associated Press Stylebook and Briefing on Media Law* 329 (2002).

<sup>8</sup> *Id.* at 326.

One explanation for the varying advice may be the level of formality involved in the writing. Some style guides note a difference between formal and informal writing, sometimes described as “open” or “closed” or “light” or “heavy.” Although the differences are not always clear, the “closed” style tends to follow traditional punctuation usages. In that case, then, the writer would set off all the elements of a series—including the element preceding the coordinating conjunction—with commas.

For an example of the importance of punctuation in a legal document, we can consider a typical case. Although the case illustrates a rather complex series of modifiers, we can see that punctuation is integrally connected with the grammar, and thus the meaning, of the clause.

### A Case Example

Assume that an insurer issues an insurance policy to a public housing authority. As the project proceeds, the housing authority has a dispute with the construction firm and seeks a judicial resolution of the insurer’s duty to provide legal services.

The defendant insurer takes the position that the policy is clear and unambiguous on its face and the housing authority’s claim does not fall within its scope. The language in the insurance policy excludes all “claims arising from procurement, construction, or architect or engineer contracts.” The housing authority argues that the vagueness of meaning requires a decision in its favor because of the generally recognized principle that holds the drafter of a contract liable for ambiguity of its terms.

### The Ambiguity of Interpretation

Where is the ambiguity? There are two possible interpretations of the clause.

The first interpretation would be that the drafter meant for all of the nouns in the prepositional phrase limiting the meaning of

“claims” to adjectivally modify the end word “contract.” Thus, a construction problem relating to the *contractual* obligation would be excluded from coverage, because “construction” would serve as a noun functioning as an adjective and thus modifying “contract” just as “architect” and “engineer” do.

However, another possibility would be for the nouns “procurement” and “construction” to function as nouns indicating procurement in general and construction in general, and for the nouns “architect” and “engineer” to function as adjectives modifying the end-word “contract.” In that situation, the insurer could claim that the exclusion is very broad and it has no obligation to defend any claim arising out of an issue related to construction, whatever its nature.

Since coordinating conjunctions usually link equal grammatical elements, we might expect all of the nouns in the clause to function as adjectives and modify the noun “contract.” But the presence of two coordinating conjunctions, *or* and *or*, is confusing, and so is the comma placement. Since the drafter placed “procurement” and “construction” before the conjunction *or* and placed a separating comma there, we might reasonably determine that “procurement” and “construction” serve as general nouns because of the comma before the first *or*. The nouns “architect” and “engineer,” which follow the comma, are placed closer to the word “contract” and thus seem more likely to be used in the adjectival sense.

### The Cost of Unclear Writing

The court, faced with two possible interpretations, applied the general rule of construing the contract against the drafter who had the opportunity to make clear the intent of the agreement. Since the insurer did not, the court, by summary judgment, held the insurer liable for approximately \$750,000 as a performance bond.<sup>9</sup>

<sup>9</sup> The author served as an expert witness in this Colorado case in 1995.

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How could mere punctuation have made this clause more clear? Let’s apply the closed punctuation rule—a conservative approach, favored by most legal writing experts. The clause would then recite the series of excluded items in this manner: exclusions for “claims arising from procurement, construction, architect, or engineer contracts.” Now we’ve followed the closed punctuation rule exactly and avoided the confusion of the second *or*. The exclusions all pertain to a set of claims involving contractual obligations.

An additional change in wording would also be helpful for clarity. If the drafter used the more obvious adjectival forms of the nouns “architect” and “engineer,” then the case for plain meaning of the excluded items would have been strengthened. Our amended clause would thus exclude “claims arising from procurement, construction, architectural, or engineering contracts.” In either example, the four excluded items would be seen to function as adjectives modifying “contracts.” If, however, the drafter wished to exclude claims arising from procurement in general and construction in general, then the entire clause would have to be rewritten to indicate such meaning.

### Punctuation Advice

What advice can be drawn from this technical discussion of grammar and punctuation? Legal writers would be best served by following the precepts of the more formal “closed” style of punctuation recommended by books on legal writing, especially in legal documents where consistency and clarity of meaning are paramount.<sup>10</sup> The insurance company drafter should have noted the use of serial elements and considered whether those elements were properly placed and punctuated; instead, the drafter used conjunctions that may or may not have been intended to substitute for commas. The lack of attention to punctuation and word choice resulted

in an adverse judgment. Not all bad punctuation practices lead to confused meaning, of course, but incorrect punctuation can suggest sloppy proofreading or general unfamiliarity with rules of writing.

### Punctuation as a Custom

Some punctuation usages simply conform to a particular custom. In the United States, for example, punctuation used with quotation marks takes a form different from that in other countries. A very common example is the placement of a period or a comma within the end quotation mark. In Great Britain, the conventional use is exactly opposite: periods and commas are placed on the outside of the end quotation mark.

### The Moral: Pay Attention to Punctuation

Punctuation may vary depending on the particular document and writer and on national custom, but it does matter. The rules of punctuation are sometimes those that clarify meaning and sometimes those that follow an established convention. But in either instance, poor punctuation habits work to the detriment of lawyers. Such habits may lead to litigation to resolve unclear rights and responsibilities, or they may indicate ignorance of the idiom. Whatever the consequences, lack of attention to punctuation carries a price.

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<sup>10</sup> Martha Faulk & Irving Mehler, *The Elements of Legal Writing* 69 (1994).