

**Q.** This question is about a charging document. Please comment on the grammar of the complaint, which follows: “On such date, Defendant, did intentionally, knowingly, or recklessly, operate or assume actual physical control of a vehicle upon a public way to care for himself and guard against casualty; and/or did operate or assume actual physical control of a vehicle upon a public way thereby committing the offense of operating a vehicle under the influence of an intoxicant in violation of section 12345 and/or 678910 of the HRS.”

**A.** The grammar of the complaint is very bad; it suffers both from archaic language (for example, “did intentionally ...,” which reads as if copied from an old copy book) and bad punctuation. But its worst fault is ambiguity, which is the result of the twice-used phrase *and/or*.

Many lawyers think that the phrase *and/or* is a useful shortcut, indicating that several meanings are possible. And lay dictionaries concur. For example, *Webster’s Third New International Dictionary* defines *and/or* as follows: “Words on either side of a term [that] can be taken either together or individually.” So the phrase “cats and/or dogs” can include one of three possible meanings: (1) both cats and dogs, (2) only cats, and (3) only dogs.

The phrase *and/or* does seem useful as a shortcut, and one court that approved of it called it a “self-evident equivocality,” because it avoids the alternative of adding confusing language like “or both or any combination thereof.” (118 A.L.R. 1367 also approved of *and/or*, saying that it was useful because it avoided alternative, round-about language like “or both or any combination thereof.”) The A.L.R. added that *and/or* is a “deliberate amphibology”—that is, a purposely ambiguous expression that is “useful in its “self-evident equivocality.” (I withhold comment on the lack of clarity in both explanations.)

But *and/or* is a *useful* shortcut only when there are just two alternatives, one on each side of the slash. But if the choice involves more than two terms, misunderstanding is almost inevitable.

One case should serve as an illustration: “The issue was whether the

evidence proved that the plaintiff had sustained unusual strain in his left side and back, or a hernia on his left side *and/or* a stretching and tearing of the ligaments in his back.” *Wichita Falls & S.R. Company v. Lindley, Tex. Civ. App.*, 143 S.W.2d 428, 432 (Emphasis added). Just try to figure that out!

In the complaint the correspondent sent, it is true that there were only two possibilities involved, one on either side of the *and/or*: “to care for himself” and “to guard against casualty.” But the drafter of the document inexplicably placed a semicolon before *and/or*, indicating that the language that followed was not connected to the phrase *and/or*.

It is possible that the drafter of the complaint intended *and/or* to refer back to the *either/or* passage at the beginning of the complaint, but that is grammatically impossible because of its distance from that language. So the phrase *and/or*, instead of being a useful shortcut, was an impediment to clarity.

The document that the lawyer enclosed was a textbook example of when to avoid *and/or*. As regular readers of this column may recall, lawyers who sent me questions about *and/or* have consistently been warned to avoid using the phrase in legal writing—in which clarity is much more important than brevity is.

But perhaps the most important reason to avoid *and/or* is that many judges vehemently dislike it. The least inflammatory objection is that the expression is “misleading and confusing.” But a significant number of judges are passionately opposed to *and/or*. The usage has been dubbed “slovenly,” “a meaningless symbol,” a “linguistic

abomination,” and “that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a someone too lazy to express his precise meaning or too dull to know what he did mean.”

And if that is not enough to deter you from using it when you appear before a judge, you cannot be dissuaded!

### Potpourri

Some time ago, a reader contributed another example of ambiguity he had noticed in the prescription for eyedrops that his ophthalmologist had given him. The instructions for using the drops read, “Three or four drops in each eye every day. You can’t use too much of the drops.”

The reader’s dilemma: Does the word *can’t* mean “it’s impossible (to use) too much”? Or does *can’t* mean “you should not use too much”? That ambiguity is inherent in the negative form of the modal verb *can*. Although the affirmative form *can* means “able to,” the negative form permits either of the two meanings above. (Perhaps the person who noticed the possible ambiguity ought to notify his ophthalmologist about it.)

Another correspondent recalled Ed Asner’s appearance on “Saturday Night Live” some time ago. Asner portrayed an engineer who was retiring from his job as chief engineer at a power plant. His parting instructions to the associate engineers were, “You can’t add too much water to the generator.” The very next day, one of the associate engineers, who understood the direction to mean that it was impossible to add too much water to the generator, was liberally pouring water into the generator, when the other associate engineer passed by. He believed that the chief engineer’s direction meant that *can’t* meant “should not.”

So they stopped pouring and called the retired chief engineer to ask him. Furious at the intrusion on the first day of his retirement, the engineer shouted, “Stop pouring the water! It’ll rust the hell out of the pipes!” Now, that’s clear! **TFL**

---

*Gertrude Block is lecturer emerita at the University of Florida College of Law and can be reached at [block@law.ufl.edu](mailto:block@law.ufl.edu).*