

# Chapter 10

## Clarity in Drafting

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This chapter is about readability or "plain language" issues in bills. It also treats some matters of substantive clarity. (On substantive clarity, see also chapter 2.) It is not about form or mechanics, which are treated in chapters 4 and 12. Its aim is to review current thinking on what makes bills hard, or easy, to read and understand.

A glance at section 2 of the bibliography will show how much material there is about readability in legal documents. In most cases, researchers agree about what writers should do, but not in all cases. So this chapter gives drafters general advice, but it also refers them to other works for further examples and discussion.

### 10.1 The Question of Audience

Bills are not all aimed at the same readers. Rather, the primary audience of bills varies with the bill. If your bill regulates migrant labor and orders recruiters and employers to put workers' terms in writing, then employers, recruiters, and workers are your audience, some with limited education. On the other hand, if you are drafting a bill regulating securities sales, then brokers and bankers are your audience, and your bill will have to use the technical vocabulary of their trade. Laws addressed to people in general—for example, laws prohibiting dumping in state parks—ought to aim at people of average intelligence and average education.

Writing for a less knowledgeable audience means that you must work hard at keeping sentences short and eliminating or defining difficult words. But writing for a knowledgeable audience does not give you an excuse to write long, unwieldy sentences. For sophisticated readers you may be

able to be briefer; you can pack information into specialized words. For other readers your material must be less dense. See Child, *Drafting Legal Documents*, pp. 2-4; Charrow, Charrow, and Erhardt, *Clear and Effective Legal Writing*, pp. 97, 101-110; Dickerson, *Fundamentals*, pp. 26-31.

## 10.2 Order and Organization

The preferable arrangement of provisions within a bill varies with each bill but, regardless of the type of bill, they should be arranged in a logical order.

You should probably put definitions first and basic provisions before special cases, but for everything else you're free to use one of several patterns.

Chronological order works especially well in bills that describe procedures. For example, a section regulating employers' treatment of migrant workers might tell what employers must do at several stages of the work season:

- when they recruit and hire;
- when they write contracts setting hours and pay;
- when they meet special situations (a worker is fired, quits, becomes ill, or refuses to work);
- when they pay wages; and
- when they settle at the end of the season.

Using chronological order may mean preferring one audience to another. For example, bills governing prisons affect not only prisoners but prison workers who must comply with the law and agency workers who have to check compliance. There is no particular order to obeying these laws. It might be best to decide on a convenient order for inspection and to order sections that way. If food service, health equipment, and sanitation will be checked together, laws governing them should be next to one another.

Not all chronological order is this obvious. It may take some discussion and reflection to decide what the order of sections should be.

## 10.3 Headnotes

Headnotes for sections and subdivisions are not part of the law, except in the Uniform Commercial Code, but they are very valuable to readers when they are written well. Their function is to help readers find the material they need. Subdivision headnotes are especially important in long sections, because a reader who has only a section number needs them to help narrow the search.

See Redish, *Beyond Readability*, p. 9; Felker, et al., *Guidelines for Document Designers*, pp. 17-19; Charrow, Charrow, and Erhardt, *Clear and Effective Legal Writing*, pp. 148-150.

## 10.4 Section, Subdivision, and Paragraph Length

The more material you place in a single block, the harder it is for readers to find the particular provisions they are interested in. Long, solid blocks of text also make it more difficult to keep one's place in reading. To make reading easier, try to limit the length of unbroken passages.

## 10.5 Person

Drafters need to compromise between the needs of statutory drafting and the requirements of plain English. Most plain English contract laws call for the use of the second and first person—addressing the consumer as "you" and calling the provider "we." Using "we" and "you" is impractical in bills which have to deal with several different sets of people and their duties at once. Write in terms of "the commissioner," "the department," and so on.

## 10.6 Number

Use the singular form of a noun rather than the plural. This custom is based on the practical difficulty of using plurals consistently. See section 2.2.

Examples:

Use: A person who . . . .

Do not use: All persons who . . . .

## 10.7 Voice

*What are active voice and passive voice?* A sentence is in the active voice when the subject "does" the verb: "Agencies publish rules in the State Register," is in the active voice. "Rules are published in the State Register by agencies" is in the passive voice because the subject *rules* is not the doer of the verb *are published*. The doer shows up in *by agencies*. "Rules are published in the State Register" is still in the passive voice, although the doer of the action does not show up at all. Another way to recognize passive voice is to look for the verbs *be, is, are, was, were, has been, have been*, and *had been* followed by words that end in *-ed, -t, or -en*. Here are some examples:

is taken  
must be arithmetically averaged  
are taught  
have been reduced

Clauses or sentences that contain verbs like these are in the passive voice.

*What's wrong with passive voice?* In laws and rules, passive sentences without phrases containing "by" are dangerous because they do not say what duties are assigned to whom. Wydick's *Plain English for Lawyers* demonstrates the problem with this sentence from a patent license:

All improvements of the patented invention which are made hereafter shall promptly be disclosed, and failure to do so shall be deemed a material breach of this license agreement.

Nothing in the sentence tells us who must disclose improvements to whom. If rules and laws exist to explain people's responsibilities, then drafters must avoid sentences that don't assign responsibilities clearly.

*When is the passive voice needed?* Voice lets you put old or repeated information at the beginning of the sentence where it demands less attention and new information at the end of the sentence where it stands out.

The indictment, information, or affidavit must charge the person with having committed a crime. It must be authenticated by the executive authority making the demand.

Passive voice can also let you put a long string of nouns at the end of a sentence so that your reader will not have to work through the series before coming to the verb:

The application may be made by the prosecuting attorney of the county in which the offense was committed, the parole board, or the chief executive officer of the facility or sheriff of the county from which the person escaped.

Sometimes passive voice will help you avoid using *he or she*.

When you use passive voice for any of these reasons, be certain that the duty or permission is assigned clearly, either in the passive sentence or in one of the sentences nearby.

*When is the passive voice unnecessary?* When the passive voice does not solve these specific problems, it is probably unneeded. When a sentence contains a phrase beginning with *by* ("by the commissioner") and that phrase is not at the end of the sentence, you can safely change the sentence to active voice.

*Passive:* The required monitoring frequency may be reduced by the commissioner to a minimum of one sample analyzed for total trihalomethanes per quarter.

*Active:* The commissioner may reduce the required monitoring frequency to a minimum of one sample analyzed for total trihalomethanes per quarter.

*Passive:* When a demand is made upon the governor of this state by the executive authority of another state for the surrender of a person charged with crime . . . .

*Active:* When the executive authority of another state demands that the governor of this state surrender a person charged with crime . . . .

## 10.8 Shall, Must, and other Verbs of Command

### (a) Duties

*Active voice:* To impose a duty to act, drafters have a choice between two auxiliary verbs: *shall* or *must*. Both *shall* and *must* are statutorily defined as mandatory, in Minnesota Statutes, section 645.44. Here are two examples of their use:

The commissioner shall evaluate the report.

The commissioner must evaluate the report.

Either way, the sentence should be in the active voice, and the subject of the sentence should be a human being or a legal entity on whom a duty can be imposed.

*Passive voice:* No matter which verb is used, imposing duties with the passive voice is risky because the sentence might not make clear who has the duty to act. However, if the context makes clear who has to do it, a drafter can impose a duty in the passive voice with *must*:

The application must be processed when the comment period has elapsed.

(This assumes that a previous sentence makes it clear who has the duty to process the application.)

Drafters should avoid using *shall* in the passive voice. See *Statements of Law*, under this topic.

*Determining duties:* Not every sentence that has a human subject takes a *shall*. When drafters use *shall* to impose duties, they should be certain that what they are creating is really a duty. Consider the sentence, "The board shall take any action it considers useful in overseeing investments." Does it really make sense to order the board to do what it wants to do? The statement makes more sense if it is drafted with *may*, as a permission. To test for this type of problem, try substituting *must* or *has the duty to* and see if the sentence still makes sense.

*Statements of Law and Requirements or conditions* (under this topic) are other types of sentences with human subjects that do not take *shall*.

## **(b) Prohibitions**

*Shall not or must not:* To impose a duty not to act—a prohibition—the drafter has the same two choices: *shall* or *must*, combined with *not*:

The commissioner shall not impose an additional fee for late applications.

A person must not operate a motor vehicle in violation of motor vehicle noise rules adopted by the pollution control agency.

*Passive voice:* Drafters should avoid using *shall not* in the passive voice. See *Statements of Law*, under this topic.

If context makes it clear who has the duty not to act, or who is subject to the prohibition, drafters can impose prohibitions in the passive voice with *must*:

Vented freestanding room heaters must not be installed in bedrooms or sleeping quarters. . . .

(This assumes that it does not matter who is acting; no one is allowed to install such a heater in a bedroom.)

*May not:* Prohibitions can also be drafted with *may not*, but passive *may not* needs special care. See *Permissions*, under this topic.

## **(c) Permissions**

*May:* To permit an action, or to give someone discretionary authority, drafters should use *may*. *May* is statutorily defined as permissive, in Minnesota Statutes, section 645.44. Longer forms like *is authorized to* are not needed.

The commissioner may order the property seized.

To test whether *may* is really the right verb to use, a drafter should ask the question: Do I really intend to give this person the *discretion* to do this or not to do it? In sentences that give alternatives, *may* feels natural but can be ambiguous. For example, consider the following sentence:

The board may amend the list of wastes by adopting a resolution or by following the normal rulemaking procedure.

Does this mean that the board is free to decide to amend or not to amend? Or does it mean that the board *must* amend, but is free to choose one way to amend or the other? If the drafter really intends the latter meaning, *shall* or *must* is the better choice. *May* should be used only to leave someone free to do a thing or not.

Like *shall* and *must*, *may* in the passive voice is risky. To make clear who has the permission or authority, it is better to write in the active voice and to say that some person may seize the property than to say that it "may be seized."

Also, a passive *may* is susceptible to misreading. For example, consider the sentence, "An application submitted after the June 30 deadline *may be rejected*." Is this sentence just alerting the reader that a late application might not be approved, or is it specifically permitting the reviewer to reject it?

*May not:* To say an action is not permitted, drafters have at least two choices. They can express a negative permission by using *may not* or they can express a prohibition by using *shall not* or *must not*. (See *Prohibitions* under this topic.)

Essential employees may not strike.

An employee must not strike unless written notice of intent to strike is served on the employer and the commissioner.

Drafters should be aware, though, that passive *may not*, like passive *may*, can be misread by readers not accustomed to the conventions of legal drafting or not acquainted with the principles of statutory interpretation. For example, consider the sentence, "If an aid application is not received by the June 30 deadline, it may not be approved for the fall quarter."

Drafters know that in laws or rules the only appropriate uses of verbs are to require or prohibit acts, grant or deny permissions, or establish standards or requirements, and they know that mere statements of possibility have no place in law. However, not all readers know these limitations. Since in general English *may* can mean possibility as well as permission, a student who wants to apply for aid might understand the example sentence as a mere warning that a late application might not get timely money. Even though the aid-granting agency will probably understand what the drafter meant—that the agency is not permitted to give money to a late applicant—at least part of the audience could be misinformed.

To avoid such misreadings of *may not be*, drafters have several choices. They can replace *may not be* with *must not be*. They can put the negative element in the main verb as shown in the following pair of examples:

If an aid application is not received by the June 30 deadline, it must not be approved for the fall quarter.

If an aid application is not received by the June 30 deadline, it must be rejected for the fall quarter.

Finally, they can adopt the advice in section 10.7 and recast the sentence in the active voice.

If an aid application is not received by the June 30 deadline, the agency may not approve the application for the fall quarter.

To avoid any misreading that involves the *may* of possibility, some drafters refrain entirely from using *may not*, either in the passive or the active voice, and substitute a prohibition with *shall not* or *must not*.

#### **(d) Statements of Law**

To say what the law is—that is, to make a statement that is true by operation of law—drafters should use *is* or *are*, not *shall be*. For example, a drafter should write that a person *is eligible* for a grant under certain conditions, not that the person *shall be eligible*. Negative statements work the same way: a drafter should write that a person *is not eligible* for a grant under certain conditions, not that the person *shall not be eligible*. The practice of using *shall* to state a legal result is discussed by drafting authorities as an error called the "false imperative."

*Shall be* and *shall not be* in any context are potentially ambiguous. Consider the following sentence: "A member of the investment board shall be a member of the guaranty association." Does *shall be* in this sentence mean *is* or does it mean *must be*? In other words, does this sentence constitute a requirement that a member of the investment board first be a member of the guaranty association, or is it a declaration that a board member automatically becomes a guaranty association member?

Because *shall* with *be* can be read two ways, and because the passive voice always involves the use of a form of *be*, drafters should avoid using *shall*, or *shall not*, in the passive voice.

#### **(e) Requirements or Conditions**

*Must*: To create requirements or conditions—statements about what people or things must be rather than what they must do drafters should use *must*, not *shall*:

To be eligible for nomination, a person must be at least 21 years old.

A motor vehicle must be equipped with a horn.

*Must* is preferred because requirements or conditions usually need a form of *be*, and *shall* combined with *be* is often ambiguous. See *Statements of Law*, under this topic.

*Must not*: A requirement or condition can also be stated negatively, and in that case the drafter should write *must not*:

The nominee must not have been a registered lobbyist at any time within three years before nomination.

*Need not or is not required to:* To show that something is not required, drafters should use *need not or is not required to*:

If fewer than seven people object to the rule, a hearing need not be held.

If fewer than seven people object to the rule, a hearing is not required.

### **(f) Definitions**

To define a term, drafters should use *means*, not *shall mean*.

"Farm tractor" means a tractor designed and used primarily as a farm implement. . . .

In the introduction to a series of definitions, drafters should say that the terms "have the meanings given them" rather than "shall have the meanings given them."

### **(g) Rights and Entitlements**

To create a right, drafters should use *is entitled to*, not *shall be entitled to*; to negate a right, *is not entitled to*.

The member is entitled to be compensated for expenses attributable to service on the board.

(This assumes that it is also clear from some other sentence who has the duty to compensate the member.)

### **(h) Conditional Clauses**

In conditions, drafters should not use *shall* at all. Formulas like "If it shall have been established" can become "If it has been established . . ." or better, "If (someone with the duty) has established . . ."

### **(i) Other Verbs**

Drafters are often tempted to use other verbs, such as *can*, *should*, or *will*. The best advice is to avoid alternatives and stick to the models given above. Some drafting authorities do discuss *should* (Dickerson, for example) and *will* (state rule-drafting manuals), but little agreement exists among the authorities. It is not certain how readers will understand the alternative verbs or how courts will construe them.

### **(j) Summary Recommendations**

What follows is a short rule that drafters can apply to help them use *shall* and *must* consistently with our recommendations.

Either *shall* or *must* may be used if all of the following conditions are satisfied:

- (1) The statement imposes a duty or prohibition.

- (2) The subject of the sentence is a human being or legal entity.
- (3) The duty or prohibition is imposed in the active voice.

If all conditions are not met, use *must* to impose a duty, prohibition, obligation, requirement, status, or condition.

## 10.9 Ambiguous Words

Ambiguity in drafting is a serious problem. It deserves attention, and it warrants detailed advice about how drafters can avoid it. The information here supplements the material in chapter 2 on the statutory interpretation of ambiguous words and phrases.

Semantic ambiguity—the type of ambiguity that occurs when a single word has more than one meaning—is most easily avoided by defining any term that people might disagree about. For example, the parties to *Frigalment Importing Co. v. International Sales Corp.* (190 F. Supp. 116, S.D.N.Y. 1960) disagreed over the meaning of "chicken." Did the word "chicken" in their contract include only broilers and fryers, or did it include stewing chickens as well? A definition would have helped, if only the parties to the contract had realized they needed one.

A greater danger, though, is that we will disagree over the meaning of very common and very small words, words we never think about defining. For example, *may* and *may not*, and *shall* with forms of *be*, can cause a number of problems. They are discussed in section 10.8. The choice of *and* or *or* in a list is discussed in section 10.20.

The following sections discuss several more situations in which drafters risk using ambiguous wording.

## 10.10 Ranges of Numbers, Days, Dates, and Ages

Some other small words that cause trouble are the words we use to specify ranges of numbers, ages, and dates: *to*, *through*, *between*, and *from*.

When specifying a set that begins at A and ends at B, the drafter should make clear whether the named end points are included.

For ranges of sections in bills, statutes, or rules, it is acceptable and traditional to use a form such as "sections 1 to 20" because the laws on statutory interpretation make clear what the range means. They specify that in ranges of sections, the form "sections x to x" includes the first and last numbers and all sections between them. See Minnesota Statutes, section 645.48.

However, in other instances, the solution is not so easy; *to* is not synonymous with *through*.

For ranges of days, the drafter should avoid the use of *to* altogether. The phrase "Monday through Friday" includes all of Friday, but the phrase "Monday to Friday" includes all of Thursday and is ambiguous as to whether Friday is included. To be certain that Friday is included, the drafter should say "Monday through Friday." To exclude Friday, the drafter should write "Monday through Thursday."

For ranges of dates, Reed Dickerson gives the following advice:

*Don't say*

From July 1, 2002, to. . .  
Between July 1, 2002, and. . .  
To (or until or by) June 30, 2002. . .

*Say*

After June 30, 2002, and before. . .  
After June 30, 2002, and before. . .  
Before July 1, 2002. . .

Ranges of ages are equally slippery. Here is more of Dickerson's advice:

*Don't say*

between the ages of 17 and 45

*Say*

17 years old or older and under 46

*Don't say*

who is more than 17 years old

*Say*

who has passed his 17th birthday  
[or 17 years old or older]

*unless you mean*

who is 18 years old or older

Remember that Minnesota Statutes, sections 645.13, 645.14, and 645.15, also affect the computation of time.

### 10.11 *That and Which*

A possible source of ambiguity is the word *which* used without commas. The general rule is that *that* should be used to introduce restrictive clauses (those that are necessary for meaning), and *which*, with commas, should be used to introduce nonrestrictive clauses (those not necessary for meaning). If a drafter uses *which* without commas, a reader may be unable to tell whether the clause is necessary for meaning. The drafter will need to decide whether to change *which* to *that* or add commas. Often the best solution is to redraft the sentence entirely.

For example, in the sentence—

A report which is required to be available for inspection must be in a form convenient for photocopying

—which of the following is meant?

1. A report, which is required to be available for inspection, must be in a form convenient for photocopying.

(In other words, all the reports have to be made available and all have to be in a certain form. This could be redrafted as *The office must make the report available for inspection and must preserve it in a form convenient for photocopying.*)

2. A report that is required to be available for inspection must be in a form convenient for photocopying.

(In other words, the reports that have to be made available are the only ones that have to be preserved in a certain form; others do not. This could be redrafted as *If a report is required to be available for inspection, it must be in a form convenient for photocopying.*)

## 10.12 Serial Commas and Ambiguity

The revisor's office uses a style that calls for a comma before the conjunction in a series. (See "Commas" in chapter 12.) A drafter should think carefully, though, before adding a comma to a sentence written by someone else. In rare cases, such a sentence may be ambiguous. Here is an example:

The commissioner shall assign to the case two managers, a program specialist and a family visitor.

How many people are being assigned to the case? Without a comma, the sentence can be read to mean two or four people. Make certain that the original drafter meant four people before adding the comma. (If the drafter meant two people, rewrite the sentence.)

## 10.13 Ambiguity at the Sentence Level

### (a) The Placement Problem

Often ambiguity is the result of unclear sentence structure or poor placement of phrases or clauses. For example, a sign about refunds at a local hardware store reads "Store credit only after 90 days." Does this mean that after 90 days, the customer can receive a refund only in the form of store credit? Or is the point that store credit is not available as a form of refund until 90 days have elapsed? The placement of *only* makes the reader unsure.

Phrases that specify time also need to be placed carefully. Consider this example:

The public school district shall inform the nonpublic school of the type, level, and location of health services that are to be made available to the nonpublic school students before August 15.

Are services to be made available before August 15, or is the district to inform the school before August 15? Placing the words *before August 15* at the head of the sentence or after *inform the nonpublic school* would make it clearer that the date is a deadline for supplying the information.

### (b) Modifiers of Nouns

Combinations of nouns and their modifiers are often a cause of trouble. A modifier is a word or group of words that tells more about another word's meaning. In the examples that follow, the modifiers are italicized.

the *escaped* prisoner  
the executive officer *of the county*  
an order *that has been signed by the governor*  
an order *signed by the governor*  
a document *stating the name of the accused*

Questions can arise when there are more nouns than modifiers, or more modifiers than nouns, or when modifiers do not appear right next to the nouns they modify.

Consider these three examples, all taken from Bryan Garner's *Advanced Legal Drafting*:

"solid wall or fence"

Does *solid* modify just *wall*, or both *wall* and *fence*? In other words, does the phrase mean *solid wall* or *solid fence* or is the drafter distinguishing between a *solid wall* and a *fence*, which is usually not solid (in the sense of "without holes")?

"charitable and educational institutions"

Does this mean *charitable institutions and educational institutions*, or does it mean *institutions that are both charitable and educational*? One way to make the meaning clearer is to draft in the singular, so as to be able to write "a charitable and educational institution" or "a charitable or an educational institution."

"to prevent piracy of original works by Americans"

Does this mean original *works by Americans* or *piracy by Americans*? *By Americans* might not be modifying the nearest noun.

A special problem with the placement of modifiers is the situation covered by the rule of last antecedent (see section 2.5). In the phrase "forms, reports, and other submissions that must be filed for review" do the words *that must be filed for review* apply to the words *forms* and *reports*, or do they only apply to other *submissions*?

The rule of last antecedent says that ambiguities like these are to be resolved by taking the problem phrase as applying only to the last item in the series. A court, however, is as likely to ignore the rule as to use it. (See *State v. Turchick*, 436 N.W. 2d 108 (Minn. App. 1989)), in which the court interpreted the phrase "headphones and earphones which are worn on both ears" without any reference to the rule.)

## 10.14 Sentence Length

Sentences in the law are often long, and they seem to grow longer every time they are amended. Long sentences are not necessarily difficult in themselves, but length often goes along with other evils. The longer the sentence, the more likely it is that the reader will have to ask: *What parts go together? What does this modifier modify? Which of these clauses and phrases are parallel?* To avoid confusion, drafters should write short sentences when possible, and give long sentences clear structure. The sections and readings that follow suggest some methods of shortening or clarifying long sentences.

See: Dickerson, *Fundamentals*, pp. 174, 182-183. Charrow, Charrow, and Erhardt, *Clear and Effective Legal Writing*, pp. 157-160.

## 10.15 Intrusive Phrases and Clauses

Most sentences in bills have verbs with more than one part: *shall* + (verb), *may* + (verb), *must* + (verb), and so on. Sometimes a word is placed between these parts, as in "the commissioner shall *immediately* order an investigation of a reported epidemic."

One-word adverbs in this position do no harm; sometimes they are necessary. But longer divisions are difficult to read, as in this sentence:

Within ten days after service of the notice of appeal, the appealing party shall in writing, with a copy to the executive secretary of the Public Employment Relations Board and all parties or their representatives of record, order from the Bureau of Mediation Services a transcript of any parts of the proceedings it deems necessary . . . .

The interrupting words make no sense without the verb *order*, but the reader must struggle through 20 words to reach it. The interrupting words would serve better as a separate sentence:

. . . the appealing party shall order from the Bureau of Mediation Services a transcript of any parts of the proceedings it considers necessary. The transcript order must be in writing. The appealing party shall give a copy of the transcript order to the executive secretary of the Public Employment Relations Board and all parties or their representatives of record.

The same advice holds in other places in the sentence as well: Avoid interrupting any group of words that must be understood together.

See Charrow, Charrow, and Erhardt, *Clear and Effective Legal Writing*, pp. 162-164.

## 10.16 Conditions and Exceptions

One of the most common functions of a statute is to set forth a simple, general proposition, subject to certain conditions and exceptions. Even when a proposed statutory section is drafted for introduction with few or no conditions or exceptions, conditions and exceptions are often added by amendment during the legislative process. The more conditions and exceptions that apply, the longer and more complex the statute becomes. One of the challenges to the drafter is to organize the statute so that the general proposition remains clear while conditions and exceptions are added to it, one after another, without needing to rewrite the whole statute each time.

If only one condition applies, the usual way to express it is to begin the sentence with an *if* or *when* clause: "If the person under arrest refuses to permit chemical testing, none may be given." Use *if* or *when*, not the legalism *where*.

Sometimes more than one condition introduces a sentence. When this happens, keep the main clause as short as possible:

If the basic member and the surviving dependent spouse are killed in a common disaster, and the total of all survivor's benefits paid under this subdivision is less than the accumulated deductions plus interest payable, the surviving children shall receive the difference in a lump sum payment.

If you can't keep the main clause short, or if there are more than two conditions, put the conditions after the main clause:

The city is eligible for a proportional share of the subsidy provided for the counties if the city has a population of 40,000 persons or more; has a board of health organized under Minnesota Statutes, section 145.913; and provides local matching money to support the community health services as provided in Minnesota Statutes, section 145.921.

See Dickerson, *Fundamentals*, pp. 182-183; Charrow, Charrow, and Erhardt, *Clear and Effective Legal Writing*, pp. 178-179.

When conditions have several components, and especially when they include both *and* and *or*, be sure to use numbers and white space to make clear how the pieces relate to one another. Otherwise, the sentence may be ambiguous, as in the following example from *Clear and Effective Legal Writing*:

If a client is receiving alimony or is receiving child support and has been divorced for more than one year, then this section of the rule does not apply.

The drafter can resolve the ambiguity by using the list form. This sentence might be rewritten in two different ways:

This section does not apply if the client:  
(1) is receiving either alimony or child support; and  
(2) has been divorced for more than one year.

This section does not apply if the client:  
(1) is receiving alimony; or  
(2) is receiving child support and has been divorced for more than one year.

## 10.17 Provisos

The phrase *provided that* often gives drafters a tool for gluing afterthoughts onto the end of a sentence. Drafters should avoid that temptation.

Example: (an unnecessary *provided that*)

The board may revoke a supervised release if the supervised person fails to enter a program; provided, however, that if no community program is available at the time of supervised release, the board may order the supervised person to enter the first available community program.

Example: (a clearer version, without *provided that*)

The board may revoke supervised release if the supervised person fails to enter a program. If no community program is available at the time of supervised release, the board may order the supervised person to enter the first available community program.

## 10.18 Sentences within Sentences

Do not write lists in which sentences are attached to phrases or clauses.

For example, don't write:

Subd. 2. [EXCLUDED STOCK.] "Excluded stock" for a brother-sister controlled group means:  
(1) stock in a member corporation held by an employee's trust if the trust is for the benefit of the employees;  
(2) stock in a member corporation owned by an employee of the corporation, but only if substantial limits or restrictions are imposed on the employee's right to dispose of the stock. A bona fide reciprocal stock repurchase arrangement is not considered one that restricts or limits the employee's right to dispose of the stock;  
(3) stock in a member corporation that is held by a nonprofitable educational or charitable organization.

If only one item has an inserted sentence, you can move that item to the end of the list. That will solve the problem temporarily, but an amendment may add a new item and make the sentence an interrupter again. You can also move the sentence to a paragraph after the list and refer to the item that the sentence applies to: "In clause (2), a bona fide reciprocal stock repurchase arrangement is not considered one that restricts or limits the employee's right to dispose of the stock." That will add an internal reference and internal references should be minimized. You can turn the sentence into an independent clause by deleting the period and inserting a semicolon. The best solution is to turn your list of sentence parts into a list of sentences, so that the inserted sentence can be left next to the item it explains:

Subd. 2. [EXCLUDED STOCK.] (a) "Excluded stock" for a brother-sister controlled group has the meanings given in this subdivision.  
(b) It means stock in a member corporation held by an employee's trust if the trust is for the benefit of the employees.  
(c) It means stock in a member corporation owned by an employee of the corporation, but only if substantial limits or restrictions are imposed on the employee's right to dispose of the stock. A bona fide reciprocal stock repurchase arrangement is not considered one that restricts or limits the employee's right to dispose of the stock.  
(d) It means stock in a member corporation that is held by a non-profitable educational or charitable organization.

## 10.19 Parallel Form

When writing a series or list, be careful to keep similar ideas in similar, or "parallel," form. Sentences with parallel structure are easier to read and remember. Here is an example of what to avoid.

An applicant must not be hired who has any of the following conditions: blood pressure over 160/100, any communicable disease, or applicant not of good general health.

The key word is "conditions." "Applicant not of good general health" is not the name of a condition in the way that "blood pressure" and "disease" are. The last clause should be rewritten as "poor general health." Here is another example:

A person shall not drain, throw, or deposit upon the lands and waters within a state park any substance that would mar the appearance, create a stench, or destroy the cleanliness or safety of the park.

"Appearance," "cleanliness," and "safety" all go with "of the park," but "stench" doesn't. The sentence needs to be rearranged this way:

. . . anything that would mar the park's appearance, destroy its cleanliness or safety, or create a stench.

When you write a series or list, make sure that every item in it does the same job in the sentence.

See Child, *Drafting Legal Documents*, pp. 41 and 211-215; and Charrow, Charrow, and Erhardt, *Clear and Effective Legal Writing*, pp. 173-175.

## 10.20 *And* and *Or*

Normally *and* means that the items are to be taken together, and *or* means that one is to be chosen from the list. But these examples adapted from Reed Dickerson's *The Fundamentals of Legislative Drafting*, 2nd ed., 1986, show how a choice of *and* or *or* can depend on the wording of your items:

The security roll includes:

- (1) each person who is 70 years of age or older;
- (2) each person who is permanently, physically disabled; and
- (3) each person who has been declared mentally incompetent.

The security roll includes each person who:

- (1) is 70 years of age or older;
- (2) is permanently, physically disabled; or
- (3) has been declared mentally incompetent.

## 10.21 Tables

Use tables when you need to present many numbers, as in appropriations, approved complements, and revisor's instructions. See those topics in other parts of this manual for examples. For guidance in setting up tables for easy reading, see Felker, et al., *Guidelines for Document Designers*, pp. 95-98.

## 10.22 Computations

Computations probably cause more headaches than any other feature of bills. In the standard phrasing for computations, the sentences are often long; they include long multiple conditions; they include references that block sentence flow and delay the arrival of the next sentence elements; they have long subordinate clauses that separate modifiers from the things they modify. Here is a relatively simple example:

If only a portion of the rent constituting property taxes is paid by these programs, the resident shall be a claimant for purposes of this chapter, but the refund calculated pursuant to section 290A.04 shall be multiplied by a fraction, the numerator of which is income as defined in subdivision 3 reduced by the total amount of income from the above sources other than vendor payments under the medical assistance program or the general assistance medical care program and the denominator of which is income as defined in subdivision 3 plus vendor payments under the medical assistance program or the general assistance medical care program, to determine the allowable refund pursuant to this chapter.

Drafters need a more readable way to describe computations. Reed Dickerson recommends the "cookbook" approach, that is, describing the steps, one by one, that produce the right figure. Here is part of Dickerson's own example:

The seller shall compute the price of any item that is packed in a new container type or size as follows:

(1) The seller shall first determine the most similar container type for which the seller has established a price for that product. From that container type the seller shall select the nearest size that is 50 percent or less larger than the new size, or if the seller has no such size, the nearest size that is 50 percent or less smaller. This is the base container.

(2) The seller shall take as the seller's base price the seller's price for the product when packed in the base container. If this price is a price delivered to any point other than the shipping point, the seller shall convert it to a price f.o.b. shipping point by deducting the transportation charges that are reflected in it.

The advantages of this method are short sentences, information delivered in small amounts, and active voice.

### 10.23 Consistent Terms

Throughout your draft, use one term consistently to mean one thing. This rule seems easy to follow, but the following definition shows how thoroughly it can be broken:

. . . Unless the context clearly indicates a different meaning, "warehouse" may be used interchangeably with "elevator," "storage house," or "facility."

The same problem appears here:

Community water *supplies* which serve a population of 10,000 or more individuals . . . shall analyze for total trihalomethanes in accordance with this part, . . . . *Systems* serving 75,000 or more individuals shall begin sampling and analysis not later than January 1, 1982.

Drafters make variations like these unconsciously. Variations often show up near the beginnings of sentences, which do not usually deliver new information and so get less of drafters' attention. To keep from varying your terms, choose one of the terms available, try to use it consistently, and check your draft or have someone else check it for variations, especially near sentence beginnings.

### 10.24 Definitions

Definitions in statutes are problem ridden, and the problems are of many kinds. They are often problems of legal substance; on that subject see Dickerson, *Fundamentals*, chapter 7. They can also affect readability. When the drafter ignores his or her own definitions, when the definitions do not clarify matters for the reader, or when the definitions are needless, they should be omitted. When definitions are hard to find or distant from the place where the terms are used, they make the reader do extra work. Use only the definitions you really need, and remember the definition when you use the term. If the term is used only in one section of the draft, define it in that section. Definitions of terms that are never used occur with surprising frequency. See section 4.5; Mellinkoff, *Legal Writing: Sense and Nonsense*, p. 137; Redish, *Beyond Readability*, p. 16.

### 10.25 Familiar Words

Use speaking vocabulary, not writing vocabulary, as much as you can without being slangy. The partial list below mentions some plainer alternatives to more formal words.

<b>Formal</b>	<b>Familiar</b>
accorded	given
afforded	given
approximately	about
as to	about, concerning
attempt	try
cease	stop
commence	begin, start
deem	consider, judge
effect (as a verb)	make, carry out, do

effectuate                      carry out, do

For more complete lists see Dickerson, *Fundamentals*, pp. 209-213; and Redish, *How to Write Regulations*, pp. 250-251.

Use the lists, but remember the principle; prefer the most familiar words. Remember also that the listed terms are not absolute prescriptions. The situation may require a different word.

### 10.26 Verbose, Obsolete, or Vague Terms

These words are often unclear and nearly always unnecessary. Again, see Dickerson, *Fundamentals*, for complete lists.

<b>Don't Use</b>	<b>Use</b>
all, each, every, some	a, an, the
such, said, same	a, an, the, it, that, them (or some other word or nothing)
above, aforesaid, aforementioned, beforementioned, hereby, herein, hereinafter, hereinbefore, herewith, therefor, therein, thereinafter, thereinbefore, thereof	Name a specific section or part
thereupon, whereupon	when, at that time
to wit	namely

### 10.27 Wordy Expressions

Replace wordy expressions with shorter substitutes. See Dickerson, *Fundamentals*, for complete lists.

<b>Don't Use</b>	<b>Shorter</b>
absolutely null and void and of no effect	void
adequate number of	enough
all of the attains the age of 21 years	the becomes 21 years old
at the time, at such time as, at the time as	when
at that (this) point in time	then (now)

by means of	by
does not operate to	does not
due to the fact that	because
during the course of	during
excessive number of	too many
for the duration of	during

## 10.28 Overdrafting

Usually this manual tells you to be as specific as possible, but being specific does not mean naming every single thing you are forbidding or requiring.

This National Park Service rule has been called the classic example of trying to cover all the possibilities:

S 50.10 Trees, shrubs, plants, grass and other vegetation. (a) General injury. No person shall prune, cut, carry away, pull up, dig, fell, bore, chop, saw, chip, pick, move, sever, climb, molest, take, break, deface, destroy, set fire to, burn, scorch, carve, paint, mark, or in any manner interfere with, tamper, mutilate, misuse, disturb or damage any tree, shrub, plant, grass, flower, or part thereof, nor shall any person permit any chemical, whether solid, fluid, or gaseous, to seep, drip, drain or be emptied, sprayed, dusted or injected upon, about or into any tree, shrub, plant, grass, flower, or part thereof, except when specifically authorized by competent authority; nor shall any person build fires, or station, or use any tar kettle, heater, road roller or other engine within an area covered by this part in such a manner that the vapor, fumes, or heat therefrom may injure any tree or other vegetation.

The section demonstrates well how hard it is to name every act the draft is intended to forbid. Not only is the section wordy and difficult to read, it also has substantive problems. Using general terms—like "No one may harm the plants,"—will probably give more legal protection than trying to list specific things. For a discussion of the dangers of overparticularity, see Child, *Drafting Legal Documents*, pp. 165-169; also see section 2.6 and the discussion of the canons of construction.

## 10.29 Jargon

*Jargon* has neutral and negative meanings. It refers to the useful technical vocabulary of a trade or profession, but it is also used for unclear expressions that have a technical ring. Real technical language can save time and space; if your audience understands it and expects it, then use it. Jargon-like terms created to dignify your subject are simply hard to read. Learn to recognize them and weed them out.

*Use the words that ordinary people know.* If the newspapers have been using the term "living wills," it is not helpful to readers, indexers, or librarians if the statute refers to the same documents as "adult health care decision declarations." Using ordinary terms simplifies not only reading but also indexing and electronic searching.

*If you must create a general term, don't make it more general than necessary.* Government writing is said to be full of "buzzwords," phrases that sound imposing but mean little. It is not hard to see why we write them since drafters often have to create names that cover broad classes. For example, the phrase "health care facility" in a bill might cover hospitals, clinics, and nursing homes.

To avoid creating buzzwords when you write broad terms, don't depend on abstract words like *facility, entity, organization, and structure*. Phrases like "regional channel entity," "entity operational structure," or "parallel policy options" are meaningless unless the reader looks back at the definitions. Be as specific as possible. Don't call something a "programming entity" if you can call it a programming *company*. If certain boards grant licenses, don't call them "credentialing organizations;" call them licensing boards.

What if the jargon already exists in the law? Drafters are conservative by nature; they often repeat any language that works legally in order to avoid lawsuits. For example, the phrase "Flesch scale analysis readability score," which would horrify Dr. Flesch by its unreadability, was copied into Minnesota law from another state's draft. It is certainly not the clearest or briefest way to refer to the Flesch test. Let your guide be communication with your readers, and don't preserve bad wording unless you have a compelling legal reason. Consistency is valuable, but so is clarity.

### **10.30 Initialisms**

One type of jargon that is extremely common in government writing is the initialism. An initialism is a set of initials that is a short form of a term, like EAW for "environmental assessment worksheet." Initialisms can be hard to read; they force the uninitiated reader to go back to the definitions and to make repeated mental substitutions. Drafters should generally avoid them.

Especially avoid creating new initialisms merely to make drafting easier. If you don't want to write the phrase "home improvement loan application form" over and over, don't call it a HILAF. Instead, define a short substitute like "application form" or just "form."

In particular, drafters should avoid using several different initialisms and acronyms (pronounceable initialisms, like AIDS) in the same draft. Even when those terms are explained, the resulting draft is an alphabet soup that can baffle a reader. A sentence that reads, "The EAW must be submitted by the RGU for approval by the EQB," is not likely to be clear to anyone outside the committees and agencies involved.

If initialisms must be used, they should be explained. They can be defined in a definition section, or near the place of use, like this: "'MTBE' means methyl tertiary butyl ether." They can also be explained by giving the term in full, followed by the abbreviation in parentheses, at the first use of the abbreviation within a section, like this: "methyl tertiary butyl ether (MTBE)."

### **10.31 Noun Strings**

A string of four or five nouns is hard to read because it masks the relationships between words. You may need more words in order to make their relationships clear, as these examples show:

**Don't Use**

**Use**

electronic financial terminal  
authorization application

application for the right to use an  
electronic financial terminal

Flesch scale analysis readability  
score

Flesch test score, or  
readability score on the Flesch scale

early childhood program  
alternative case loads

case loads for early childhood  
programs

See Charrow, Charrow, and Erhardt, *Clear and Effective Legal Writing*, pp. 184-185; Felker, et al., *Guidelines for Document Designers*, pp. 63-65.

### 10.32 Nominal Style

Many verbs have related nouns; *decide* is related to *decision*; *complain* to *complaint*; *speak* to *speech*. An idea can often be expressed with either a verb or a related noun. For example, you can *complain* or *make a complaint*.

Writing that uses verbs (verbal style) is usually brief and clear. Writing that uses nouns (nominal style) can be too formal and wordy.

#### Nominal

#### Verbal

to implement pupil behavior  
management techniques . . .

to manage pupils' behavior

established a contractual  
relationship with . . .

contracted with

has knowledge or suspicion that . . .

knows or suspects that . . .

make application for

apply for

make payment for

pay for

make provision for

provide for

upon X's request to Y

if X asks Y

upon a determination by X that

if X determines that

There are many other possibilities. The suffixes *-ance*, *ancy*, *ant*, *ence*, *ency*, *ent*, *ion*, and *-ment* often mark nouns derived from verbs, so check for nominal style whenever you see these suffixes.

Not all nominals, however, show how they are related to specific verbs. For example, "*to have an adverse impact on the environment*" could mean "*to harm the environment*" or "*to disturb the environment*" or any of a number of verbs. Nominals of this kind are harder to spot and correct, so learn to concentrate meaning in your verbs in the very first draft.

See Charrow, Charrow, and Erhardt, *Clear and Effective Legal Writing*, pp. 169-171; Felker, *Guidelines for Document Designers*, pp. 35-38.

### 10.33 Gender-Neutral Language

There are many ways to avoid gender-specific nouns like *workman* or *man-hours*. The revisor's office has some standard substitutions developed for use during the gender project of 1986, which removed gender-specific language from the statutes. Other useful lists appear in *The Nonsexist Word Finder* by Rosalie Maggio.

Avoiding pronouns like *he* or *she* is much harder. Normal English word order begs for a pronoun in the main clause of a sentence like this: "If the commissioner finds that the sampling frequency may be safely reduced, he may order it reduced to the rate specified in subdivision 2." Not every method for avoiding pronouns works in every sentence. Consider the methods in the following order of preference.

*Repeat the noun:* "If the commissioner finds . . . the commissioner may order . . ." This is legally clear but can sound awkward when the two nouns are close together.

*Use a relative clause:* An applicant who has been licensed in another state must submit verification of licensure and the required fee.

*Use a modifier without an expressed subject:* Upon finding that the sampling frequency can be safely reduced, the commissioner may order it reduced as specified in clause (2).

*Remove the nominal:* A person who imports or possesses untaxed intoxicating liquor is guilty of a misdemeanor.

*Use of he or she or his or her:* The revisor has been asked by the legislature to avoid the use of these doubled pronouns which can be cumbersome.

*Use the plural:* Sections 150A.01 to 150A.12 do not apply to duly licensed physicians or surgeons unless they practice dentistry as a specialty.

*Use the passive voice:* After having been certified, the candidate may begin supervised clinical practice. But see section 10.7.

