

CHAPTER FOUR

SPECIFIC WORDS AND PHRASES

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Most writers use too many words. One or two well-chosen words can often replace a multi-word phrase without loss of meaning. Likewise, short, simple words can replace long ones. And English may often be substituted for Latin in legal terminology. The result is a shorter, less complex sentence.

1. OBJECTIONABLE WORDS AND PHRASES.

Some words have led to so much ambiguity or are so pedantic in style that they should be avoided altogether in drafting a bill.

“Said,” when used as a demonstrative adjective, adds nothing in making a noun more definite than “the,” “that” or “those.” “Same” should not be used as a substitute for “it.” If the antecedent is in any doubt, the use of “same” does not clarify the situation. A more specific reference should be used. “Whatsoever,” “whenever,” “wheresoever” and “whosoever” may impart a scriptural ring to a statute, but are not favored in modern drafting. A colon (:) is more concise than phrases such as “to wit.”

Words that make reference to another section or statutory provision by its **position** are highly objectionable. “Above,” “aforesaid,” “afore-mentioned,” “before-mentioned,” “below,” “following,” “hereinafter,” “hereinbefore” and “preceding” should never be used. In referring to a provision set out in another section of a bill, the drafter should refer to that provision by its precise and proper designation, e.g., “section 4 of this (year) Act.”

“And/or” is a “verbal monstrosity which courts have quite generally condemned.” Ollilo v. Clatskanie P.U.D., 170 Or. 173, 179 (1942). The expression “and/or” has been attacked by numerous authorities. One authority notes it is “a device for the encouragement of mental laziness.”

“Herein” is highly objectionable because it “may refer to the section, the chapter or the entire enactment in which it is used.” Gatliff Coal Co. v. Cox, 142 F.2d 876, 882 (6th Cir., 1944). For a lazy, imprecise drafter, “herein” is a best friend.

2. PREFERRED WORDS AND PHRASES.

The following list includes some words and phrases to be avoided in drafting a bill. The preferred word is in the right-hand column. In general, the words in the left-hand column are not proscribed, as are “Objectionable Words,” but most of them involve pomposity, redundancy or unnecessary length.

AVOID:

absolutely null and void
 accorded
 afforded
 any and all
 at the time
 attempt (verb)
 attorney and counselor at law
 be and the same is hereby
 bonds, notes, checks, drafts and evidences of
 other indebtedness
 cease
 commence
 constitute and appoint
 construed to mean
 deem
 does not operate to
 during such time as, during the time that
 during the course of
 each and all
 each and every
 effectuate
 employ (meaning “use”)
 endeavor (verb)
 evidence, documentary or otherwise
 examine witnesses and hear testimony
 expend
 fail, refuse or neglect
 final and conclusive
 for the duration of
 for the reason that

USE:

void
 given
 given
 any, or all
 when
 try
 attorney at law, or lawyer
 is
 indebtedness
 stop
 begin or start
 appoint
 means
 consider
 does not
 while
 during
 each, or all
 each, or every
 carry out
 use
 try
 evidence
 take testimony
 spend
 fail
 final
 during
 because

AVOID:

forthwith
 full force and effect
 in case
 in cases in which
 in lieu of
 in order to
 in the case of
 in the course of
 in the event that
 inform
 inquire
 institute
 is able to
 is applicable
 is authorized to
 is binding upon
 is defined and shall be
 is directed to
 is empowered to
 is entitled to
 is hereby authorized and it shall be the duty
 of the person to
 is hereby vested with power and authority
 and it shall be the duty of the director
 in carrying out the provisions of this
 (year) Act to
 is required to
 is unable to
 it is lawful to
 it is the duty of the person to
 law passed
 matter transmitted through the mail
 means and includes
 modify
 null and void and of no effect
 obtain
 occasion (verb)
 ordered, adjudged and decreed
 per annum
 per day
 per foot
 possess
 preserve
 prior
 prior to
 prosecute its business

USE:

immediately
 force, or effect
 if
 when
 instead of
 to
 when
 during
 if
 tell
 ask
 begin or start
 can
 applies
 may
 binds
 is
 shall
 may
 may

 shall

 shall
 shall
 cannot
 may
 shall
 law enacted
 mail
 means, or includes, as required
 change
 void
 get
 cause
 ordered
 each year
 a day
 a foot
 have
 keep
 earlier
 before
 carry on its business

AVOID:

provision of law
 pursuant to
 render (meaning “cause to be”)
 render (meaning “give”)
 retain
 rules and regulations

shall have the power to
 sole and exclusive
 subsequent to
 Terminate
 the place of the abode of the person
 Transmit
 unless and until
 until such time as
 utilize (meaning “use”)
 Whenever

USE:

law
 under
 make
 give
 keep
 rules (unless reference is to federal regulations or local provisions when “regulations” is correct)
 may
 exclusive
 after
 end
 the abode of the person
 send
 unless, or until, as appropriate
 until
 use
 if

3. “SHALL,” “MAY,” “MUST”; “SHALL NOT,” “MAY NOT.”

To impose an obligation to act, use “shall.” To confer a right, power or privilege, use “may.” Do not use “shall” to grant permission or “may” to impose a duty.

To prohibit an action, use “may not.” See ORS 174.100 (4). Do not use “shall not” to prohibit an action. Although ORS 174.100 (4) makes “shall not” and “may not” equivalent expressions of prohibition, the office has a strong preference for “may not.” If you are amending a section in which there is already extensive use of “shall not” (used as a prohibition), you may use “shall not” (to express a prohibition) in order to avoid extensive changes to the statute. Note that there are instances of “shall not” in ORS that are not actually prohibitions. For example, ORS 192.580 (3) (1999 Edition) said, “The provisions of subsection (2) of this section shall not apply in the case of records” The intended meaning is probably that the provisions “do not” apply. “Shall not” must not be mindlessly replaced with “may not.” The drafter must understand the function of the phrase “shall not” before determining whether and how it should be changed.

In a condition precedent, you may use “must.” For example, “An applicant must be at least 18 years of age.” To express an imperative in the passive voice, you may use “must.” For example, “The report must be filed”

Avoid using “shall” in a manner that indicates a legal result rather than a command. For example, use “This (year) Act becomes operative on ...” instead of “This (year) Act shall become operative on” Or, use “ORS xxx.yyy does not apply to” rather than “ORS xxx.yyy shall not apply to....”

4. “MAY” SOMETIMES CONSTRUED AS MANDATORY.

Under certain circumstances, “may” has been held to be mandatory in statutes conferring power upon a public officer or agency when the action concerns the public interest or the rights of individuals. Unfortunately, “may at the director’s discretion” is not an acceptable cure. No general rule can be set out to determine the effect of the use of “may” in all cases. It will be construed to further the intent and purpose of the Act in which it is found, and this intent will be gathered from a consideration of the Act as a whole. For example, ORS 654.335 (a section in the Employers’ Liability Act, 1999 Ed.) read as follows:

The contributory negligence of a person injured shall not be a defense, but **may** be taken into account by the jury in fixing the amount of damages.

In Donaghy v. Ore.-Wash. R. Nav. Co., 133 Or. 663 (1930), the Oregon Supreme Court said that the word “may” in ORS 654.335 (1999 Edition) should be construed as “must.”

If a provision using “may” is likely to be construed to concern the public interest or the rights of individuals and to be mandatory, and if the drafter wants to authorize and not to command, the intent should be made clear by using a separate sentence for this purpose; for example, “The exercise of this power is within the discretion of the director.”

Even if “shall” is used, it is possible for a provision to be construed as less than mandatory. If so construed, strict compliance with the provision is not required. A court may permit some variation in the minor details of a procedure even though “shall” has been used, assuming that the legislature did not intend that minor matters and immaterial details in statutes be so firmly fixed that the courts cannot relax such requirements in proper cases.

Mandatory provisions usually contain both a command and a prohibition against varying the terms of the command, even though the prohibition may exist only by implication. If the prohibition is expressed affirmatively and imposes a sanction or penalty, the legislative intent that the provision be mandatory is as clear as it can be made.

5. “WHICH” HUNTING.

“That” is to be used when the intention is to limit or restrict the antecedent. Statute clauses normally are restrictive. “Which,” on the other hand, is descriptive and in effect introduces a parenthetic effect, even if not so punctuated. The phrase using “which” may not be construed as restrictive in some cases where a restriction is intended.

According to *The Grammatical Lawyer*, a nonrestrictive clause (beginning with “which”) provides only incidental or nonessential information about a previous word. Even if the clause is omitted, the basic meaning of the sentence will remain intact. For example, “The trial manual, which is regularly supplemented, is much in demand.” Without the “which” clause, which is merely descriptive, the sentence will nevertheless survive. If “that” had been used (“The trial manual that is regularly supplemented is much in demand.”), the

implication would have been that the manual that is not regularly supplemented interests no one. For easy memorization of the above:

THAT -- essential (restrictive) -- no commas

WHICH -- nonessential (nonrestrictive) -- commas

6. “SUCH,” “ANY,” “EVERY,” ETC.

In legalese, “such” often is used as a demonstrative adjective when “the” or “that” suffices. This departure from plain English not only is unnecessary but also may cause confusion when “such . . . as” is used in the same context.

Simple words such as “a,” “an” or “the” nearly always can be used instead of “any,” “each,” “every,” “all” or “some” with an attendant gain in clarity. “Read naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’” U.S. v. Gonzales, 520 U.S. 1, 5 (1997). The greatest generality is accomplished with the least modification of the operative word, because the function is to make more specific the concept represented by that word. “A person” is at least as general as “any person” or “every person.” When the use of “a,” “an” or “the” produces an ambiguity, the concept probably needs to be refined and the use of “any,” “each” or “every” is not the cure.

7. “PERSON” AND “INDIVIDUAL.”

As defined in ORS 174.100, “person” includes individuals, corporations, associations, firms, partnerships, limited liability companies and joint stock companies. The drafter may wish to consult the topic “Words and Phrases” in the ORS General Index for other definitions of “person.” To refer only to humans and not to business entities, “individual” should be used.

8. “PUBLIC BODIES,” “STATE GOVERNMENT,” “LOCAL GOVERNMENT,” ETC.

ORS 174.108 to 174.118 provide comprehensive definitions for public bodies of this state. The definitions provided by these laws apply **only** if the language of a bill draft makes specific reference to the statute providing the definition. ORS 174.108. For instance, a draft that merely refers to a “public body” will not pick up the definition of “public body” provided by ORS 174.109. The draft must refer to a “public body as defined in ORS 174.109.”

The definition provided by ORS 174.109 for “public body” was intended to be the broadest category of governmental entities. The term does not include the federal government, foreign governments or the governments of other states. If the drafter wishes to cover these types of governmental agencies, the draft must make specific reference to them. Nor does the term include the Oregon State Bar or Oregon Health and Science University. ORS 174.108 (3). Under the provisions of ORS 9.010 (OSB) and ORS 353.100 (OHSU), laws relating to public bodies or governmental entities do not apply to these entities unless the laws make a specific reference to OSB or OHSU.

ORS 174.111 defines “state government” as the executive department, judicial department and legislative department. If the drafter wishes to refer only to the executive branch of state government (i.e., state agencies as the term is used in the Administrative Procedures Act), the drafter should use “executive department as defined by ORS 174.112.” Drafters should avoid references to “the courts of this state” and use “the judicial department as defined in ORS 174.113.” ORS 174.114 provides a definition of the “legislative department” that includes all committees and administrative divisions of the legislative branch.

“Local government” includes cities, counties and districts. ORS 174.116. Note that the definition does not include school districts. When drafting bills relating to cities, use the term “city” and not “incorporated city” (all cities are incorporated).

ORS 174.116 (2) provides a comprehensive list of governmental entities that are frequently treated as districts for statutory purposes. As always, it is important to be sure that a specific draft intends to cover all of these entities if the defined term is used.

“Special government body” is a miscellaneous group of entities that do not fit under the normal definition of state government or local government, but are clearly public bodies. ORS 174.117. It is unlikely that a drafter would ever want to use this term.

9. PRONOUNS.

Nouns are used in preference to pronouns even if the noun must be repeated, especially when a lack of clarity otherwise might result. When a pronoun is used, the drafter should check to see that there is no question as to the antecedent of the pronoun. In Home Builders Association of Metropolitan Portland v. City of West Linn, 204 Or. App. 655 (2006), the Court of Appeals considered a statute (ORS 34.100) that provides:

Upon the review, the court shall have power to affirm, modify, reverse or annul the decision or determination reviewed, and if necessary, to award restitution to the plaintiff, *or to direct the inferior court, officer, or tribunal to proceed in the matter reviewed according to its decision.* From the judgment of the circuit court on review, an appeal may be taken in like manner and with like effect as from a judgment of a circuit court in an action. (Emphasis added by the court.)

The court, in discussing the meaning of “its,” said:

Although petitioners are correct that, according to common grammatical rules, one way to resolve an ambiguous pronoun is to conclude that the pronoun refers to the nearest antecedent noun, an equally valid resolution is to conclude that it (again, the pronoun) refers to the most prominent noun in the sentence: the subject. *See Landswick v. Lane*, 49 Or. 408, 412, 90 P 490 (1907) (discussing how “the law of prominence” and “the law of proximity” can each be used to resolve pronoun ambiguity). In this case, “the lower court officer or tribunal” is the nearest antecedent noun to the ambiguous pronoun at issue, but the subject of and most prominent noun

in ORS 34.100 is "the court." In short, the rules of prominence and proximity yield equally plausible results."¹

A drafter could have avoided this ambiguity by replacing "its" with the appropriate noun – which, as found by the court, was most likely intended to be the reviewing court.

ORS 174.129 states that all statutes must be written in sex-neutral terms. This means that gender specific pronouns ("he" and "she," for example) should normally not be used.

10. ENUMERATION OF PARTICULARS.

There are two major canons of statutory construction that relate to the effect of using general words or phrases in association with particular words. These are commonly referred to as "*expressio unius*" and "*ejusdem generis*."

a. Expressio Unius.

The maxim "*expressio unius est exclusio alterius*" means that specifying one person or thing implies the exclusion of other persons or things, the presumption that omissions are intended. 2A Sutherland, *Stat. Const.* §§47:23-47:25 (6th ed.). For example, the Oregon Supreme Court has held that a law permitting the Secretary of State to exclude from the voters' pamphlet matter that is objectionable for several specified reasons did not permit the Secretary of State to exclude matter that the Secretary of State found objectionable for another reason. Lafferty v. Newbry, 200 Or. 685 (1954). See also AT&T Communications of the Pacific Northwest, Inc. v. City of Eugene, 177 Or. App. 379 (2001). The drafter must analyze carefully the situation to which the statutory language may later be applied. The maxim as applied by the courts may also affect the completeness with which the drafter must describe the situation.

b. Ejusdem Generis.

The maxim "*ejusdem generis*" means that general words following an enumeration of particular persons or things apply only to persons or things of the same general character as the enumerated items. This maxim is based on the reasonable assumption that a drafter will not enumerate items if the drafter intends general words to have their unrestricted meaning. For example, a statute that applied to any forged "record, writing, instrument or matter whatever" was held not to apply to forgery of a certificate of nomination for candidacy of a person seeking public office, because it was not a record, writing or instrument as those terms were defined by law. The words "or matter whatever" were limited under *ejusdem generis* by the preceding enumeration of particulars. State v. Brantley, 201 Or. 37 (1954); see also Portland Distributing Company v. Department of Revenue, 307 Or. 94 (1988) . "Other" is often the key word in an enumeration that will cause this maxim to be invoked. Distinctions may help, as with "applies to . . . but does not apply to," both methods of clarifying the general category.

¹The court used ORS 174.010 and concluded that "its" referred to the "reviewing court's."
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c. Clear Intent.

The purpose of the two canons discussed is ostensibly to clarify statutory meaning. Like all canons of statutory interpretation, their application by the courts in particular cases is less than consistent. However, a drafter cannot afford to ignore them. The drafter must consider carefully whether an enumeration of particulars is necessary. If a provision is to apply to a class as a whole, it is generally safer if the class is named in general terms rather than in particulars, even when the particulars would be preceded or followed by general language. It often is virtually impossible to make an enumeration all-inclusive, and omission may be construed as implying deliberate exclusion. Sometimes there will be trouble finding a factor common to all the particulars, and it will not be possible to name them as a class to avoid listing each of the particulars. When it is **necessary** to list them, the drafter must indicate whether the enumeration is exclusive or illustrative. If merely illustrative, a drafter may want to use phrases such as “including, but not limited to.” Sometimes particulars can be enumerated that are being excluded from a class expressed in general terms. Other times the class may be named in general terms and those additional particulars that are in doubt as being included in the class may be listed, making it clear that the particulars listed are not exclusive of others that are included within the general class.

11. PROVISOS.

Clauses introduced by “provided, however,” “provided, always,” “provided, further” or “provided that” are called *provisos*. Provisos generally are undesirable because of uncertainty as to whether a condition or exception is intended. Also, one proviso may tempt drafters to add a second, and then the question arises as to whether the second proviso is a condition only to the first proviso or to the entire section.

If a legislative statement is limited in application or is subject to an exception or condition, the sentence should begin with the condition or exception to call attention to the limitations. More simply, a new sentence can begin with “However.” Note that the word “provided” often is used inartistically as a conjunction. Its usual role “in a statute is to create a condition, or to restrain the enacting clause, to except something which would otherwise be in it, or in some manner modify it.” *Griffa v. City of Monmouth*, 95 Or. 433, 436 (1920). Sometimes no special words are necessary to indicate the exception or condition when the controlling statement is placed in a sentence or subsection following the statement that is to be controlled.

If a statement is subject to numerous exceptions or conditions, the exceptions or conditions can be placed in a list tabulated at the end of the sentence or placed in a separate subsection or section. If a statement is subject to a long or complex exception or condition, the exception or condition should be placed in a separate subsection or section.

If the exceptions or conditions are placed in a separate subsection or in one or more sections, the drafter usually will want to make an appropriate reference to the exceptions or conditions in the legislative statement to be controlled by them. The following are typical introductory phrases calling attention to conditions or exceptions that have been placed in a

separate subsection or section: “Subject to subsection (2) of this section, the director shall . . .”; “Except as provided in section 4 of this (year) Act, the director may”

12. MODIFIERS.

A common problem with the use of modifiers (adverbs, adjectives and participles) is that they suggest a standard without supplying it. **A drafter does better to stick with unmodified verbs and nouns.** If the modifiers are supposed to supply standards, then probably the standards need to be more specific. One test of the need for a modifier is to try the same sentence with the reverse modifier. If the sentence uses “duly,” the drafter should try reading the sentence with “unduly” as a substitute. If the result is absurd, the modifier is probably not necessary. It is also worth noting that a misused modifier may produce a double standard. For example, “duly performed in a manner that . . .” may precipitate an argument whether “duly” is one standard and “a manner that . . .” is another.

On March 31, 2004, the United States Supreme Court issued an opinion in the case of BedRoc Ltd. v. United States, 541 U.S. 176 (2004). The case involved interpretation of a 1919 federal statute reserving to the United States the right to remove all coal and other “valuable minerals.” The question before the court was whether sand and gravel are “valuable minerals” for purposes of the statute. An earlier case had interpreted another federal statute that reserved to the United States “all coal and other minerals.” That court had concluded that gravel was a mineral. A plurality of the current court agreed that gravel was a mineral, but decided that it was not a “valuable” mineral. Accurate and careful drafting might have avoided all litigation.

13. “IMPLY” AND “INFER.”

Imply and *infer* are often confused with each other. To imply means “to suggest or say indirectly.” To infer means “to surmise or to draw a conclusion.” A speaker who hints, *implies*; a listener who recognizes the hint, *infers*.

The distinction between *imply* and *infer* is easily made if one remembers that just as *im* precedes *in*, one must imply before another can infer. The author implied, the reader inferred.

14. JUDGMENTS

References to “final” judgments are inherently ambiguous. The reference may be to a judgment that has been entered at the end of the trial court phase of an action (until 2003, the Oregon Rules of Civil Procedure used the term in this fashion). On the other hand, drafters frequently use the term to mean a judgment that is no longer subject to appeal.

All judgments are either limited, general or supplemental judgments. See ORS 18.005 (defining limited, general and supplemental judgments). If the drafter intends to refer to the judgment that is entered at the end of the trial court phase of the action, the drafter should refer to a “general judgment, as defined in ORS 18.005.” If the drafter wishes to refer to a

judgment that is no longer subject to appeal, the drafter should refer to “a judgment that is no longer subject to appeal.”

Drafters should be careful about the manner in which they refer to the dates relating to judgments. ORS chapter 18 lays out the following sequence of events surrounding judgments: A judge renders a judgment. That is, the court decides one or more issues. The judge signs a judgment document, and files the document with the court administrator. The court administrator notes in the register that the document has been filed, at which point the judgment is deemed entered.

When the drafter wants to tie the effect of a provision to a specific date connected with a judgment, the best solution will almost always be to refer to the date on which a judgment is “entered as described by ORS 18.075.” This date is reflected in the court’s register, and is the option least susceptible to creating confusion. The drafter should almost never have occasion to refer to the date on which a judgment is “rendered” or “signed.”

Drafters should also be careful in distinguishing between the “judgment” (i.e., the court’s decision) and the “judgment document” (defined by ORS 18.005 to be “a writing . . . that incorporates a court’s judgment”). Usually, a drafter intends to refer to the “judgment,” but there may be occasions when reference to the “judgment document” is more appropriate.

15. “WHERE” OR “WHEN.”

Where represents place; *when* time. In the sentence “Where a hearing is held by the commission, the hearing shall be public,” *when* should replace *where*. However, depending on the context, the drafter may wish to consider using *if* when the intent of the clause is to establish a condition. Definitions that use *is when* or *is where* are faulty and the marks of immature writing. “Incarceration means confinement in a correctional institution,” not “Incarceration is when a person is confined in a correctional institution.”

16. PRETENTIOUS WRITING AND LEGALISMS.

A drafter may be tempted to make an extravagant use of elegant words when simpler expression is adequate. For example, use of “respectively” usually is superfluous. The drafter needs also to avoid words that give rise to legal arguments. “Valuable consideration” raises a whole series of law school questions that “compensation” does not. “Bona fide” is not only usually mispronounced but is subject to argument on its specific meaning.

