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What Can Humor and Advertising Teach Us About Legal Drafting?

Interface

—Feature by
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Thomas R. Haggard,
Legal Drafting in a Nutshell.
St. Paul, MN: West Publishing, 1996.

Index Terms—*Ambiguity and models, ambiguous phrasing, humor, structural ambiguity.*

In his book *Legal Drafting in a Nutshell*, Haggard [1] includes a useful chapter of nearly 50 pages in which he lists various lexical and structural elements and explains how these can lead to ambiguous writing. The kind of inventory approach that he presents is helpful and reveals that ambiguity doesn't just happen but often results from the careless use of identifiable structures or particular words.

One structure that Haggard discusses is the passive. He points out that when a passive has been "truncated" so that it removes the performer of a given action, this results in a problem for interpretation. For example, if we truncate a passive sentence such as "All change orders over \$500 shall be reported to the bank by the contractor within 10 days," the resulting sentence, "All change orders shall be reported to the bank within 10 days," removes the identity of the party responsible for making the report [1, p. 145]. This potential problem that the passive can pose for interpretation is widely known. But Haggard also illustrates what Dickerson [2] earlier showed about the potential of a passive construction to be confused with an adjectival subject complement construction (cf. [2, p. 243]). This is evident in Haggard's example "Each person who was admitted to the Club on January 1, 1995, is eligible," which could refer either to people who were brought into the club on January 1 or to people who were already in the club at that time [1, p. 138].

As Haggard's title suggests, his intent is not to give an exhaustive treatment of ambiguity in legal drafting, and a careful examination of his chapter reveals that much more could be said about the role that individual items or constructions in his inventory play in creating ambiguity. Indeed, we are not aware of any comprehensive work on how to avoid ambiguity in legal drafting, despite the potential usefulness that such information would have. We suggest that analysts consider examining humor and advertising for ideas about some of the possible features that may create ambiguity in legal drafting. This is particularly true of structural ambiguities, which are ambiguities involving the structure, not just the word meanings, of an utterance. For example, the sentence *The team designed the prototype being tested in March* is structurally ambiguous because *in March* could modify either *designed* or *being tested*. In contrast, the sentence *The inspector examined the plant* is lexically ambiguous because *plant* has both an industrial and a botanical meaning.

For us to suggest examining humor and advertising for ideas about avoiding ambiguity in legal drafting may initially sound like we are trivializing the work of the legal profession. However, an examination of humor and advertising could be helpful since these areas often deliberately exploit features that create structural ambiguity. Indeed, over the years as people have noted trouble spots in the grammatical system of the language, they have developed

wordplays around these features. The humor and advertisements built around troublesome linguistic features are easy to spot and, in some cases, may provide ideas about potential ambiguities that might otherwise have escaped the attention of someone who tries independently to discover or imagine such patterns within the language. Thus humor and advertising essentially flag important data for consideration.

An examination of the structural ambiguities in humor, advertising, and legal drafting shows that there are important similarities among them. In relation to legal drafting, we earlier noted the ambiguity potential of a passive construction being confused with an adjectival construction. And as it turns out, this type of construction is quite commonly exploited in humorous texts as well as advertising (cf. [3, p. 380; 4, p. 378]).

In what follows, we shall very briefly consider some humorous texts and advertisements with regard to the behavior of modal verbs such as *can*, *shall*, *must*, etc. Our purpose is to illustrate through a consideration of this single category that humor and advertising contain useful examples of potentially ambiguous features of the language that might otherwise be overlooked by an author seeking to compile a thorough treatment of such features.

Haggard explains that in a sentence such as *The Mayor is empowered to appoint the Chief of Police who shall be a resident of the city*, ambiguity may result when the modal *shall* is used descriptively rather than to convey a duty [1, p. 132]. This potential ambiguity of modals has also been pointed out by Charrow and Erhardt, who explain that

in writing legal documents, it is traditional to use *shall* to establish a legal obligation. However, many lawyers use

shall incorrectly. They use it inconsistently—to mean both *must* (obligatory or mandatory action) and *will* (future action). This ambiguous use can cause legal problems [5, p. 116].

Interestingly enough, this kind of ambiguity has also been exploited in humor. For example, the following joke from the Cold War era capitalizes on the difference between *must* as expressive of a particular reality versus a statement of something that is required:

While Gorbachev is giving Daniel Ortega a tour of Moscow, the Nicaraguan leader says, "This is a very nice car. From where does it come?"

The Soviet ruler replies, "It was made for us by our good friends in Poland."

"And your suit, sir," Ortega says. "It too is quite elegant."

Gorbachev says, "It was also given to us by our good friends in Poland."

"Well," Ortega remarks, "they must be very good friends indeed."

"Yes," Gorbachev says. "They must" [6, pp. 260-61].

This joke shows that the kind of concern that modals hold for legal drafting has also been noted by those who create humor.

But examining advertisements shows us that there is another potential for ambiguity with modal verbs, an ambiguity that is probably less likely to have been noted in legal drafting books but which could potentially cause problems for a writer who is not alert. One of the features of modal verbs is that, besides being uninflected themselves, they must be followed by a verb that is also uninflected. For example, we can say *John walks*, which contains a verb inflected with the suffix *-s*. But, if we use

the modal *must*, then we can get a sentence like *John must walk*, in which neither the modal nor the subsequent verb *walk* is inflected.

The uninflected verb form following a modal can blur number distinctions which might otherwise clarify and prevent an ambiguity from occurring. As Oaks has noted elsewhere [3, pp. 393-394], this property of modals is crucial to the ambiguity in Noam Chomsky's famous sentence *Flying planes can be dangerous*. The use of the modal *can* removes the requirement for the verb *be* to appear as either the singular *is*, or the plural *are*. The use of the singular or plural form would have prevented the ambiguity from occurring. *Flying planes is dangerous* refers unambiguously to the act of navigation, while *Flying planes are dangerous* refers unambiguously to the aircraft themselves. This ability of modal verbs to remove inflectional incompatibility between two competing interpretations, and thus allow ambiguity to occur, has been exploited in an advertisement reportedly used by Kodak: "Your prints will live happily ever after" [7, p. 73]. The advertisement works better orally than in print since it relies on a homophone (*prints/prince*), but it illustrates nonetheless the capacity of a modal to erode a number distinction built into our grammatical system. Notice that a spoken statement such as *Your prints live* or *Your prince lives* requires one interpretation or the other. It is through the use of the modal *will* that the verb form *live* can be interpreted as either a singular or plural. We are not aware that any legal textbooks have cautioned about this feature of modal verbs. Yet, it would seem to us that the common use of the modal *shall* in legal drafting could lead to such an ambiguity as in a construction that might prescribe that *Moving vehicles shall be prohibited on these premises*.

Humor and advertising represent fruitful areas for the identification

of grammatical structures and combinations that can contribute to structural ambiguity. Future

scholarly treatments of how to avoid ambiguity in legal drafting could benefit from an examination

of the wordplays that have been deliberately constructed around these features.

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Dallin D. Oaks is an Associate Professor of English at Brigham Young University. His research interests include historical linguistics and structural ambiguity. He is also interested in applications of linguistic theory and has recently published a textbook through Harcourt Brace College Publishers titled *Linguistics at Work: A Reader of Applications*. This book shows applications of linguistic theory in a variety of disciplines such as law, medicine, therapy, business, education, social policy, and translation.

Jeremy Lewis is an undergraduate student at Brigham Young University. He has served as a Volunteer Youth Mentor and is involved with a volunteer advocacy program that speaks up, in court, for abused and neglected children. His future plans include attending law school, following graduation from BYU.