DEVICES TO LIMIT AMBIGUITY OF REFERENCE IN LEGAL LANGUAGE

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Abstract*: The most difficult aspect when dealing with the language of the law is the specialized vocabulary of the legal profession, which has always been perceived by nonlawyers as a sort of incomprehensible jargon. But terminology is only a piece of the puzzle. Problems arise even at higher diplomatic levels when the phenomenon of lexical ambiguity intervenes. This article aims to illustrate some of the main sources of ambiguity in legal writing, with a focus on the ambiguity of reference.*

Keywords: *legal language, ambiguity of reference, pronouns.*

As specialized legal writing ("legalese") is considered pompous and silly, lawyers and judges have focused on clarity in legal documents. Solan (1993:121) illustrates the inaccessibility of the law and especially of the legal language to ordinary people.

> To many, I imagine, the lawyer is some sort of translating device: The lawyer is presented with a problem in the actual world, such as an automobile accident. He translates this easily understood problem into some sort of incomprehensible jargon. The judge then rules, and this incomprehensible jargon is translated into dollars owed, or prison terms, or something else that can once again be understood. For all of this translation back and forth, the lawyer charges a healthy fee. Some critics go so far as to claim that legal language is a plot perpetrated by lawyers to create the false impression that their services are needed so that the legal profession can fleece the rest of society.

Clarity refers to the use of a more accessible language. Many states in the USA have passed laws requiring that documents such as leases, insurance policies, loan agreements and all the documents intended for nonlawyers should be written in plain English. The most relevant example is the ***Plain Writing Act of 2010,*** whose first two sections are reproduced below.

PUBLIC LAW 111–274—OCT. 13, 2010 124 STAT. 2861
Public Law 111–274 111th Congress

> *An Act*
> *To enhance citizen access to Government information and services by establishing that Government documents issued to the public must be written clearly, and for other purposes.*
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*
> *SECTION 1. SHORT TITLE.*
> *This Act may be cited as the ''Plain Writing Act of 2010''.*
> *SEC. 2. PURPOSE.*
> *The purpose of this Act is to improve the effectiveness and accountability of Federal agencies to the public by promoting clear Government communication that the public can understand and use.*

Problems arise even at higher levels when the phenomenon of lexical ambiguity intervenes. Munson (1976:74, apud Pehar, 2001: 14) defines an ambiguous expression as one that "has more than one meaning and it is used in a situation or

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context in which it can be understood in at least two different ways". The guide to legal writing presented by the Office of the Federal Register, National Archives and Records Administration shares the view expressed by Munson, and describes an ambiguous sentence as a sentence that a reader can interpret in two or more ways. Pehar (ibid.:13, 14) adds that for an expression to be ambiguous it has to generate at least two different meanings, but two incompatible meanings. Ambiguities violate the primary (informative [1]) aim of the language, leaving the message recipient "with a less transparent and less usable kind of data."

Schane (2006:12) points out that even the word "ambiguity" has two interpretations.

> One of the senses, what I should call the "broad" or general meaning, has to do with how language is used by speakers or writers and how it is understood by listeners or readers. Ambiguity occurs where there is lack of clarity or when there is uncertainty about the application of a term. It is this sense of ambiguity that generally is meant within the law, as well as by speakers of the language. But there is another sense, what I shall call the "narrow" or restricted meaning. […] A word may have multiple definitions or a group of words may partake of more than one grammatical parsing.

Pehar (*ibid.*), who dedicates an ample study to the ambiguous language used in peace agreements, offers a multi-faceted approach to understanding this phenomenon and starts by offering a theoretical explanation of its origin.

> To attribute ambiguousness to a single sentence, or text, means to offer two irreconcilable translations, or paraphrases, of the sentence, or the text, between which we cannot decide. The code has been actually split into two sub-codes that, with an equal plausibility, follow from the original code. Each of the two interpreters proposes a single sub-code as the proper way to run the original code, and since those sub-codes are equally plausible, but cannot stand together, the interpreters lose the image of a single shared code. Each begins using his own language, or translating the original code/language into his own sub-code, and believes that his, not the competing, translation is one which preserves and confirms the structure of the original code. This means that ambiguity implies a kind of untranslatability – language or the original code cannot be translated into itself.

Dwiggins (1971:262, 263) emphasizes the idea that isolated words, abstracted from any specific context, are not ambiguous. It is the sentence as a whole, which is ambiguous. In a dictionary, words are only semantic virtualities, whose actual meaning is obvious only in the context of a sentence. Thus, an ambiguous sentence is one in which "more than one meaning is actualized simultaneously. It is not that the sentence is unclear, but that it seems to have "too many meanings".

Judges and lawyers are aware of the fact that ambiguity can give rise to important legal rights and can lead to litigation. One of the attempts to achieve clarity was the creation of a special syntax. The peculiarities of legal syntax were meant to reduce „the number of possible interpretations that a sentence in a legal document may have" (*ibid*.), but sometimes legal syntax itself is one of the sources of ambiguity.

[1] Language performs not only an informative function, but also an expressive (expresses one's feelings, interests or preferences) and evocative (the need to influence others' feelings, interests or preferences) function. (Bühler, 1934, apud Pehar, 2001:13).

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Linguists concluded that ambiguity is induced either by word meaning[1] or by word order (lexical or syntactic ambiguity).

Considering word meaning, one ought to pay attention to:

- use the singular noun rather than the plural noun, thus avoiding the question of whether the rule applies separately to each member of a class or jointly to the class as a whole.

e.g. ambiguous: *The guard shall issue security badges to employees who work in Building D and Building E* (which might also be interpreted as: The guard shall issue a security badge to each employee who works in both Building D and Building E)
clear: *The guard shall issue a security badge to each employee who works in Building D and each employee who works in building E.*

Lexical ambiguity is not restricted to nouns, it can occur with any part of speech. One of the many examples is the verb *to lease* (A leases to B or B leases from A, where A is the lessor and B is the lessee), a case in which the following sentence becomes ambiguous: *"Anyone leasing property should consult Ordinance 613."* (cf. Schane, 2006:19).

- draft an expression of time as accurately as possible, clearly stating the first and last days of that period and avoid the use of time relational words such as "now", "presently", and "currently".

e.g. ambiguous: *From July 1, 19___, until June 30, 19___*
clear: *After June 30, 19___, and before July 1, 19___.*

- draft an expression of age as accurately as possible. The expression "more than 21 years old" has two possible meanings. A person may be "more than 21" on his or her 21st birthday, or on his or her 22nd birthday.

e.g. ambiguous: A person who is more than 21 years old...(a person who is 22 years old or older)
clear: A person who is 21 years old or older...[2]

As regards word order, the basic rules for clear and effective legal writing are[3]:

- avoid misplaced modifiers

e.g. ambiguous: *John saw Jane driving down the street* (it might also mean that John saw Jane, who was driving down the street)
clear: *John, while driving down the street, saw Jane*).

- avoid indefinite pronouns used as references. In case a pronoun could refer to more than one person or object in a sentence, the advice is to repeat the name of the individual or object.

e.g. ambiguous: *After the administrator appoints an assistant, he or she shall supervise the...*
clear: *After the Administrator appoints an Assistant, the Assistant shall supervise the ...*

- avoid grouping together two or more prepositional phrases

e.g. ambiguous: *Each subscriber to a newspaper in Washington, DC.* (each subscriber to a newspaper published in Washington, DC.)
clear: *Each newspaper subscriber who lives in Washington DC.*

With respect to the rule on the use of pronouns, mention should be made that these acquire their interpretation from the context in which they are used. The major

[1] http://www.archives.gov/federal-register/write/legal-docs/ambiguity.html
[2] http://www.archives.gov/federal-register/write/legal-docs/ambiguity.html
[3] cf. ibid.

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problem is that sometimes it is not clear which is the intended antecedent of the pronouns used.

Solan (*op. cit.*:125) offers an illustrative example: *Burger told Mason that **he** was likely to win the case.*, where the pronoun *he* may refer either to Burger (the prosecutor Hamilton Burger) or to Mason (the defense attorney Perry Mason), or maybe to someone who is not mentioned in the sentence (probably the defendant).

The difficulty in the interpretation of the previously mentioned sentence arises from the impossibility to determine the antecedent of the pronoun *he*. The antecedent can be marked by using subscripts, as follows:

e.g. *Burger$_i$ told Mason that he$_i$ was likely to win the case.*

Burger$_i$ told Mason$_j$ that he$_j$ was likely to win the case.

Burger$_i$ told Mason$_j$ that he$_k$ was likely to win the case.

The last two sentences are clear, because the subscripts help us determine the antecedent. In the last sentence, the subscript is not sufficient and further information is needed to complete the meaning: „we must know from prior discourse the expression to which the subscript k has been assigned, if such an expression exists." (*ibid*.:125) The use of indices is only a technique by which we can illustrate the ambiguity of reference, and not a viable solution in natural speech.

Schane (2006:19) also mentions that certain pronouns are susceptible to misunderstanding and he brings into discussion the same case of the pronoun *he*: *The seller will convey the property to the buyer after he has paid the closing costs*, where the ambiguity is caused not by two distinct meanings of the word, but by its grammatical role.

A method with an archaic tinge used when drafting contracts (still common in the US in the 1980s) was to give each party a number and then use the number instead of the party's name to refer to that party (e.g. „the party of the first part", „the party of the second part", etc.)

e.g. Anvil Mining Co. v. Humble - 153 U.S. 540 (1894)

U.S. Supreme Court Page 153 U. S. 541

> The provisions of the contract, so far as they are material, are that "they, the said **party of the first part**, shall and will, in a good and workmanlike manner, and at their own proper charge and expense, mine, remove, and load into the skips all the merchantable iron ore contained on or above the first level of the mine now owned and worked by the said Anvil Mining Company at its No. 1 shaft, in said Township of Bessemer. [...]
> "It is also agreed that it shall be entirely optional with said **party of the second part** to extend the contract to the ore below the second level, and that the said party of the second part shall have the right of terminating this contract and the said system of mining at any time when said second party shall decide that said system is prejudicial to the future welfare and development of said mine; [...]

Another way to reduce ambiguity is to replace pronouns with names: "The use of names instead of pronouns should be effective in reducing referential ambiguity when the pronoun could have had more than one potential antecedent, but two occurences of the same name could have only one referent in the discourse in which the sentence occurs." (Solan, *op. cit.*: 127-128)

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> **IBM** and **RTKL** agree that **RTKL** did not officially join or consent to removal within thirty (30) days after service of process. However, **RTKL** contends that it is sufficient for removal here that its counsel informed **IBM**`s counsel of its desire to join in the petition prior to its filing. **IBM** states that its counsel believed **RTKL** would file a pleading joining in the petition. **IBM** contends that an amendment to the petition voicing **RTKL**`s consent is proper because that consent was omitted in good faith from the original petition.[12]

As one of the major sources of ambiguities in legal writing, because they have little inherent meaning, pronouns are many times avoided by legal writers.

Taking into account all this quest for precision, Mellinkoff (1963:293) claims that "outside the academy, no profession of words has a longer history of practical effort devoted to refining language. Lawyers spend more time talking about being precise than other similarly addicted to words."

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[1] Charles D. MASON, Plaintiff, v. INTERNATIONAL BUSINESS MACHINES, INC. and RTKL Associates, Inc., Defendants No. C-82-686-R UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, ROCKINGHAM DIVISION July 28, 1982

[2] http://www.manningfulton.com/newsstand/237-mason-v-ibm

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