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The Difficult Choice Between “And” and “Or”

By Reed Dickerson, Professor of Law, Indiana University

One of the difficult problems in writing, particularly in a field such as legal drafting that calls for high precision, is to know when to use “and” and when to use “or”. I know several excellent draftsmen who say that they develop mental blocks whenever they meet a complicated situation involving this decision. The lawyers’ recent preoccupation with the mysteries of “and/or” has distracted attention from the broader difficulties here.

Fortunately for the courts and the other readers of definitive legal documents, a correct choice between “and” and “or” does not always control the result. This is because the basic principle that language is to be read in its broadest appropriate context has laid bare intended meanings unsupported or denied by a grammatical word-for-word construction of the text. This being so, why discuss so pedestrian, grammatically technical, and almost minuscule a subject as choosing between “and” and “or”?

The answer is partly that context, however valuable, does not resolve all doubts and correct all imprecisions. Also, because a system of communication should be internally consistent, grammar should support, rather than subvert, intended meanings otherwise revealed. That the choice between “and” and “or” is of minor importance in the broad range of drafting problems is not significant because general clarity is usually the cumulative result of attending to many individually insignificant matters. But enough of apologies.

The reader will wonder why the following analysis ignores the many court decisions construing specific uses of “and” and “or”. The answer is that such decisions (being concerned for the most part with misused language) are largely irrelevant to this discussion. Even where they are not irrelevant they carry no official weight. Although the courts are the final arbiters of the meaning of particular litigated documents, their pronouncements are directed in such cases toward extracting the meaning of the whole document when viewed in its proper setting, which means overriding any specific inconsistent wording. This is different from saying that courts speak authoritatively on the normal factual meanings of words and phrases when read out of their contexts. In determining current general usage, the courts have no official function or special competence beyond the fact that their duties offer a broad opportunity for acquiring sophistication in this field. There is, therefore, a vast difference between a court’s saying, “This is what the word ‘vehicle’ officially means in this particular litigated document” and its saying, “This is the normal and usual meaning of the word ‘vehicle’.”

The difference between “and” and “or” is usually explained by saying that “and” stands for the conjunctive, connective, or additive and “or” for the disjunctive or alternative. The former connotes “togetherness” and the latter tells you to “take your pick.” So much is clear. Beyond this point, difficulties arise.

One difficulty is that each of these two words is on some occasions ambiguous. Thus, it is not always clear whether the writer intends the inclusive “or” (A or B, or both) or the exclusive “or” (A or B, but not both). This long recognized uncertainty has given rise to the abortive attempt to develop “and/or” as an acceptable English equivalent to the Latin “vel” (the inclusive “or”).

What has not been so well recognized is that there is a corresponding, though less frequent, uncertainty in the use of “and”. Thus, it is not always clear whether the writer intends the several “and” (A and B, jointly or severally) or the joint “and” (A and B, jointly but not severally). This uncertainty will surprise some, because “and” is normally used in the former sense. Even so, the authors of documents sometimes intend things to be done jointly or not at all. This idea inheres in the purchase of a pair of shoes (try to buy one shoe separately!) without, however, posing any grammatical problem. On the other hand, a reference to “husbands and wives” may create a grammatical uncertainty as to whether the right, privilege, or duty extends to husbands without wives, and vice versa, or whether it may be enjoyed or discharged only jointly.2 Where such a doubt exists, it is desirable to recognize and deal with it.

2. Dickerson, Legislative Drafting 65, note 4 (1954). And use works on logic cited in note 4 below. Some logicians would add a third meaning of “or” that of equivalence. Thus, the sentence “The cat or dog is a useful animal” can be viewed as asserting the equivalence of the things respectively designated by the words “cat” and “dog”. From this it might seem that in such a context “or” means “which is equivalent to”. On the other hand, it seems unnecessary to postulate a third meaning here, because the assertoric or indicative statement can be justified without it. Thus, the sentence can be viewed grammatically as an ascription of the equivalence of the things to which the words “dog” and “cat” refer but as an assertion that the identical thing may be referred to by either of two alternative names.

3. Professor Dickerson is the author of “Legislative Drafting” and has often contributed to this Department. His discussion of the “and” and “or” problem will be of interest not only to legislative specialists but to other draftsmen as well.

310 American Bar Association Journal
Observation of legal usage suggests that in most cases "or" is used in the inclusive rather than the exclusive sense,\(^4\) while "and" is used in the several rather than the joint sense. If true, this is significant for legal draftsmen and other writers, because it means that in the absence of special circumstances they can rely on simple "or's" and "and's" to carry these respective meanings. This, incidentally, greatly reduces the number of occasions for using the undesirable expression "and/or" or one of its more respectable equivalents, such as "A or B, or both", or "either or both of the following".

Special circumstances in which it is unsafe to rely on general usage exist, on the other hand, wherever the courts have shown an unfriendly or biased attitude in "interpreting" language. Thus, in drafting a criminal statute, with respect to which the courts are inclined to legislate restrictively under the euphemism of "strict construction", it is safer not to rely on the chance that "or" will be given its normal inclusive reading but to say expressly "shall be fined not more than $5,000 or imprisoned not more than three years, or both".

Another and more perplexing difficulty in the use of "and" and "or" is that it is often uncertain, because of a possible conflict between grammar and immediate context, whether the draftsman has attempted an enumeration of people or institutions, on the one hand, or of their characteristics or traits, on the other. Take the phrase "every husband and father". If this is intended as an enumeration of two classes of persons, fact can be less equivocally expressed by saying "every husband and every father" or, taking another approach, by saying "every person who is either a husband or a father". If, on the other hand, it is intended as an enumeration of characteristics or traits necessary to identify each member to be covered, that alternative can be less equivocally expressed by saying "every person who is both a husband and a father".\(^5\)\(^6\)

As the foregoing examples show, the former alternative meaning can be expressed, without changing substance, either by an enumeration of persons, using "and", or by an enumeration of their identifying characteristics or traits, using "or". This does not say that "and" means "or". It says that whether you use "and" or "or" in such a case depends upon whether you identify the affected persons by enumerating the several classes into which they may fall or by defining them as a single class by enumerating their qualifying characteristics. A corollary of this is that shifting from "and" to "or" without shifting from a "persons" approach to a "characteristics" or "traits" approach changes the grammatical meaning.

Because of the subtlety of the point, it may be desirable to clarify it with an example and explanation that I have used elsewhere:6

... Compare, for instance, these two provisions:

**Provision A:** The security roll shall include—

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.

**Provision B:** The security roll shall include each person who—

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

To illustrate some typical problems involving "and" or "or", I will now discuss four basic variations of phrases that are commonly used. The discussion of these variations is not intended to imply that either "and" or "or", or the phrases in which they are used, can be interpreted in specific utterances apart from the contexts in which they respectively appear. Clearly, they cannot. Even so, we are not forsocked from making appropriate generalizations about the usual meanings of these phrases. Instead of disemboweling them, such generalizations imply useful generalizations about the kinds of contexts in which these phrases tend in legal experience to appear and, in part, recognize that even when read out of specific context particular words and phrases retain much of the flavor of their usual associations.

One of the normal functions of context is to provide the basis for imply-
ing limitations on otherwise overly broad general terms. There is, for instance, no risk in referring to "the Administrator" in a paragraph or section in which the official is otherwise identified. Context limits also in other ways. Thus, the following discussion recognizes that the grammatical alternatives are conditioned by whether the enumeration is assumed to appear in a mandatory or permissive sentence. It further recognizes that these alternatives are also conditioned by whether the connective in question links characteristics that are potentially cumulative or mutually exclusive.

More specifically, the examples dealing with the modifiers "charitable" and "educational" must be appraised in the light of the fact that these terms are potentially cumulative in that the same institution can be both charitable and educational. On the other hand, those dealing with the modifiers "hospital" and "burial" must be appraised in the light of the fact that these terms are not potentially cumulative, but mutually exclusive. An expense can be a hospital expense or a burial expense, but the same expense cannot be both.

Phrase (1): "Charitable and educational institutions"

Does this mean:
(a) "institutions that are both charitable and educational"; or
(b) "charitable institutions and educational institutions"?

If you tabulate phrase (1), remembering the fact that strings of adjectives are normally used cumulatively, rather than distributively, you get this:

"Institutions that are:
(1) charitable; and
(2) educational."

Although sense (b) is sometimes intended by this phrase, it is believed that sense (a), as expressed in the tabulation, is the normal grammatical reading, that is, the way it is usually read in practice. This is true whether the sentence is mandatory or permissive.

Phrase (1) is therefore a proper way of expressing the idea of "institutions that are both charitable and educational". If sense (b) is intended, it is better to express it as sense (b) is expressed above (see also phrase (3), below), or in some other way different from phrase (1).

Compare the phrase "hospital and burial expenses", in which the modifiers are mutually exclusive. Because the same expense cannot be both "hospital" and "burial", only sense (b) is possible, and the phrase can mean only "hospital expenses and burial expenses". Although the phrase "hospital and burial expenses" is shorter and has the sanction of usage, it would seem grammatically preferable to say "hospital expenses and burial expenses", reserving the shorter form for use with potentially cumulative modifiers where sense (a) is both possible and intended.

Phrase (2): "Charitable or educational institutions"

Does this mean:
(a) "institutions that are either charitable or educational, but not both"; (b) "institutions that are either charitable or educational, or both"; (c) "charitable institutions or educational institutions, but not both"; or (d) "charitable institutions or educational institutions, or both"?

If you tabulate phrase (2) similarly to phrase (1) and infer the normal inclusive "or", you get this:

"Institutions that are:
(1) charitable; and
(2) educational; or
(3) both."

It is believed that sense (b) as so expressed is the normal grammatical reading. This is true whether the sentence is mandatory or permissive. Phrase (2) is therefore a proper way of expressing the idea of "institutions that are either charitable or educational, or both". If sense (a), (c), or (d) is intended, it is better to express it differently from phrase (2).

On examination, it appears that sense (d), which is apparently different, is in most cases substantively the same as sense (b), because it is normally inferred that, if you may or must have institutions that are either charitable or educational or both, you may also have both charitable institutions and educational institutions. Conversely, it is normally inferred that, if you may or must have both charitable institutions and educational institutions, you may also have institutions that are both charitable and educational.

Compare the phrase "hospital or burial expenses", in which the modifiers are mutually exclusive. Here, sense (b) is impossible. Sense (c) is also eliminated if you infer the normal inclusive "or". Instead, it is believed that sense (a) is the normal grammatical reading. Examination similarly shows that sense (d) is substantively the same as sense (a) in most cases, because, if you may or must pay expenses that are either hospital or burial, it is normally inferred that you may pay both kinds.

Phrase (3): "Charitable institutions and educational institutions"

Does this mean:
(a) "both charitable institutions and educational institutions", which may include institutions that are both charitable and educational; or
(b) "charitable institutions or educational institutions, or both", which may include institutions that are both charitable and educational?

If the sentence is mandatory, you must have both kinds of institutions (i.e., a "package deal" is intended). Here, "and" is joint rather than several, and sense (a) is the normal grammatical reading.

If the sentence is permissive, it is normally inferred that you may have one kind without the other (i.e., no "package deal" is intended). Here, "and" is several rather than joint, and sense (b) is the normal grammatical reading.

Compare the phrase "hospital expenses and burial expenses", in which the modifiers are mutually exclusive. Here the answers are the same, except that the possibility of including an expense that is both "hospital" and "burial" is excluded from both sense (a) and sense (b).

Phrase (4): "Charitable institutions or educational institutions"

Does this mean:
(a) "charitable institutions or educational institutions, but not both", which may not include institutions that are both charitable and educational; or
(b) "charitable institutions or edu-

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1. See second paragraph of note 5 above.
cational institutions, or both”, which may include institutions that are both charitable and educational?

If you infer the normal inclusive “or”, sense (b) is the normal grammatical reading. This is true whether the sentence is mandatory or permissive.

Compare the phrase, “hospital expenses or burial expenses”, in which the modifiers are mutually exclusive. Here the answer is the same, except that the possibility of including an expense that is both “hospital” and “burial” is excluded from sense (b).

It is interesting to note that for the cumulative modifiers “charitable” and “educational” senses (b) and (d) of phrase (2), sense (b) of phrase (3), and sense (b) of phrase (4), the normal grammatical ways of reading these respective phrases, are substantively the same in any case in which the sentence is permissive. Thus, if you intend that the person covered by the statute is to be free to have either, neither, or both, you may use any of these three sentences to express the idea:

(A) “He may contribute to charitable or educational institutions.”

(B) “He may contribute to charitable institutions and educational institutions.” Here, “and” is several, not joint.

(C) “He may contribute to charitable institutions or educational institutions.” Here, “or” is inclusive, not exclusive.

Sentences (B) and (C) differ only in that the former uses “and”, whereas the latter uses “or”. Because both sentences mean the same thing, it follows that “and” and “or” produce the same result in such a context. Stating the matter broadly, we can say that in a permissive sentence the inclusive “or” is interchangeable with the several “and”. (Again, this does not say that “and” means “or”. It says that in such a context the two words are reciprocally related in that the implied meaning of one is the same as the expressed meaning of the other.)

Of the three ways of extending permission, sentence (B) is to be preferred. Sentence (A) is open to the objection that its applicability to both charitable institutions and educational institutions is based on inference (a strong one, however). Sentence (C) is open to the objection that in the wider context of the statute as a whole it is more likely that “or” will be read as exclusive than that “and” will be read as joint.

With respect to the alternative modifiers “hospital” and “burial”, the same analysis applies, except that, because they cannot be cumulative, there is the fourth alternative of using phrase (1): (D) “He may pay the hospital and burial expenses”.

As pointed out in connection with phrase (1), sentence (D) is not as desirable grammatically as sentence (B).

The reader is warned that many of the foregoing generalizations are based only on personal observation. So far as they have not (to my knowledge) been confirmed by exhaustive scientific investigation they remain subject to honest skepticism. Even so, they may retain some value as potential conventions that, if adopted, would ultimately crystallize the very usages that I believe them now to reflect. While I do not rest my analysis on this kind of bootstrap pulling, it is comforting to recognize its supporting effect.

The reader is also warned that, even if sound, the foregoing generalities on usage are valid only as observed tendencies. The value of relying on such generalities is not that they foreclose all possibility of ambiguity or other uncertainty (they are incapable of discharging this responsibility). Rather, it is that they establish probable meanings that, fortified in particular cases by general and specific context, are strong enough so that the incidence of uncertainty remaining after a careful reading of the whole statement in its proper setting is reduced to the point where an attempt to eliminate it altogether would cost more in prolixity and unreadability than would be gained by attaining the unattainable ideal of absolute certainty.

While the foregoing analysis is hardly reducible to several handy rules of thumb, perhaps it will be helpful in some instances in lessening the confusion that now exists in this area.

Make Your Hotel Reservations Now!

The Eighty-Third Annual Meeting of the American Bar Association will be held in Washington, D. C., August 29-September 2, 1960.

The January, 1960, issue of the Journal carries a complete announcement with respect to hotels, registration, etc., and in requesting accommodations please use the hotel reservation application therein provided.

Attention is called to the fact that many interesting and worthwhile events of the meeting will take place on Sunday, August 28, preceding the opening sessions of the Assembly and the House of Delegates on Monday, August 29.

Requests for hotel reservations should be addressed to the Registration Department, American Bar Association, 1155 East 60th Street, Chicago 37, Illinois, and must be accompanied by payment of the $35.00 registration fee for each member for whom reservation is requested. This fee is NOT a deposit on hotel accommodations but is used to help defray expenses for services rendered in connection with the meeting.

Be sure to indicate three choices of hotels, type of accommodations desired and by whom you will be accompanied. We must also have definite dates of arrival and departure.