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77 Md. L. Rev. 311 (2018)

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“AND/OR” AND THE PROPER USE OF LEGAL LANGUAGE

IRA P. ROBBINS*

The use of the term and/or is pervasive in legal language. Lawyers use it in all types of legal contexts—including statutes, contracts, and pleadings. Beginning in the 1930s, however, many judges decided that the term and/or should never be used in legal drafting. Ardent attacks on the term included charges that it was vague, if not meaningless, with some authorities declaring it to be a “Janus-faced verbal monstrosity,” an “inexcusable barbarism,” a “mongrel expression,” an “abominable invention,” a “crutch of sloppy thinkers,” and “senseless jargon.” Still today, critics maintain that the construct and/or is inherently ambiguous and should be avoided whenever possible—which, many detractors would argue, is always.

And/or, however, is not ambiguous at all. It has a definite, agreed-upon meaning: when used properly, the construct signifies “A or B or both.” In most areas of law, there is simply no compelling reason to avoid using and/or. The term is clear and concise. It derives criticism mainly from instances in which people use it incorrectly. Pleadings, contracts, statutes, and patent claims all allow for a cogent use of and/or. Conversely, some legal areas—such as jury instructions, search warrants, and jury verdicts—do not typically allow a drafter to provide options, making and/or unsuitable.

Despite the few contexts in which and/or should be avoided, the construct should not be discarded simply because individuals occasionally misuse the term. After all, legal drafters and courts commonly struggle with using and interpreting “and” and “or,”

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words that are riddled with ambiguity. And/or has a precise meaning; it allows for the possibility of conveying options in the alternative. As with many consistent errors in legal writing, the problem lies not with the term and/or itself, but with a lack of close attention to detail. Legal drafters should use it with the same level of care with which they use any other word or phrase.

TABLE OF CONTENTS

| | |
|---|-----|
| INTRODUCTION..... | 312 |
| I. TWO WRONGS CAN MAKE A RIGHT: THE VICES OF “AND” | |
| AND “OR” | 316 |
| II. LEGAL CONTEXTS IN WHICH TO AVOID AND/OR EVADE | |
| THE TERM..... | 320 |
| A. Jury Instructions | 321 |
| B. Search Warrants..... | 324 |
| C. Jury Verdicts..... | 324 |
| III. COGENT USES OF “AND/OR” | 325 |
| A. Acceptance in Pleadings, Contracts, and Statutes | 325 |
| B. Patents | 331 |
| C. Courts Wrongly Interpret “And/Or” | 333 |
| IV. A, B, AND/OR C | 335 |
| IV. CONCLUSION | 336 |

INTRODUCTION

Most scholars, jurists, and practitioners would likely agree that ambiguity should be avoided in legal writing whenever possible. Yet that same group would also probably admit that, in certain circumstances, a degree of flexibility is advantageous and might even be necessary to achieve a desired result. Although the term *and/or* has a definite meaning and provides lawyers with an efficient way to express a deliberate choice between either or both of two propositions, virtually every segment of the legal profession has harshly criticized the term. This Article argues that it is time for courts and lawyers to both recognize and accept the utility of *and/or* in legal writing. At worst, the term is misused—hardly a novelty in legal drafting; at best, it

is a strong, cogent, and efficient signal of flexibility. At a time when there are those who claim that there is “no need for terminological complexity in law,”¹ *and/or* should be lauded as the most direct way to express an inclusive disjunction² between two terms.

Legal scholars are among the foremost critics of *and/or*. Grammarian Bryan A. Garner, known for his works on legal drafting and his position as Editor-in-Chief of *Black’s Law Dictionary*, universally condemns the use of the term in legal writing and advises lawyers to “[k]ill it.”³ Garner further describes *and/or* as “unnecessary,” claiming, “[n]ever once have I needed *and/or*.”⁴

Several style guides also recommend avoiding the term to reduce potential confusion and ambiguity. In 2008, Kenneth A. Adams, author of *A Manual of Style for Contract Drafting*, asserted that, in some cases, *and/or* would be the most efficient way to express an idea.⁵ In 2013, Adams changed his position and recommended avoiding the use of *and/or* because “*X or Y or both*” is a clearer alternative.⁶ Strunk and White describe *and/or* as a phrase that damages sentences.⁷ Professor Eugene Volokh, who has

1. Zoe Tillman, *Q&A: Judge Posner on Writing, Law School and Cat Videos*, NAT’L L.J. (May 18, 2016), <http://www.nationallawjournal.com/id=1202757990658/QampA-Judge-Posner-on-Writing-Law-School-and-Cat-Videos?mcode=0&curindex=0&curpage=1>. Judge Posner recently criticized judges who use legal jargon in opinions. *Id.* He drafted a concurrence simply to lambast the majority’s use of “verbal formulas.” *United States v. Dessart*, 823 F.3d 395, 405 (7th Cir. 2016). Judge Posner stated, “I disagree merely with the rhetorical envelope in which so many judicial decisions are delivered to the reader. Judicial opinions are littered with stale, opaque, confusing jargon. There is no need for jargon, stale or fresh. Everything judges do can be explained in straightforward language—and should be.” *Id.* at 407–08. It is not uncommon, however, to hear the term *and/or* used during the course of a spoken conversation even outside of a legal context.

2. *See infra* text accompanying note 44.

3. Bryan A. Garner, *Ax These Terms from Your Legal Writing*, A.B.A. J. (Apr. 1, 2014), http://www.abajournal.com/magazine/article/ax_these_terms_from_your_legal_writing/ (advising lawyers to eliminate “legalese” from their legal writing).

4. BRYAN A. GARNER, *GARNER ON LANGUAGE AND WRITING* 181 (2009).

5. KENNETH A. ADAMS, *A MANUAL OF STYLE FOR CONTRACT DRAFTING* 209–10 (2d ed. 2008).

6. KENNETH A. ADAMS, *A MANUAL OF STYLE FOR CONTRACT DRAFTING* 224 (3d ed. 2013). Mr. Adams, who read an earlier draft of this Article, commented in a blog post: “Professor Robbins’s view is a contrarian one There’s nothing wrong with being contrarian. Unless . . . you’re wrong. I suggest that Professor Robbins is mistaken. . . . I find tiresome the righteous spittle-flecked invective directed at *and/or*, so I’m sympathetic to Professor Robbins’s thesis. But I disagree with it.” Ken Adams, *Can “And/Or” Be Rehabilitated?*, ADAMS ON CONTRACT DRAFTING (May 15, 2017), <http://www.adamsdrafting.com/can-and-slash-or-be-rehabilitated/>. He added: “By the way, in everyday English, when the stakes aren’t high, *and/or* can come in handy.” *Id.*

7. WILLIAM STRUNK, JR. & E.B. WHITE, *THE ELEMENTS OF STYLE* 40 (4th ed. 2000).

written extensively on matters concerning the use of legal language,⁸ has also stated that he believes *and/or* is unnecessary, commenting that “writing that phrase makes your argument seem stilted and offputting.”⁹

Certain courts have also penned diatribes against *and/or*, the most famous of which came from the Wisconsin Supreme Court in 1935:

It is manifest that we are confronted with the task of first construing “and/or,” that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal documents, through carelessness or ignorance or as a cunning device to conceal rather than express meaning with view to furthering the interest of their clients. We have even observed the “thing” in statutes, in the opinions of courts, and in statements in briefs of counsel, some learned and some not.¹⁰

Other courts have denounced the phrase by labeling it as a “crutch of sloppy thinkers”¹¹ and “senseless jargon.”¹² A Texas court expressed that a plaintiff should have used either “and” or “or” to express either the conjunctive or disjunctive; because the plaintiff used *and/or*, however, he “expressed neither.”¹³ Overall, courts generally “abhor” the term *and/or*, often claiming the phrase has been so criticized that the court need not reiterate that criticism in the present case.¹⁴

8. EUGENE VOLOKH, *ACADEMIC LEGAL WRITING: LAW REVIEW ARTICLES, STUDENT NOTES, SEMINAR PAPERS, AND GETTING ON LAW REVIEW* (4th ed. 2010); Eugene Volokh, *Test Suites: A Tool for Improving Student Articles*, 52 J. LEGAL EDUC. 440 (2002).

9. E-mail from Eugene Volokh, Professor of Law, UCLA School of Law, to author (Sept. 21, 2016, 05:40 EDT) (on file with author). Professor Volokh set aside whether using *and/or* “may be helpful in drafting contracts, wills, or statutes.” *Id.* He also made a tongue-in-cheek reference to *and/or* by using it in the title of a short piece, *Eschew, Evade, and/or Eradicate Legalese*, <http://www.law.ucla.edu/volokh/legalese.htm> (last visited Dec. 14, 2017).

10. *Emp’rs Mut. Liab. Ins. Co. v. Tollefsen*, 263 N.W. 376, 377 (Wis. 1935).

11. *Raine v. Drasin*, 621 S.W.2d 895, 905 (Ky. 1981).

12. *Cochrane v. Fla. E. Coast Ry. Co.*, 145 So. 217, 219 (Fla. 1932). “It is one of those inexcusable barbarisms which was sired by indolence and dammed by indifference, and has no more place in legal terminology than the vernacular of Uncle Remus has in Holy Writ.” *Id.* at 218; *see also Popham v. Case*, 271 N.W. 226, 229 (Iowa 1937) (referring to *and/or* as a “mongrel expression”).

13. *Willis Sears Trucking Co. v. Pate*, 452 S.W.2d 782, 784 (Tex. Civ. App. 1970).

14. *See, e.g., State v. Tuck*, No. A-6497-03T4, 2006 N.J. Super. LEXIS 838, at *11 (Ct. App. Div. Jan. 12, 2006) (“We need not repeat the criticism that has also been heaped upon ‘and/or’ by commentators and the courts of many other states . . .”); *Seneca Falls Cent. Sch. Dist. v. Lorenz*, 459 N.Y.S.2d 689, 693 (Sup. Ct. 1983) (“Long since abhorred by the Courts, the use of the term ‘and/or’ has been referred to as ‘the abominable invention,’ ‘as devoid of meaning as it is incapable of classification by the rules of grammar and syntax.’” (quoting *Am. Gen. Ins. Co. v. Webster*, 118 S.W.2d 1082, 1084 (Tex. Civ. App. 1938))); *see also Webster*, 118 S.W.2d at 1084 (“Inci-

Contrarily, many United States Supreme Court Justices have used *and/or* in their own opinions. The late Justice Antonin Scalia, who is widely considered to be one of the best and most expressive writers in the Court’s history,¹⁵ wrote in a *qui tam* case that “the relator’s bounty is simply the fee he receives . . . for filing and/or prosecuting a successful action on behalf of the Government.”¹⁶ Other Justices who have used the term include Justice O’Connor,¹⁷ Justice Sotomayor,¹⁸ Justice Breyer,¹⁹ and Justice Alito.²⁰ Moreover, as an institution, the Supreme Court routinely uses *and/or* in denying “writ[s] of mandamus and/or prohibition.”²¹

While grammarians, scholars, and judges typically despise *and/or*, the problems associated with it are often wrongly attributed to the term itself. Many criticisms that *and/or* is imprecise or ambiguous ignore that the term has a definite meaning: it is “a formula denoting the items joined by it can be taken either together or as alternatives”²²—i.e., “*A or B, or both*.”²³ Critics urge those wanting to use *and/or* to simply write out its meaning for the sake of clarity. Given the term’s definite meaning, however, proper use of *and/or* creates neither ambiguity nor confusion. Of course, *and/or* critics seem to overlook that *any* term can be ambiguous when used incorrectly. In short, the term’s potential for confusion has been severely overstated—drafters should seek to incorporate it where appropriate.

dentally, we will remark that we would probably be warranted in considering that part of the sentence following ‘and/or’ as meaningless . . .”).

15. See, e.g., Jeet Heer, *Antonin Scalia Is the Supreme Court’s Greatest Writer*, NEW REPUBLIC (June 26, 2015), <https://newrepublic.com/article/122167/antonin-scalia-supreme-courts-greatest-writer>.

16. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000); see also *Lambrix v. Singletary*, 520 U.S. 518, 524–25 (1997). Yet Justice Scalia’s coauthored book with Bryan Garner states that *and/or* is an “unfortunate hybrid,” “a drafting blemish.” ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 125 (2012).

17. *Republican Party of Minn. v. White*, 536 U.S. 765, 792 (2002) (O’Connor, J., concurring) (referring to “appellate and/or general jurisdiction trial court judges”).

18. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 253 (2011) (Sotomayor, J., dissenting) (“[W]hen Congress intends to pre-empt design defect claims categorically, it does so using categorical . . . and/or declarative language . . .”).

19. *Brown v. Sanders*, 546 U.S. 212, 232 (2006) (Breyer, J., dissenting) (“[W]hy else would the State call that factor an ‘aggravator’ and/or permit it to render a defendant death eligible?”).

20. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2255–56 (2016) (Alito, J., dissenting) (describing the contents of a license plate as “the name of the State and the numbers and/or letters identifying the vehicle”).

21. See, e.g., *In re Grenadier*, 136 S. Ct. 1520, 1520 (2016) (mem.).

22. *And/or*, OXFORD ENGLISH DICTIONARY <http://www.oed.com/view/Entry/7283?redirectedFrom=and%2For#eid4002106> (last visited Dec. 14, 2017).

23. SCALIA & GARNER, *supra* note 16, at 125 (“When [*and/or*] is meant, careful drafters would say *A or B or both* . . .”).

Part I of this Article examines the ambiguity of terms as simple as “and” and “or” and emphasizes that the concerns over *and/or* are no different from any other conjunction or disjunction. Part II acknowledges improper uses of *and/or*, focusing on its misuse in jury instructions and search warrants. Part III provides an overview of proper uses of *and/or*, demonstrating judicial acceptance of the term in pleadings, contracts, statutes, and more specific areas like patent cases. Finally, while the majority of this Article considers the use of *and/or* in the context of “A and/or B,” additional problems arise when *and/or* is used to connect more than two terms, such as “A, B and/or C.” Part IV proposes a way to clarify *and/or* when it is used to connect a list of terms.

I. TWO WRONGS CAN MAKE A RIGHT: THE VICES OF “AND” AND “OR”

Despite the wide-ranging and profound dislike of the term *and/or*, its critics fail to acknowledge that it has a definite, useful meaning.²⁴ The separate terms of “and” and “or” are seemingly contradictory, lending confusion when combining the two terms into *and/or*.²⁵ Some have even called *and/or* “purposely indefinite.”²⁶ However, this perspective fails to see that *and/or*—and at the very least, the construction of “A and/or B”—provides a finite choice to the reader.²⁷ Using *and/or* to separate two terms, such as “A and/or B,” invites the reader to choose only A, only B, or both A and B.²⁸ Thus, a reader is presented with only three options when *and/or* is used to separate two terms.²⁹

Justice Scalia and Bryan Garner wrote that *and/or* constitutes a “drafting blemish,” because the same meaning can be expressed by “A or B or

24. *Supra* note 22 and accompanying text.

25. Note, *In Defense of And/Or*, 45 YALE L.J. 918, 918 (1936) (explaining the view that the combination of “and” and “or” is “logically absurd”). See generally Maurice B. Kirk, *Legal Drafting: The Ambiguity of “And” and “Or”*, 2 TEX. TECH L. REV. 235 (1971).

26. See *Richardson v. Mason*, 956 F. Supp. 2d 1372, 1380–81 (M.D. Ga. 2013) (describing the standard for a plaintiff’s recovery of compensatory damages to be “purposefully indefinite” because it is within the discretion of the jury to decide). *But see* 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 30:12 (4th ed. 2012) (clarifying that *and/or* takes the place of phrases like “or either” and “or any combination thereof” after a string of alternatives connected by “and”).

27. *In Defense of And/Or*, *supra* note 25, at 918; Annotation, *And/or*, 118 A.L.R. 1367 (2017) (“When the term is properly used, however, its meaning is not indefinite or uncertain. It is broad, but not indefinite; it is elastic, but within definite bounds and for a definite purpose.”).

28. See *In Defense of And/Or*, *supra* note 25, at 918 (stating that *and/or* can denote a difference in the meaning of words, such as “request of and/or demand of,” or can be used to combine classes, such as “March and/or April”).

29. *Id.* at 918–19.

both.”³⁰ This argument, however, concedes that *and/or* has a clear and definite meaning. That the expression can be spelled out is not a compelling argument; many expressions in legal writing can be conveyed with more words than are necessary.³¹ A careful use of *and/or* would carry the same meaning and promote a more efficient sentence structure. Moreover, Scalia and Garner note that “if several items were to be listed, they would introduce the list with *any one or more of the following*.”³² However, a logical extension of the meaning of “A and/or B” comes when separating more than two terms with *and/or*, such as “A and/or B and/or C.” Using *and/or* between each term illustrates the choices of only A, only B, only C, or any combination of the three terms. Any confusion that *and/or* may bring should not dissuade individuals from recognizing a definite meaning with proper use of the term.

The term *and/or* is not alone in causing concern among academics, jurists, and practitioners. In fact, the seemingly simple terms of “and” and “or” are sources of confusion in the English language depending on the context in which they arise,³³ making the criticisms against *and/or* less forceful. The word “and” can create misunderstanding when nouns connected by it are “acting, or are being acted on, individually or collectively.”³⁴ Using “and” to connect the *subjects* of a sentence can create ambiguity in whether the subjects act individually or collectively, such as “A and B must call C.”³⁵ Must A and B complete this call while using the same

30. SCALIA & GARNER, *supra* note 16, at 125 (emphasis omitted); *see also* Hess v. Hartford Life & Accident Ins. Co., 274 F.3d 456, 463 (7th Cir. 2001) (citing BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 56 (2d ed. 1995) (using the definite meaning of *and/or*)).

31. Indeed, the legal profession continues to use Latin and French phrases precisely because they are efficient and have clear meanings. *See, e.g., Per Se*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“This phrase denotes that something is being considered alone, not with other collected things.”).

32. SCALIA & GARNER, *supra* note 16, at 125.

33. For an in-depth analysis of the ambiguities that can arise when using “and” and “or,” *see* Kenneth A. Adams & Alan S. Kaye, *Revisiting the Ambiguity of “And” and “Or” in Legal Drafting*, 80 ST. JOHN’S L. REV. 1167 (2006). To resolve the difficulties in interpreting “and” and “or,” some sources suggest avoiding the use of these terms completely in legal drafting. *See, e.g.,* 1A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 21:14 (7th ed. 2009) (“Avoiding use of either the conjunctive or disjunctive may solve the difficulty [of interpreting these terms]. When compliance with every standard set by the act is desired and one standard is not intended to be a condition upon another, a mere itemization of standards is the best practice.”); Kirk, *supra* note 25, at 253 (stating that “every use of ‘and’ and ‘or’ as a conjunction involves some risk of ambiguity”).

34. Adams & Kaye, *supra* note 33, at 1172; *see also* Thomas Haggard, *The Ambiguous And and Or*, 80 MICH. B.J., Nov. 2001, at 48 (“The word *and* may be construed as meaning either jointly or severally. . . . Ambiguity may also arise when the reader cannot determine from context whether *and* is intended to identify several different entities or to identify the traits of a single entity.”).

35. Adams & Kaye, *supra* note 33, at 1173. Additional problems arise when using permissive language such as “may” instead of mandatory language like “must” or “shall.” “A and B may

phone, or can they call separately? Similar problems arise when the *objects* of a sentence are connected by “and,” such as “C must call A and B.”³⁶ Here, the reader is left uncertain whether C is required to call A and B together or individually. Moreover, using multiple adjectives joined by “and” to describe a plural noun can create confusion over whether both adjectives modify the noun collectively or individually.³⁷ For instance, the phrase “Emily must call young and healthy residents” leaves the reader wondering whether, to receive a phone call from Emily, these residents must be both young and healthy or if they require only one of the listed characteristics. These are only a few examples where, in the right context, “and” can confuse the reader of a contract, statute, or other document.³⁸

Similar to “and,” “or” may cause confusion when used to connect subjects or objects in a sentence.³⁹ The word “or” can be construed as exclusive or inclusive, leading to confusion about which variant of “or” applies in a given context.⁴⁰ Legal sources differ on which meaning of “or” is authoritative.⁴¹ In the realm of symbolic logic, the exclusive “or,” otherwise known as the exclusive disjunction, means that only one of the propositions or terms joined by the disjunction can be true.⁴² “Jim is eight or nine years old” is exemplary of an exclusive disjunction because only one proposition

call C” suggests that perhaps only A or only B can call C, in addition to the problem of choosing to call C individually or collectively. *Id.* at 1174.

36. *See id.* at 1173–74 (“[W]hen the members of the object group are considered individually rather than collectively, it is not clear whether the subject has discretion to act with regard to all the members . . .”).

37. *Id.* at 1177–79. The authors note a similar issue when the term “every” is added to a group of nouns joined by “and.” For example, stating that “Lisa shall call every young and healthy resident of town X” does not make clear whether Lisa shall call every young resident *and* every healthy resident of town X, or only those residents who are both young and healthy. *See id.* at 1179.

38. *See generally id.* at 1172–80 (offering examples of ambiguity created by “and”).

39. *See id.* at 1183.

[Ambiguity] arises when a plural noun is associated with an *or*-coordination: it is unclear whether all the items in question are to be attributed to one coordinate or the other, or can be divided between them. [Ambiguity also] occurs in the context of negation, including, most pertinently, language of prohibition, and only in this context can one correctly speak of ambiguity—albeit limited—as to whether *or* is exclusive or inclusive.

Id.

40. *See id.* at 1180 (noting that an exclusive “or” means “A or B, but not both” and an inclusive “or” means “A or B, or both”). Note that an inclusive “or” has the same definition that *and/or* has in the context of “A and/or B.”

41. Compare 11 WILLISTON & LORD, *supra* note 26, § 30:12 (“The word ‘or’ is frequently construed to read ‘and’ when that construction is necessary in context . . .”), with Adams & Kaye, *supra* note 33, at 1183 (“[F]or purposes of contract drafting, *or* serves to distinguish alternatives, and it is untenable to seek to attribute, across the board, an inclusive meaning to *or*”).

42. Layman E. Allen, *Symbolic Logic: A Razor-Edged Tool for Drafting and Interpreting Legal Documents*, 66 YALE L.J. 833, 843 (1957).

in the disjunction can be true.⁴³ On the other hand, an inclusive disjunction assumes that either one or both of the terms or propositions on either side of the disjunction are true.⁴⁴ A sentence like, “X will call or email Y,” does not necessarily denote an exclusive disjunction, but rather, it leaves open the possibility that X could call *and* email Y. Essentially, an inclusive disjunction allows the possibility of either option, or both, which is also the literal meaning of *and/or*.⁴⁵ The difficulty with competing versions of a disjunction is that when used in plain English, a reader must dissect what type of disjunction it is, leaving more room for confusion. What *and/or* provides is a clear and unambiguous signal of choosing either or both, at least in the example of “A and/or B.” Thus, *and/or* is the better choice when trying to express an inclusive use of “or.”⁴⁶

Another phenomenon demonstrating the confusion of even simple terms such as “and” and “or” is the erroneously named “and/or rule.”⁴⁷ In New York, for example, the “and/or rule” states that the two words are interchangeable “when necessary to effectuate legislative intent,”⁴⁸ noting that the use of “and” and “or” in statutory construction is “notoriously loose and inaccurate.”⁴⁹ One legal commentator explained that the use of this “and/or rule” presents itself in three situations: (1) where a negation confuses the meaning of “and” or “or”; (2) where “or” is to be interpreted as inclusive or exclusive; and (3) where there seems to be no problem with the statutory language used.⁵⁰

An example of the ease with which “and” and “or” can be substituted is in *United States v. Claude X*.⁵¹ There, the United States Court of Appeals

43. A particularly relevant example from Allen is: “[a] disjunctive statement is an exclusive disjunction, or it is an inclusive disjunction.” *Id.*

44. *Id.* at 847 (using the symbol “&OR” to express an inclusive disjunction in symbolic logic).

45. See Adams & Kaye, *supra* note 33, at 1190 (noting that *and/or* is sometimes used to mean an inclusive “or,” but maintaining that “X or Y or both” is clearer than “X and/or Y”). Though Adams and Kaye encourage replacing *and/or* with a longer, but apparently clearer, explanation, they do not explicitly encourage clearer language when distinguishing between an inclusive or exclusive “or.”

46. For a case involving a court substituting “and/or” for “or” in a statute, see *Air Mach. Com SRL v. Superior Court*, 186 Cal. App. 4th 414 (2010). There, the court dealt with a statute using the disjunctive in listing “‘answer,’ ‘demurrer’ or ‘motion to strike.’” *Id.* at 420 n.6. The court noted that “California law allows parties to demur and answer at the same time” as well as “demur and move to strike at the same time.” *Id.* The court therefore concluded that the word “or” in the statute meant “and/or.” *Id.*

47. LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 45 (1993).

48. *Id.* (quoting N.Y. STAT. LAW § 365 (McKinney 2016)).

49. *Id.*

50. *Id.* at 46 (expressing concern over the third category, as it “renders the application of the and/or rule incoherent from any doctrinal point of view”). An in-depth consideration of the application of the “and/or rule” is beyond the scope of this Article.

51. 648 F.3d 599 (8th Cir. 2011).

for the Eight Circuit interpreted an indictment that charged the defendant with “us[ing] and carr[ying]” a firearm as using *or* carrying a firearm.⁵² The verdict form submitted to the jury excluded the term “carried,” which the court saw as a non-issue, as it was generally accepted that “in an indictment, ‘and’ means ‘or.’”⁵³

These issues demonstrate that the English language is fickle regardless of which conjunction or disjunction is used. *And/or* is not unique in its potential for misuse.⁵⁴ Bryan Garner contends that *and/or* “plays into the hands of a bad-faith reader . . . [who] can pick whatever reading seems favorable.”⁵⁵ The nature of *and/or* does provide a choice, but a correct use of the term will provide context for that choice. Moreover, based on the potential for ambiguity within simple terms like “and” and “or,” it seems as though any reader—including judges—will pick whichever reading is favorable or equitable in light of the surrounding circumstances.⁵⁶ The argument that *and/or* should be avoided merely because it can be misused or misunderstood is unpersuasive, especially given its widely-recognized, definite meaning.

II. LEGAL CONTEXTS IN WHICH TO AVOID AND/OR EVADE THE TERM

Drawing both on common sense and the discussion above, it is easy to see that the injudicious use of coordinating conjunctions can be fatal to legal drafting. Since “and” and “or” have multiple interpretations due to syntactic ambiguity,⁵⁷ drafters can find their provisions subject to the broad disapproval of trial courts and the searching scrutiny of appellate courts. Even though the term *and/or* has a definite meaning and should be used where the author intends to express an inclusive disjunction, there are certain scenarios in which its use should be avoided. In general, *and/or* should not be used in jury instructions, search warrants, or jury verdicts. In cases that involve more than one person, victim, or element of a crime or civil cause of action, jury instructions that use the term carry the risk of jurors

52. *Id.* at 603 n.6.

53. *Id.*

54. See Adams & Kaye, *supra* note 33, at 1195 (“It would be unreasonable to expect drafters to attempt to eliminate all instances of ambiguity associated with *and or or*.”).

55. Garner, *supra* note 3.

56. See, e.g., Adams & Kaye, *supra* note 33, at 1191–94 (using the case of *SouthTrust Bank v. Copeland One, LLC*, 886 So. 2d 38 (Ala. 2003), to demonstrate that drafters mistakenly use “or” instead of “and,” and that courts may “find ambiguity where linguistic analysis would indicate none exists”).

57. Kermit L. Dunahoo, Note, *Avoiding Inadvertent Syntactic Ambiguity in Legal Draftsmanship*, 20 DRAKE L. REV. 137, 142 (1970) (explaining that “‘Syntactic ambiguity’ arises when there is ‘uncertain[ty] of modification or reference within the particular instrument’” (alteration in original) (quoting REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* 25 (1965))).

making decisions they are not allowed to make. Using *and/or* in search warrants might broaden the warrant’s scope beyond what is legally permissible. And the possibility of ambiguity in jury verdicts should be avoided where possible. Thus, judges, law enforcement officers, and jurors should avoid using the term in these circumstances.

A. Jury Instructions

Ambiguity and confusion in jury instructions are not new problems for jurors and reviewing courts.⁵⁸ Courts considering the use of *and/or* in jury instructions often look to the totality of the circumstances in deciding whether an instruction contained an error.⁵⁹ The Florida Supreme Court had occasion to consider *and/or* in *Victorino v. State*,⁶⁰ in which the defendant and two co-defendants were charged with multiple counts of first-degree murder.⁶¹ The names of all three co-defendants were separated by the term *and/or* during the trial court’s jury charge, where the element of the criminal offense “provided for inclusion of the name of the defendant.”⁶² The defendant claimed that the use of *and/or* constituted an error because its use suggested that he could have been convicted solely for the conduct of one of his co-defendants.⁶³ While the court acknowledged that the use of *and/or* has a tendency to mislead a jury and that its use was erroneous, it ultimately held that it did not constitute a fundamental error.⁶⁴

58. See, e.g., *Russell v. Empire Storage & Ice Co.*, 59 S.W.2d 1061, 1069 (Mo. 1933) (calling the term “and/or” a “freakish symbol [that] has been condemned as unintelligible” and emphasizing that it should not be used in jury instructions); *Librach v. Litzinger*, 401 S.W.2d 433, 437 (Mo. 1966) (asserting that *and/or* should not be used in jury instructions as it is “meaningless”). But see *Weibezahl v. Raytheon Co.*, No. B259957, 2016 LEXIS 1558, at *10 (Cal. Ct. App. Mar. 3, 2016) (holding that the use of *and/or* in both jury instructions and a special verdict form was not ambiguous).

59. See, e.g., *Croom v. State*, 36 So. 3d 707, 709–11 (Fla. Dist. Ct. App. 2010) (indicating that a jury instruction error is fundamental if a “guilty verdict ‘could not have been obtained without the assistance of the alleged error’” (quoting *State v. Delva*, 575 So. 2d 643, 645 (Fla. 1991))).

60. 23 So. 3d 87 (Fla. 2009).

61. *Id.* at 91.

62. *Id.* at 100. The co-defendants’ names were listed as “TROY VICTORINO and/or JERONE HUNTER and/or MICHAEL SALAS.” *Id.*

63. See *id.* at 100–02 (noting that the error was harmless because the defendant’s counsel emphasized that the jury should only judge the defendant based on the defendant’s testimony and evidence against him, and him alone, in closing arguments); see also *Provow v. State*, 14 So. 3d 1134, 1136 (Fla. Dist. Ct. App. 2009) (“Because *and/or* correctly expressed the meaning of the statute that defendant could be found guilty of resisting with violence if he resisted either officer or both at the same time, the same conjunctive/disjunctive may properly be used in the jury instructions to convey the applicable legal rule to the jury.”).

64. *Victorino*, 23 So. 3d at 100–02. The court previously acknowledged the error in the use of *and/or* in *Hunter v. State*, an appeal by one of the co-defendants in *Victorino*. 8 So. 3d 1052 (Fla. 2008); see also *State v. Ruffin*, 370 S.E.2d 279, 282 (N.C. Ct. App. 1988) (holding that the use of *and/or* in jury instructions was not prejudicial error). Specifically, the court found the trial judge’s use of the term not to be prejudicial because “the jury was not misled by the use of the

The use of *and/or* can constitute a fundamental error in jury instructions, however. In *Harris v. State*,⁶⁵ the Florida trial court's jury instruction included the term *and/or* between the defendants' names in describing the elements of second-degree murder.⁶⁶ The instruction noted that the jury must consider the evidence of each co-defendant separately, but the court still found the use of *and/or* to be a fundamental error that warranted a new trial.⁶⁷ Despite an additional curative instruction that the jury should consider each defendant separately, the court ruled that the use of *and/or* in the primary instruction was enough to allow the jury to conclude that the defendant was guilty based on the actions of his co-defendant.⁶⁸ To remedy this issue in jury instructions, the Florida Supreme Court has suggested the use of alternative language instead of using *and/or* in cases with co-defendants.⁶⁹

Even with alternative language, courts have found similar problems in jury instructions when the names of multiple defendants or victims were included together in the charge.⁷⁰ For example, placing "or" between the names of defendants also allows for the possibility that a defendant will be convicted solely based on the evidence against the co-defendant. Similarly, using "or" between the names of multiple victims can result in different elements of a crime being considered for different victims, rather than one

term or they would have convicted defendant and the co-defendant of exactly the same crimes." *Id.*

65. 937 So. 2d 211 (Fla. Dist. Ct. App. 2006).

66. *Id.* at 212. The jury instruction read as follows:

To prove the crime of second degree murder, the State must prove the following three elements beyond a reasonable doubt:

1. [The victim] is dead.
2. The death was caused by the criminal act of [the co-defendant] *and/or Robert Lewis Harris*.
3. There was an unlawful killing of [the victim] by an act imminently dangerous to another and demonstrating a depraved mind without regard for human life.

Id. (emphasis added) (alterations in original).

67. *Id.* at 212–13.

68. *Id.*

69. See *Garzon v. State*, 980 So. 2d 1038, 1045 (Fla. 2008). The Florida Supreme Court suggested that the trial court use the following instead of *and/or*: "As to each of the defendants, the State must prove the following elements: first, that *the defendant* [engaged in the element of the crime]." *Id.* (alteration in original).

70. E.g., *Schepman v. State*, 146 So. 3d 1278, 1282–83 (Fla. Dist. Ct. App. 2014). The court rejected even the alternate version of the jury instruction because, while it distinguished the victims, it used the term "or" between the names of the victims. *Id.* at 1283. The case involved assault, and there was overwhelming evidence demonstrating "that the defendants threatened and caused fear" in two victims. *Id.* at 1285. By using an "or" to connect the names of the two victims in the jury instruction, the jury could have found that the defendants could have assaulted one victim but not the other. *Id.* "[T]he jury must have concluded that Defendants assaulted both victims, not one or the other." *Id.*

victim fulfilling each of the required elements of that crime.⁷¹ These additional issues suggest that drafting jury instructions free from ambiguity is a difficult process even without using *and/or*. The Florida court in *Schepman v. State*⁷² encouraged courts to “charge separate counts for each victim and to give separate instructions for each count. While this solution may result in longer jury instructions, it avoids the much greater consequences of a retrial or a defendant being discharged because of this avoidable error.”⁷³ This problem, while prevalent in Florida courts, is not unique to that state.⁷⁴

With respect to cases involving multiple criminal defendants, the use of *and/or* in jury instructions ordinarily will be inapposite, even when a curative instruction is used.⁷⁵ Therefore, using the term creates too high a risk of confusion for the jury. But with respect to the liability of a legal entity, where liability is founded on the actions of one or more individuals, *and/or* may be appropriate because the actions of either or both of two defendants might give rise to liability.⁷⁶ Moreover, where there are co-defendants in a case, but the nature of the crime or charge—like conspiracy—is such that it can be attributed to all of the co-defendants, using *and/or* may well be proper.⁷⁷

71. *James v. State*, 706 So. 2d 64, 65 (Fla. Dist. Ct. App. 1998) (“[The defendant] was correct in his initial challenge to the amended information alleging error in the inclusion of multiple victims in a single count alleging aggravated assault. It is well settled that separate and distinct offenses may not generally be alleged in a single count of an information.”).

72. 146 So. 3d 1278 (Fla. Dist. Ct. App. 2014).

73. *Schepman*, 146 So. 3d at 1286.

74. *See, e.g., State v. Gonzalez*, 130 A.3d 1250, 1255 (N.J. Super. Ct. App. Div. 2016) (holding that the judge’s constant use of *and/or* was “so confusing and misleading as to engender great doubt about whether the jury was unanimous with respect to some part or all aspects of its verdict or whether the jury may have convicted defendant by finding the presence of less than all the elements the prosecution was required to prove”); *see also State v. Martinez*, No. 2007AP2669-CR., 2008 WL 5396880, at *2 (Wis. Ct. App. Dec. 30, 2008) (per curiam) (holding that, “even if the instruction itself [which included *and/or*] was confusing, the explanation given by the court immediately following the reading of the instruction communicated to the jury a correct statement of the law”).

75. *E.g., Harris v. State*, 937 So. 2d 211, 213 (Fla. Dist. Ct. App. 2006) (“[T]he addition of a standard jury instruction with respect to the joint trial of Harris and the codefendant did not remedy the fundamental error resulting from the inclusion of the ‘and/or’ conjunction in the specific jury instruction regarding the elements of second degree murder.”).

76. *See, e.g., City of Monroe Emps.’ Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 688 (6th Cir. 2005) (establishing that a company’s Executive Vice President’s awareness of the underlying claims in the lawsuit were “directly attributable” to the corporation because “knowledge of a corporate officer or agent acting within the scope of [his] authority is attributable to the corporation” (alteration in original) (quoting 2 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 12.8[4], at 444 (4th ed. 2002))).

77. *See Pinkerton v. United States*, 328 U.S. 640, 647 (1946) (“If that can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense.”).

B. Search Warrants

Search warrants are another type of document in which *and/or* may lead to undesirable results. The Fourth Amendment to the United States Constitution⁷⁸ requires that warrants “*particularly* describ[e] the place to be searched, and the persons or things to be seized.”⁷⁹ Thus, even if a warrant contained “A or B or both” in lieu of *and/or* to describe premises to be searched, courts could find that this violates the constitutional particularity requirement.⁸⁰ In *Wood v. State*,⁸¹ the Texas Court of Criminal Appeals considered the use of *and/or* in an affidavit and a warrant describing the “premises occupied by, in charge of and under the control of Willie Wilson, and/or Eddie J. Ford” with respect to a search for intoxicating liquors.⁸² After condemning the use of *and/or* in other contexts,⁸³ the court determined that the warrant was defective for failing to comport with a Texas statute, permitting warrants based on an affidavit “setting forth the name or description of the owner or person in charge of the premises to be searched.”⁸⁴ Because the warrant was unspecific with respect to the occupancy and ownership of the premises, the court ruled that the defendant was able to exclude evidence that law enforcement had obtained relating to the defendant’s occupancy and ownership.⁸⁵ Given the warrant particularity requirement and the options that *and/or* provides, it is best to avoid *and/or* so as not to impermissibly broaden the scope of a warrant.

C. Jury Verdicts

Although jury verdicts are highly unlikely to be written by members of the legal profession, appellate courts look upon them with disdain in the rare cases in which they contain the term *and/or*. In *Cobb v. State*,⁸⁶ an appellate court found a jury verdict to be faulty when it found the defendant guilty and assessed a punishment of “\$0.00, and/or confinement in the

78. U.S. CONST. amend. IV.

79. *Id.* (emphasis added).

80. *People v. Miranda*, 964 N.E.2d 1241, 1246 (Ill. App. Ct. 2012) (ruling that the assertion that the defendant was “under the influence of alcohol and/or drugs” was a “bare conclusion” and the “phrase ‘and/or’ left some ambiguity about whether [the officer] suspected that defendant had used drugs at all”). The court held that “the affidavit did not establish a sufficient basis on which to find the probable cause needed to test defendant’s urine for the presence of controlled substances.” *Id.*

81. 243 S.W.2d 31 (Tex. Crim. App. 1951).

82. *Id.* at 32.

83. *Id.* at 33 (“[T]his court . . . condemned the use of ‘and/or’ in a verdict held as being indefinite and uncertain. The civil appellate courts of this state have also uniformly condemned the words, ‘and/or,’ as meaningless, indefinite and uncertain.”).

84. *Id.* at 32 (quoting VERNON’S ANN. PENAL CODE Art. 666-20).

85. *Id.* at 33.

86. 139 S.W.2d 272 (Tex. Crim. App. 1940).

County Jail of 30 days.”⁸⁷ Once the jury rendered this verdict, who decides which punishment the defendant would face? The obvious lack of certainty in the verdict required the appellate court to remand the case for further proceedings.⁸⁸

Reviewing courts generally seem to disfavor the use of *and/or* in jury instructions, search warrants,⁸⁹ and jury verdicts. The key issue, however, is whether the use of the term is likely to lead to confusion. In most other scenarios, *and/or* is a useful, efficient tool in sentence construction. It is not the fault of the term itself that drafters fail to use it correctly.

III. COGENT USES OF “AND/OR”

In many legal contexts, drafters can use *and/or* to their advantage as a more concise and effective expression of “A or B or both.” Section A of this Part discusses the appropriate use of *and/or* in complaints, contracts, and statutes; specifically, it illustrates where courts have found *and/or* to be unambiguous and consistent with its definite meaning. Section B considers the particular context of patents, especially where courts are called upon to interpret *and/or* in patent claims and applications. Section C provides examples of courts incorrectly construing *and/or* to the detriment of the parties and to courts’ own preferences for efficiency and clarity.

A. Acceptance in Pleadings, Contracts, and Statutes

In the context of complaints, *and/or* is a useful construction consistent with the minimum pleading requirements articulated in *Bell Atlantic Corp. v. Twombly*⁹⁰ and *Ashcroft v. Iqbal*.⁹¹ In *Zolin v. Caruth*,⁹² the plaintiff

87. *Id.* at 273.

88. *Id.*

89. *But see* United States v. Csanadi, No. 3:11cr239 (JBA), 2012 WL 3779166, at *7 (D. Conn. Aug. 31, 2012) (deeming a search warrant valid because it “specifically enumerated the items to be seized, including ‘video and/or audio recording devices’”); United States v. Vaughan, 875 F. Supp. 36, 43 (D. Mass. 1995) (accepting the use of *and/or* in a warrant that described “the area occupied by and/or in the possession of [the defendant]”); State v. Sharp, 795 N.W.2d 638, 644 (Neb. 2011) (construing a warrant specifying the “‘place or person’ of the North 28th Street residence AND/OR SHARP . . . AND/OR HICKS” to be valid for a search conducted either on or off the residence and with or without the presence of either named defendant).

90. 550 U.S. 544 (2007).

91. 556 U.S. 662 (2009). Under Federal Rule of Civil Procedure 8, a complaint must “state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. Thus, a complaint must plead facts that are more than merely consistent with a defendant’s liability; otherwise, the plaintiff will not have moved past the threshold that separates sheer possibility from actual plausibility, and the court must grant a motion to dismiss. *Iqbal*, 556 U.S. at 678. Courts may hold that *and/or* satisfies minimum pleading requirements because pleadings are preliminary and construed liberally. *See, e.g.*, *Arista Records LLC v. Greubel*, 453 F. Supp. 2d 961, 967 n.6 (N.D. Tex. 2006) (“The Court disagrees with the contention that the use of the phrase ‘and/or’ in a complaint does

identified three defendants—an unincorporated association, the president of the association in his official capacity, and the president of the association in his individual capacity.⁹³ Defendants filed a motion to dismiss, contending *inter alia* that the “plaintiff’s continuous use of the phrase ‘and/or’ makes it difficult for them and this court to determine whether a sufficient claim has been alleged.”⁹⁴ Citing a “single, complete identity” between the named defendants, the court held that the complaint “[was] not so vague or ambiguous that defendants [could not] reasonably be required to frame a responsive pleading,”⁹⁵ despite the plaintiff’s use of *and/or*.⁹⁶

In *TracFone Wireless, Inc. v. Zip Wireless Products*,⁹⁷ the plaintiff alleged that “[d]efendants and/or other unnamed co-conspirators [were] purchasing and selling TracFone prepaid phones in bulk quantities for use outside of the TracFone prepaid wireless service and coverage area.”⁹⁸ Defendants, in a motion to dismiss, claimed that the complaint failed both *Twombly* and Georgia pleading standards because of the plaintiff’s repeated use of *and/or*.⁹⁹ Defendants mainly relied on a Georgia state case holding that *and/or* is too indefinite when used in a pleading, unless the party defines specifically whether the phrase means “and” or “or.”¹⁰⁰ The court in *TracFone* refused to adhere to this state court holding, instead determining that the plaintiff’s use of *and/or* satisfied the *Twombly* requirements.¹⁰¹ The complaint, which named “[d]efendants and/or other unnamed co-conspirators,” would be invalid if the alleged actions were attributable solely to the unnamed co-conspirators.¹⁰² The plaintiff’s pleading, however, sufficiently alleged a civil conspiracy, thus plausibly rendering the acts of the co-conspirators attributable to the named defendants.¹⁰³

Courts sometimes find the use of *and/or* to be sufficient for pleading requirements even though the basis for their reasoning is simply the com-

not satisfy the liberal notice pleading requirements of Federal Rule of Civil Procedure 8, which permits a party to state as many separate claims or defenses as he has, regardless of consistency.”)

92. No. 3:09cv38/WS/MD, 2009 U.S. Dist. LEXIS 125965 (N.D. Fla. Aug. 12, 2009).

93. The plaintiff proceeded pro se, asserting claims for “breach of contract, breach of the implied covenant of good faith and fair dealing, fraudulent misrepresentation, and quantum meruit.” *Id.* at *1–2.

94. *Id.* at *16.

95. *Id.* at *16, *19.

96. *Id.* at *17 n.1.

97. 716 F. Supp. 2d 1275 (N.D. Ga. 2010).

98. *Id.* at 1280.

99. *Id.* at 1281.

100. *Id.* (citing *Saylor v. Williams*, 92 S.E.2d 565, 567 (Ga. Ct. App. 1956)).

101. *Id.* at 1282.

102. *TracFone Wireless, Inc. v. Zip Wireless Prods.*, 715 F. Supp. 2d 1275, 1280, 1282 (N.D. Ga. 2010).

103. *Id.*

monly understood meaning of the term. For instance, the court in *Caldarola v. Rosner Realty LLC*¹⁰⁴ found that the use of *and/or* did not render a complaint too vague; the complaint gave the defendant fair notice of the claim and its grounds.¹⁰⁵ To the extent the defendant wanted “more specific allegations, such as how Plaintiff was impacted by each alleged . . . violation, . . . discovery [would] provide that specificity.”¹⁰⁶

In *PNC Bank, N.A. v. Roy A. Alterman, P.A.*,¹⁰⁷ a federal district court in Florida rejected a defendant’s claim that the use of *and/or* rendered a complaint “nonsensical.”¹⁰⁸ Specifically, the court described a contract law phrase—that conditions precedent had been “satisfied, performed, and/or waived”—as “exceedingly common,” and that using *and/or* did not inhibit the defendant’s ability to answer.¹⁰⁹ Courts’ acceptance of *and/or* in pleadings is further supported by *Elf-Man, LLC v. Brown*,¹¹⁰ in which the defendant argued that “[a] plaintiff who makes a list of ‘and/or’ allegations fails to state a claim if *any* of the alternative possibilities fail[s] to state a claim.”¹¹¹ The court dismissed this argument, reasoning that, “[n]otwithstanding its occasional use of the phrase ‘and/or,’ the Amended Complaint specifically alleges that each individual Defendant is liable for direct and contributory infringement.”¹¹² The court held that the use of *and/or* did not preclude an inference of liability.¹¹³

104. No. 13-80493, 2014 U.S. Dist. LEXIS 16999 (S.D. Fla. Feb. 10, 2014).

105. *See id.* at *9 (rejecting the defendant’s assertion that the plaintiff’s complaint was too vague). The court decided that the complaint—despite the plaintiff’s use of *and/or*—satisfied the Federal Rules of Civil Procedure. *Id.* (citing FED. R. CIV. P. 8(a)). *But see* *Allied Med. Assoc. v. State Farm Mut. Auto. Ins. Co.*, No. 08-2434, 2009 WL 1066932 (E.D. Pa. Apr. 16, 2009). In *Allied*, State Farm brought a counterclaim for fraud. *Id.* at *3. State Farm alleged in its pleading that “Allied operates a business that provides ‘chiropractic, medical, diagnostic, and/or physical therapy treatment, testing, services and/or goods.’” *Id.* at *1 (citation omitted). Under the Federal Rules, “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.” FED. R. CIV. P. 9(b). Accordingly, the counterclaim defendant argued that State Farm’s repeated use of *and/or* rendered “many of State Farm’s allegations overly vague.” *Allied Med. Assoc.*, 2009 WL 1066932, at *3. Considering the heightened pleading requirement for fraud, the court concluded that “State Farm’s liberal use of the phrase ‘and/or’” did not place the counterclaim defendant “on notice of the precise misconduct with which they are charged,” requiring that the counterclaim-defendants defend multiple theories of liability. *Id.* at *5 (quoting *Seville Indus. Mach. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984)). The court further elaborated that “Rule 9(b) is intended to eliminate this type of guesswork.” *Id.*

106. *Caldarola*, 2014 U.S. Dist. LEXIS 16999, at *10–11.

107. No. 6:13-cv-1704-Orl-37GJK, 2014 U.S. Dist. LEXIS 15629 (M.D. Fla. Feb. 7, 2014).

108. *Id.* at *5.

109. *Id.* at *5–*6.

110. 996 F. Supp. 2d 1056 (E.D. Wash. 2014).

111. *Id.* at 1058.

112. *Id.* at 1058–59.

113. *Id.* at 1059; *see* *United States v. Mendoza Medina*, No. CR 06-0144-1 JSW, 2006 WL 3411878, at *3 (N.D. Cal. Nov. 27, 2006) (holding that even though the allegations of the overt acts were “in the form of an ‘and/or’ allegation,” they were sufficient to notify the defendant of

Courts have held that *and/or* sufficiently conveys the overall intent of the party using it and that the phrase *and/or* has a definite meaning, thus often refusing to label it as ambiguous. When the phrase *and/or* is used in a party's complaint against two other parties, courts have held that its use is not ambiguous. Consider *West v. Quality Gold, Inc.*,¹¹⁴ in which the defendant argued that the amended third-party complaint, which implicated him and another party, was deficient because of the use of *and/or*.¹¹⁵ The federal district court in California, citing decisions from other circuits, determined that the phrase *and/or* is commonly construed to mean "the one or the other or both."¹¹⁶ The court found that the plaintiff's use of *and/or* to combine the parties simply meant either one of them or both of them.¹¹⁷ As this example illustrates, *and/or* not only sufficiently conveys the intent of the parties using it, but it is also a significantly more efficient and concise form of expression.¹¹⁸

Contracts are another context in which using *and/or* can be effective—and even strategic. Using *and/or* in a contract can create flexibility in terms that are desirable and necessary to allow parties the freedom to contract as they wish. When *and/or* is used in a contract, the term is typically interpreted in the manner effectuating the intent of the parties as gathered from the entire contract.¹¹⁹ Sometimes, courts look to parol evidence when de-

"the charge against which he must defend"). In conspiracy cases, the use of *and/or* is usually permitted because any co-conspirator may commit the overt act, and only one overt act is needed for a charge of conspiracy. See *Pinkerton v. United States*, 328 U.S. 640, 646–47 (1946) (finding that in a conspiracy charge a defendant need not personally commit the overt act as long as another co-conspirator is alleged to have done so).

114. No. 5:10-cv-03124-EJD, 2012 WL 1067394 (N.D. Cal. Mar. 28, 2012).

115. *Id.* at *2.

116. See *id.* at *2–3 (quoting Local Div. 589, Amalgamated Transit Union v. Massachusetts, 666 F.2d 618, 627 (1st Cir. 1981)).

117. *Id.* at *3; see also *J. Alexander Invs., Inc. v. Irons*, No. 08-00420 HG-LEK, 2009 WL 3922610, at *4 (D. Haw. Nov. 18, 2009) (accepting the use of *and/or* in the alleged complaint); *United States v. Lyon*, No. 1:07-cv-00491-LJO-GSA, 2007 WL 4591448, at *4 (E.D. Cal. Dec. 28, 2007) (finding that the use of *and/or* in the complaint sufficiently notified the defendant of the crimes with which he was charged); *State v. Dunn*, 974 So. 2d 658, 659 (La. 2008) (involving a death penalty defendant who argued that he was "entitled to a jury determination of his mental retardation, and/or, a new sentencing hearing," which the court understood clearly).

118. For another example of a court acknowledging that *and/or* has a definite meaning, see *In re John B. Rose Co.*, 275 F. 409, 414 (2d Cir. 1921) ("The words 'and/or' cannot be ignored. They have a meaning."). But see, e.g., *Pragmatus AV, LLC v. Yahoo! Inc.*, No. 11-902-LPS-CJB, 2012 WL 6044793, at *13 n.5 (D. Del. Nov. 13, 2012) ("Plaintiff's use of the phrase 'and/or' is disfavored by our Court, as the use of that phrase in this context [an action for patent infringement] does not give a defendant (or the Court) a clear indication as to whether a plaintiff intends to plead induced infringement, contributory infringement or both."); *Sperry v. Tammany*, 235 P.2d 847, 848 (Cal. Dist. Ct. App. 1951) ("The term 'and/or' in this case is ambiguous and uncertain.").

119. See, e.g., *Jones v. Serval, Inc.*, 186 N.E.2d 689, 693 (Ind. App. 1962); *Schaffer v. City Bank Farmers' Tr. Co.*, 267 N.Y.S. 551, 553–54 (N.Y. App. Div. 1933) ("The interpretation to be

termining this intent;¹²⁰ other times, courts interpret *and/or* in light of its plain meaning.¹²¹

Courts have interpreted the use of *and/or* in contracts as evidencing the intent of the party using the term. For example, the Eighth Circuit in *United States v. Taylor*,¹²² involving a plea agreement,¹²³ held that the government intended “to retain the right to determine the specific form of sentencing reduction.”¹²⁴ The court held that “[h]owever clumsy the ‘and/or’ may be as a writing device, it sufficiently conveys the intent of the government to retain discretion over whether to seek [one type of sentencing] reduction ‘and/or’ [another type of sentencing] reduction.”¹²⁵

A term in a contract is ambiguous when that term is capable of being interpreted in more than one way.¹²⁶ Because of this possibility, some argue that using *and/or* in a contract renders the contract ambiguous: the phrase can be read in the conjunctive or the disjunctive.¹²⁷ This criticism

afforded it must depend in each instance upon the circumstances under which it is used and it must be so construed as to express the true intention of the parties to the transaction.”); *Oman Constr. Co. v. Tenn. Cent. Ry. Co.*, 370 S.W.2d 563, 572 (Tenn. 1963) (“It is generally held that when the expression ‘and/or’ is used in contracts its interpretation depends upon the circumstances and it must be construed to express the intention of the parties.”); *Victory v. Victory*, 399 S.W.2d 332, 338 (Tenn. Ct. App. 1965) (highlighting that, in interpreting the meaning of *and/or*, courts will consider the intent of the parties as well as the circumstances surrounding execution of the contract).

120. *See Bank Bldg. & Equip. Corp. of Am. v. Ga. State Bank*, 209 S.E.2d 82, 85 (Ga. Ct. App. 1974) (recognizing plaintiff’s argument that *and/or* rendered a contract’s subject matter ambiguous, but deferring to the trial court’s ruling that parol evidence clearly demonstrated the party intent regarding *and/or* in the contract). The dissent noted that if there was any ambiguity, it pertained to the term coming after *and/or* and not the term before *and/or*. *Id.* at 87 (Evans, J., dissenting).

121. *See Hess v. Hartford Life & Accident Ins. Co.*, 274 F.3d 456, 463 (7th Cir. 2001) (applying the plain meaning of *and/or* to the contract term “base salary and/or draw” to allow the plaintiff to have her benefits calculated based on her base salary, her draw, or both); *Re-Solutions Intermediaries, LLC v. Heartland Fin. Grp., Inc.*, No. A09-1440, 2010 WL 1192030, at *2 (Minn. Ct. App. Mar. 30, 2010) (giving *and/or* used in a contract its plain meaning and ruling contractual obligations could be satisfied “by introducing appellant to a target firm, by assisting in its purchase, or by doing both”).

122. 258 F.3d 815 (8th Cir. 2001).

123. Whenever a prosecutor obtains a plea with a promise, the prosecutor must fulfill that promise. *Santobello v. New York*, 404 U.S. 257, 262 (1971). A plea agreement, therefore, is akin to a contract, and courts “look to principles of contract law to determine whether a plea agreement has been breached.” *United States v. Jones*, 58 F.3d 688, 691 (D.C. Cir. 1995).

124. *Taylor*, 258 F.3d at 819.

125. *Id.*

126. *See, e.g., Metro Office Parks Co. v. Control Data Corp.*, 205 N.W.2d 121, 123 (Minn. 1973) (“A writing is ambiguous if, judged by its language alone and without resort to parol evidence, it is reasonably susceptible of more than one meaning.” (citing *Emp’rs Liab. Assurance Corp. v. Morse*, 111 N.W.2d 620 (Minn. 1961))).

127. *See Re-Solutions Intermediaries, LLC v. Heartland Fin. Grp.*, No. A09-1440, 2010 WL 1192030, at *1 (Minn. Ct. App. Mar. 30, 2010) (containing an argument that a contract was ambiguous because it contained *and/or* in a description of the services respondent was to perform);

falls flat. Properly using *and/or* does not automatically engender ambiguity, as the whole contract can indicate party intent.¹²⁸ If contracting parties properly use *and/or*, that leaves them the ability to contract in the alternative.¹²⁹ Consistent with the definite meaning of *and/or*, when contracting parties properly use the term, it would allow three alternatives: A, B, or both. Overall, the perceived problems associated with *and/or* in a contractual setting do not stem from the actual phrase, but rather from careless or improper use.¹³⁰ Therefore, parties wishing to create an agreement should use *and/or* when they want to state concisely a choice between two contract terms.

Statutes are another legal context in which *and/or* can be both clear and useful. Notwithstanding its frequent appearance in statutory text, courts typically frown upon legislators who draft statutes using the term.¹³¹ *And/or* in statutes is generally interpreted in the “context of the statute’s over-all objective.”¹³² In *Cassano v. Cassano*,¹³³ for example, the New York Court of Appeals interpreted a phrase—containing two terms con-

see also Podany v. Erickson, 49 N.W.2d 193, 196 (Minn. 1951) (“Either meaning can be assigned to the ‘and/or’ term, depending upon whether it is viewed conjunctively or disjunctively.”).

128. *See* Bridgewater Twp. v. City of Dundas, No. A13-0704, 2013 Minn. App. LEXIS 1134, at *16 (Ct. App. Dec. 23, 2013) (acknowledging that *and/or* probably should not have been used in the contract, but that “one poorly written phrase does not create an ambiguity where the totality of the agreement plainly” denotes party intent).

129. *See Re-Solutions*, 2010 WL 1192030, at *2 (“According to the plain language of this contract, respondent could satisfy its contractual obligations in any of three alternative ways . . .”); Detroit Water Team Joint Venture v. Agric. Ins. Co., 371 F.3d 336, 342 (6th Cir. 2004) (holding that “the use of ‘and/or’ language in exclusion M unambiguously means that the exclusion applies if either or both of the two specified conditions are met”).

130. *See* Local 144, Hotel, Hosp., Nursing Home & Allied Servs. Union, SEIU, AFL-CIO v. CNH Mgmt. Assoc., Inc., 669 F. Supp. 632, 634–35 (S.D.N.Y. 1987) (deferring to an arbitrator’s interpretation of *and/or* in a collective bargaining agreement to mean only “or”); Bank Bldg. & Equip. Corp. of Am. v. Ga. State Bank, 209 S.E.2d 82, 85 (Ga. Ct. App. 1974) (allowing a plaintiff to present the minutes from a meeting and oral testimony to show that two contracting parties intended for a contract to apply only to one of two terms connected by *and/or*). These two cases illustrate careless use or interpretation of *and/or*. As mentioned, properly using *and/or* in a contract should produce the possibility of three alternatives, and deciding that *and/or* means only “or” or applied to only one term is erroneous. Interestingly, the dissent in *Bank Building* noted that if there was any ambiguity surrounding *and/or*, it regards the term coming after *and/or* and not the term before *and/or*. *Id.* at 87 (Evans, J., dissenting). This reasoning is flawed because *and/or* has a definite meaning; the only ambiguity is in the choice the parties have between either or both of the terms.

131. *See* Heath v. Westark Poultry Processing Corp., 531 S.W.2d 953, 955 (Ark. 1976) (“The phrase ‘and/or’ has brought more confusion than clarity to the task of construction of statutes, contracts and pleadings.”); State v. Dudley, 106 So. 364, 365 (La. 1925) (“Such latitude in contracts is, of course, permissible to individuals, who may contract as they please, but not so with a Legislature in making its laws; it must express *its own will* and leave nothing to the mere will or caprice of the courts, especially in the matter of punishing offenses.”).

132. *Cassano v. Cassano*, 651 N.E.2d 878, 882 (N.Y. 1995).

133. *Id.*

nected by *and/or*—in a child support statute to give courts determining child support amounts discretion to apply either specific calculating factors outlined in the statute, statutory percentages, or both.¹³⁴ The court deemed this interpretation consistent with the language and the overall objectives of the New York child support law.¹³⁵

Another example involves the minimum wage statute at issue in *Castro v. Dryden Farms, Inc.*¹³⁶ In that case, the plaintiff appealed from summary judgment for the defendant, which had been granted based on the argument that the plaintiff had not exhausted administrative remedies to recover from violations of Michigan’s minimum wage law.¹³⁷ The Michigan Court of Appeals, however, noted that by using the term *and/or*, the statute provided a choice between filing a civil action or an administrative claim.¹³⁸ Although the court was generally skeptical of the term, it acknowledged that it was clear in the statute that “the phrase ‘and/or’, as used therein, properly expresses the intent of indicating both or either.”¹³⁹ Thus, the plain meaning of *and/or* in the statute at issue in *Castro* did not require the plaintiff to exhaust other remedies before filing with the courts.

Criminal statutes calling for penalties of a fine, imprisonment for not more than a term of years, or both are also exceedingly common.¹⁴⁰ *And/or* is clearly appropriate in this situation and should be used to simplify what is otherwise cluttered and complicated statutory language. Thus, statutes are an ideal setting for the use of *and/or*.

B. Patents

Not only is the term *and/or* applicable in a complaint, a contract, and a statute, but it is also a useful tool in crafting patent claims. In many circumstances, *and/or* is more appropriate than the conjunctive “and.” In 2016, in *Brain Synergy Institute, LLC v. Ultrathera Technologies, Inc.*,¹⁴¹

134. *Id.*

135. *Id.* But see *Div. of Family Servs. v. J.W.C.C.*, No. CS10-01305, 2013 Del. Fam. Ct. LEXIS 29, at *29 (Fam. Ct. Oct. 30, 2013) (determining that *and/or* used in a statute was intended to mean only the disjunctive).

136. 263 N.W.2d 22 (Mich. Ct. App. 1977).

137. *Id.* at 23–24.

138. *Id.* at 24.

139. *Id.*; see also *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2352 (2016) (“Patients may not be given misleading ‘advertising regarding the competence and/or capabilities of the organization.’” (citing 25 TEX. ADMIN. CODE § 135.5(g) (2016))). The Court ultimately enjoined the Texas regulation not because of its unclear language, but because the regulation was unduly burdensome. *Id.*

140. See, e.g., 18 U.S.C. § 1030(c)(A) (2012) (imposing a punishment of “a fine under this title or imprisonment for not more than ten years, or both” for fraudulent activity related to computers).

141. No. 13-CV-01471-CMA-BNB, 2016 WL 106489 (D. Colo. Jan. 11, 2016).

the Colorado federal district court upheld a magistrate judge's decision to replace "and" with "and/or" in a patent claim.¹⁴² The defendants contended that the use of *and/or* in this context enlarged the scope of the terms beyond their original meanings.¹⁴³ The court disagreed, reasoning that it was required to follow the plaintiff patentee's special meaning of "spatial orientation."¹⁴⁴ Because the plaintiff's patent specifications defined "spatial orientation" by using *and/or* between two terms,¹⁴⁵ the magistrate judge appropriately inserted *and/or* into the claim itself where spatial reasoning was concerned.¹⁴⁶

Similar to courts' treatment of the term in general civil complaints, *and/or* is often given its plain meaning in patent construction.¹⁴⁷ Consider *Cipher Pharmaceuticals Inc. v. Actavis Laboratories FL, Inc.*,¹⁴⁸ in which the defendants argued that *and/or* in the patent term "the isotretinoin is partially in suspension and/or partially in solution" rendered the term indefinite.¹⁴⁹ Conversely, the plaintiffs asserted that this term covered products in which the "isotretinoin is (1) partially in suspension; (2) partially in solution; and (3) partially in suspension and partially in solution."¹⁵⁰ The court agreed with the plaintiff's construction, holding that it comported with the plain meaning of *and/or*: it indicated an inclusive disjunction and did not render the claim indefinite.¹⁵¹

In addition, the court in *Droplets, Inc. v. eBay, Inc.*,¹⁵² considered *and/or* in a longer list of terms. Defendants argued that the patent claim was ambiguous because the use of *and/or* created "at least seven different

142. *Id.* at *1.

143. *Id.* at *2.

144. *Id.* The court asserted that the magistrate judge correctly used the patentee's definition in assigning meaning to the terms being reviewed. *Id.*

145. *Id.* at *2.

146. *Id.* ("The specification is always highly relevant to the claim construction analysis' and 'is the single best guide to the meaning of a disputed term.'" (quoting *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996))).

147. The use of *and/or* in complaints for patent infringement cases has also been accepted. See *Dioptrics Med. Prods. v. Ideavillage Prods. Corp.*, No. CV 08-03538 PVT, 2010 WL 4393876 (N.D. Cal. Oct. 29, 2010). There, the defendants claimed that the use of *and/or* in some of the causes of action listed by the plaintiff made those causes of action "overly simplistic," warranting a dismissal. *Id.* at *4. However, the court determined that "[the allegations were] sufficient under either of the 'and/or' scenarios" and denied the motion to dismiss. *Id.* For the use of *and/or* in document discovery in a patent claim, see *Avago Technologies. General IP (Singapore) Pte. Ltd. v. Asustek Computer Inc.*, No. 15-cv-04525-EMC, 2015 WL 8488130, at *3 (N.D. Cal. Dec. 11, 2015), in which a judge allowed the use of *and/or* where it was appropriate to maximize the scope of the document request.

148. 99 F. Supp. 3d 508 (D.N.J. 2015).

149. *Id.* at 517.

150. *Id.* at 517-18.

151. *Id.*

152. No. 2:11-CV-401-JRG-RSP, 2014 WL 4217376 (E.D. Tex. Aug. 22, 2014).

combinations of information classes that could allegedly satisfy the claims” and that the plaintiffs failed to specify which combination satisfied the claim.¹⁵³ However, the court accepted *and/or* as another way of expressing an inclusive “or,” which, it concluded, did not render the claim indefinite.¹⁵⁴

C. Courts Wrongly Interpret “And/Or”

Courts have gone to great lengths to discourage the use of *and/or* as a tool in a drafter’s legal lexicon. They have even gone so far as to strike it from counsels’ briefs and claims and have instead viewed the statement without the phrase. Although *and/or* is not an appropriate phrase for every situation, courts’ disdain for it is often without merit, and they sometimes erroneously decide that using *and/or* produces ambiguity.

In certain instances, courts simply fail to ascribe the term its plain meaning. In *Podany v. Erickson*,¹⁵⁵ for example, the Supreme Court of Minnesota analyzed a lease containing the phrase “giving of said written notice by Lessee to purchase and/or the consummation of said purchase.”¹⁵⁶ Even after acknowledging that the “Janus-faced” *and/or* may be viewed conjunctively or disjunctively, the court went on to find an ambiguity where none existed.¹⁵⁷ Specifically, the court held that the ambiguity resulted from not knowing whether notice should be given prior to one or both of the stated events.¹⁵⁸ By its plain meaning, however, *and/or* would have allowed for notice to suffice in the event of a purchase, in the event of the consummation of a purchase, or both.

Not infrequently, courts themselves will misuse the term in light of the surrounding context. For instance, *In re United Scaffolding, Inc.*¹⁵⁹ involved a writ of mandamus directing the trial court to explain its reasoning for setting aside a jury verdict and granting a new trial.¹⁶⁰ After amending its order, the trial court enumerated four rationales, all connected by *and/or*, with the last rationale being “[i]n the interest of justice and fairness.”¹⁶¹

153. *Id.* at *37 (citation omitted).

154. *Id.* at *38 (suggesting that *and/or* is less clear than “or,” but the two terms have “effectively the same meaning”).

155. 49 N.W.2d 193 (Minn. 1951).

156. *Id.* at 196 (citation omitted).

157. *Id.*

158. *Id.*

159. 377 S.W.3d 685 (Tex. 2012).

160. *Id.* at 686 (citing *In re United Scaffolding, Inc.*, 301 S.W.3d 661, 663 (Tex. 2010)).

161. *Id.* at 686–87. The order read as follows:

[T]he Court GRANTS the motion and orders New Trial based upon:

A. The jury’s answer to question number three (3) is against the great weight and preponderance of the evidence; *and/or*

Therefore, “the trial court’s actual reasons might have been any of the first three [rationales], all four of them, or just ‘in the interest of justice and fairness’ by itself.”¹⁶² Accordingly, the appellate court elaborated that because “[i]n the interest of justice and fairness” is “never an independently sufficient reason for granting a new trial, the amended order” must be vacated.¹⁶³ The trial court did not fail to ascertain the meaning of *and/or*. It simply got the law wrong. Using the term allowed for the different rationales to be considered collectively or independently. The context, then, is what rendered the use of the term improper: because “in the interest of justice and fairness” could never be the only reason to grant a new trial, the trial court incorrectly used *and/or* to connect that term to the list. Instead, the trial court should have connected the “in the interest of justice and fairness” term to the list with an “and.” The appellate court, therefore, correctly ruled that the trial court’s order was erroneous.

The disapproval of *and/or* is often not because the term is ambiguous or because courts misuse it, but rather because some other aspect of the case was insufficient in context. In *United States v. \$133,420.00 in U.S. Currency*,¹⁶⁴ for example, the claimant asserted that he had an “ownership and/or a possessory interest in, and the right to exercise dominion and control over, all or part of the defendant property.”¹⁶⁵ The United States Court of Appeals for the Ninth Circuit held that, because the use of *and/or* was not sufficiently specific, the court could not determine whether he was asserting “a possessory interest, an ownership interest, or something else.”¹⁶⁶ In this case, *and/or* was not appropriate because the plaintiff did not provide sufficient evidence to support his possessory interest, not because the term was ambiguous.¹⁶⁷ As a result, he was unable to establish standing in the forfeiture proceeding.¹⁶⁸

B. The great weight and preponderance of the evidence supports a finding that the determined negligence of Defendant was a proximate cause of injury in the past to Plaintiff, James Levine; *and/or*

C. The great weight and preponderance of the evidence supports a finding that the determined negligence of Defendant supports an award of past damages; *and/or*

D. In the interest of justice and fairness.

Id. at 687 (footnote omitted).

162. *Id.* at 689–90 n.3. (citation omitted)

163. *Id.* at 689–90.

164. 672 F.3d 629 (9th Cir. 2012).

165. *Id.* at 636.

166. *Id.* at 640 (quoting *United States v. \$191,910.00*, 16 F.3d 1051, 1057 (9th Cir. 1994), *superseded by statute on another ground as stated in United States v. \$80,180.00*, 303 F.3d 1182, 1184 (9th Cir. 2002)).

167. *Id.* at 642–43.

168. *Id.* at 644.

Ultimately, the lack of instances in which courts fail to attribute the proper meaning to *and/or* is encouraging; it demonstrates the disproportionate criticism that the term receives relative to the frequency with which parties use it incorrectly. The construction “A and/or B” is widely used—and should continue to be—for good reason: people understand what it means.

IV. A, B, AND/OR C

Another common construction in which *and/or* appears takes the form of “A, B and/or C,” which, strictly speaking, is an ambiguous phrase. As opposed to “A and/or B,” adding an additional proposition, C, can leave a reader guessing whether *and/or* is intended to be placed between all propositions or only some of the propositions. On the one hand, “A, B and/or C” could provide a choice among A, B, C, or any combination thereof, equal to “A and/or B and/or C.”¹⁶⁹ On the other hand, the placement of *and/or* between B and C might suggest that *and/or* is intended to provide a choice between only B and C, with A remaining a constant. In this scenario, the possible choices for the reader end up being A and B, A and C, or all three propositions.

A workable resolution to the structure of “A, B and/or C” is to always use a serial comma¹⁷⁰—also known as an Oxford comma—such that the structure becomes “A, B, and/or C.” With this construction, it becomes more clear that *and/or* should apply to all of the terms.¹⁷¹ The inclusion of this comma is key to ensuring that a phrase using *and/or* with more than two propositions is interpreted correctly.

The Doctrine of the Last Antecedent provides insight into a potential solution. Although it addresses a somewhat different problem, this doctrine prescribes that a modifier or qualifying clause at the end of a sentence is “generally construed to refer to and limit and restrict an immediately pre-

169. For an example of a state court accepting this interpretation of “A, B and/or C,” see *Air Mach. Com SRL v. Superior Court*, 186 Cal. App. 4th 414, 420 n.6 (2010). See also OXFORD ENGLISH DICTIONARY, *supra* note 22.

170. *Serial Comma*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/176428?redirectedFrom=serial+comma#eid285879752> (last visited Dec. 14, 2017) (defining a serial comma as “a comma immediately preceding the conjunction in a list of items”); see also *Serial Comma*, CHICAGO MANUAL OF STYLE § 6.18 (16th ed. 2010) (recommending the use of a serial comma, which has been “blessed by Fowler and other authorities,” because “it prevents ambiguity”).

171. See Adams & Kaye, *supra* note 33, at 1190 (“X, Y, and/or Z means X or Y or Z or any two or more of them.”). One example of a statute that uses *and/or* in a long list of terms is 7 U.S.C. § 502 (2012). Section 502 dictates that “[The Secretary of Agriculture] shall specify the types, groups of grades, qualities, colors, and/or grades, which shall be included in the returns required by this chapter.” *Id.*

ceding clause or the last antecedent.”¹⁷² Other constructions of the rule note that contrary evidence that a qualifier should apply to all clauses “may be found in the fact that it is separated from antecedents by a comma.”¹⁷³ Thus, comma placement is key in determining whether the Doctrine of the Last Antecedent applies or whether a modifying clause applies to all antecedents.¹⁷⁴

Due to stark criticism against the use of *and/or* in any context, “A, B, and/or C” should be used with caution. While “A and/or B” has a definite and accepted meaning, *and/or*’s fragility increases when additional propositions are added to the mix.

IV. CONCLUSION

The term *and/or* has been vilified since its inception in legal drafting. Lawyers have been admonished harshly for using the term. However, critics are forced to admit that *and/or* has a clear and definite meaning. The term has faced intense scrutiny entirely disproportionate to the potential harm it creates—which is much less than the potential harm created by the individual terms “and” and “or”—words with inherent ambiguity and myriad problems, but nonetheless essential to our most basic linguistic expressions. Admittedly, there are some instances in which *and/or* proves to be potentially more problematic than its virtues can compensate for—most notably, in jury instructions, jury verdicts, and search warrants. Its use in other legal documents, however—including contracts, statutes, pleadings, and

172. Jeremy L. Ross, *A Rule of Last Resort: A History of the Doctrine of the Last Antecedent in the United States Supreme Court*, 39 SW. L. REV. 325, 325 (2009) (quoting 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47:26 (7th ed. 2007)). A recent use of the rule of last antecedent can be found in the case of *Lockhart v. United States*, 136 S. Ct. 958 (2016). There, the Supreme Court applied the rule of last antecedent to construe the modifier of “involving a minor or ward” to only the last clause of a sexual abuse statute, 18 U.S.C. § 2252(b)(2) (2012). See *id.* at 962. For a case declining to use the rule of last antecedent, see *Lloyd v. J.P. Morgan Chase & Co.*, 791 F.3d 265, 272 (2d Cir. 2015) (“The last antecedent rule does not apply because there is only one antecedent to which all of the modifiers must refer: ‘claim or controversy.’”).

173. Terri LeClercq, *Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers*, 2 J. LEGAL WRITING INST. 81, 87 (1996).

174. *But see id.* at 91.

What can be said about the doctrine’s emphasis on the comma to glue the modifier to all previous antecedents is disquieting: for Sutherland, the comma can always be seen as an indication of multiple antecedents; however, the absence of the comma can signal either limited modification or sloppy writing—and the courts are left to decide which it is.

Id.; Noah Feldman, *Whereas, the Supreme Court Rules for Stuff Language*, BLOOMBERG VIEW (Mar. 1, 2016, 1:20 PM), <http://www.bloombergvew.com/articles/2016-03-01/whereas-the-supreme-court-rules-for-stuff-language> (discussing Justice Kagan’s dissent in the recent *Lockhart* case and the arguments against the rule of last antecedent).

patent claims—helps to avoid clumsy, awkward phrasing where a simple expression like *and/or* would suffice and should be strongly preferred for its flexibility and clarity. As with many errors in legal writing, the problem lies not with the term *and/or* itself, but with the drafter’s lack of meticulous attention to detail. Legal writers should use it with the same level of care that they would use with any other word or phrase.