Wake Forest Journal of Business and Intellectual Property Law

The Case for the Oxford Comma Was Settled out of Court

Emily Steele

Published on: Oct 17, 2022

URL: https://jbipl.pubpub.org/pub/3p87rzj1

License: Creative Commons Attribution 4.0 International License (CC-BY 4.0)

The Oxford (or serial) comma, which is the comma used between the penultimate item and the conjunction in a list, represents an ambiguous, confusing, and polarizing corner of the English written world. Arguing the affirmative, one can find the writing style systems of the Chicago Manual of Style (CMOS), the Modern Language Association (MLA), and Publication Manual of the American Psychology Association (APA). The negative side consists of the Associated Press Style (AP), Canadian Style and the majority of large news publications, including the New York Times and the Wall Street Journal. The legal field, however, is a mix of both.

Oxford proponents argue that omitting the comma leads to confusion in two ways.

The first instance of confusion occurs when identifying, such as:

My parents, the King and the Queen.

My parents, the King, and the Queen.

In the first example, without the comma, you would be justified in assuming that my parents are royalty. In the second, likely to my actual parents' dismay, there is no such latitude.

The second instance of ambiguity occurs when listing, particularly with the conjunction "or," such as:

Apples, bananas or oranges.

Apples, bananas, or oranges.

The first example suggests that I definitely need apples, and I also need *either* bananas *or* oranges. When employing the Oxford comma, it becomes clear that my grocery list requires only one fruit from the list.

The debate about the Oxford comma in the legal profession centers around personal choice, claiming that the legislature and courts have not spoken. However, legislatures and courts have taken a more solid stance than it seems.

In 2010, the Federal Plain Writing Act called for the adoption of Plain Writing Guidelines to be employed by federal agencies, branches of government, and those who file with these organizations. In response, agencies adopted the Federal Plain Language Guidelines. These Guidelines called for the use of active voice, careful abbreviation, and "short, simple words." While the Guidelines fail to cover punctuation, the Oxford comma is employed throughout the document itself. Further, *The Elements of Legal Style*, is included among the works cited. This book, originally published in 1991 by none other than the Oxford University Press, advocates for the serial comma to "clear[ ] up the clouded relationship of coins, stocks, and bonds." As a result, the Federal Government implicitly adopts the Oxford comma by reference and by use in the Guidelines themselves.

How about every business lawyer's favorite federal agency, the SEC? The SEC's Plain English Handbook seeks to prevent readability hurdles, like long sentences and unnecessary details in public companies' filings. Yet again, this guide omits commas altogether. The only mention of "punctuation" in the document is on the Reading List, which recommends *The New Well-Tempered Sentence, A Punctuation Handbook for the Innocent, the Eager, and the Doomed*. If it's not already clear from the title, this book also states that "three or more elements in a series are separate by commas."

Finally, a court was confronted with the issue of the Oxford comma (or lack thereof). "For want of a comma, we have this case," *O'Connor v. Oakhurst Dairy*. A dispute arose between Maine's Oakhurst Dairy, and its delivery drivers, concerning the scope of Maine's overtime statute, which carved out overtime pay for:

The canning, processing, preserving, freezing, drying, marketing, storing, **packing for shipment or distribution of:**

(1) Agricultural produce;

(2) Meat and fish products; and

(3) Perishable foods.

(Emphasis added). The drivers argued that they were entitled to overtime pay and not carved out by the exception because they engaged in distribution, not "*packing* for shipment or distribution." They contended that "packing" modified both "shipment," and "distribution," and the court entitled them to overtime pay based on the ambiguity created through the omission of the Oxford comma. Oakhurst Dairy contends that the phrase in question actually refers to two distinct activities, "packing for shipment" and "distribution."

Due to the obvious ambiguity in the statutory language, both parties argued the legislative intent. Oakhurst even cites the Maine Legislative Drafting Manual, which contains an express condemnation of the Oxford comma, asking legislators to not "use a comma between the penultimate and the last item of a series." However, the drafting manual also confusingly cites Strunk and White's *Elements of Style*, which expressly condones the use of the comma in question.

The drivers, on the other hand, cite Websters Dictionary and contend that "packing for shipment" and "packing for distribution" are not synonymous, but refer to different activities. That is the case in other Maine statutes, where the legislature defined "distribution" and "shipment" separately. The drivers argued that distribution and shipment are also the only non-gerunds in the list, so the parallel usage convention suggests that packing is the operative verb, modifying the only 2 non-gerunds in the list. Finally, the drivers contend that the Maine Drafting Manual, like our other fateful manuals, is not dogma, but in fact instructs drafters—on the same page it distains my favorite comma—to "[b]e careful if an item in the series is modified." The Maine Drafting Manual both scorns the Oxford comma and recognizes the confusion caused by its omission.

The First Circuit determined that the statute was unclear. While the Court entered judgment for the drivers and remanded the case, they left the Oxford comma determination to the lower court. The drivers only won at the Circuit level "because, under Maine law, ambiguities in the state's wage and hour laws must be construed liberally in order to accomplish their remedial purpose."

In an unlucky break for grammar spectators everywhere, the case settled out of court. Some report this as a failure of the court to confirm or deny the Oxford comma, but the mere fact that the case exists and justified a remand demonstrates the ambiguity created by failure to employ the comma, even when the State Legislature's Drafting Manual addresses the comma head-on. The legislature effectively declared its own support for the Oxford comma soon after, when, despite the Drafting Manual's disdain for the comma, the statute was amended. MRS § 664 now reads:

The canning; processing; preserving; freezing; drying; marketing; storing; packing for shipment; or distributing of:

(1) Agricultural produce;

(2) Meat and fish products; and

(3) Perishable foods.

O'Connor v. Oakhurst Dairy recognized what Oxford promoters have long argued. Failure to employ the comma creates an easily avoided ambiguity. As prudent drafters should seek to avoid ambiguity, the Oxford comma should be embraced.

Emily Steele is a second-year law student at Wake Forest School of Law. She holds a Bachelor of Sciences in Political Science and a minor in Renewable Energy Assessment from North Carolina State University.

