The Pesky Serial Comma

Douglas E. Abrams
University of Missouri School of Law, abramsd@missouri.edu

Follow this and additional works at: https://scholarship.law.missouri.edu/facpubs

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.law.missouri.edu/facpubs/808
THE PESKY SERIAL COMMA

Douglas E. Abrams

On March 13, the United States Court of Appeals for the 1st Circuit decided O’Connor v. Oakhurst Dairy. The decision, born of statutory ambiguity, might be dubbed “The Case of the Missing Ten-Million-Dollar Serial Comma.”

The “serial comma” – sometimes called the “Oxford comma” or the “Harvard comma” – comes immediately before a conjunction that separates the last of three or more elements in a series. For example, consider the trio “ready, willing, and able.” Consider too “win, lose, or draw.” The serial comma is the one immediately before the “and” or the “or.”

In statutes or private arrangements, a comma’s presence (or, as in O’Connor, its absence) may hold high stakes for litigants. In an age dominated by news of national and international crises and discord, however, commas ordinarly do not attract widespread attention in the popular media. O’Connor was different because, according to the Associated Press, media coverage of the 1st Circuit decision “reignited a longstanding debate over whether the punctuation is necessary.”

In O’Connor’s immediate wake, The New Yorker said that “[p]eople love [the serial comma] or hate it, and they are equally ferocious on both sides of the debate.” The New York Times called the serial comma “perhaps the most polarizing of punctuation marks.”

Lay writers and their readers have reached no consensus about the serial comma, though weighty authority favors its general use. The Chicago Manual of Style, for example, “strongly recommends [the] widely practiced” use of the serial comma because “it prevents ambiguity.” The New Oxford Style Manual concurs that “the [serial] comma can serve to resolve ambiguity, particularly when any of the items are compound terms joined by a conjunction.”

On the other hand, the New York Times explains that “news writing has traditionally omitted the serial comma – perhaps seeking a more rapid feeling in the prose, or perhaps to save time and effort in the old days of manual typesetting.”

Journalists have embraced rules of reason that depend on context. The Times generally omits the serial comma, but uses it “where a sentence would be awkward or confusing without it.” The Associated Press Stylebook includes these standards for avoiding ambiguity: “Use commas to separate elements in a series, but do not put a comma before the conjunction in most simple series. Include a final comma in a simple series if omitting it could make the meaning unclear.”

In a 2014 poll, Nate Silver’s FiveThirtyEight found Americans closely divided. Fifty-seven percent of respondents favored use of the serial comma and 43 percent were opposed.

Distinctive Missions

National disagreement about whether to use the serial comma – perhaps sometimes driven by partisans’ habits, academic interest, or personal preferences – should not sway lawyers and legislative drafters. To enhance precision and clarity by diminishing the prospect of ambiguity, the serial comma belongs in legal writing.

My recent book, Effective Legal Writing: A Guide for Students and Practitioners, proceeds from the foundation that “the English language knows only two types of writing – good writing and bad writing. Good legal writing is good writing about a legal subject.” Like other writers, lawyers should strive for concise, precise, simple, and clear expression.

No writer, lay or legally trained, should be satisfied with anything less than pursuit of this quartet. But legal writing’s distinctive missions tolerate even less potential for unclear, imprecise expression than might be passable in much lay writing in newspapers and elsewhere. Drafters of legislation (and of accompanying administrative rules and regulations) establish standards of lawful conduct, and frequently prescribe civil or criminal sanctions for failing to heed these standards. In the private or public sector, lawyers serve as guardians of their clients’ status, rights, and obligations.

Establishment and guardianship confer responsibility to take reasonable measures to avoid foreseeable written ambiguity. One reasonable measure is to use the serial comma. Debates about the comma’s use or non-use might energize lay grammarians and other purists on both sides of the fence, but O’Connor demonstrates that non-use in legal writing can exact substantial costs.

O’Connor v. Oakhurst Dairy

O’Connor was a class action brought by delivery drivers who sought four years of back overtime pay, totaling about $10 million dollars, from their employer Oakhurst, a Portland, Maine dairy company. Maine’s wage and hour law provides for overtime pay (the familiar time-and-a-half per hour) for employees who work more than 40 hours in a week.

The drivers’ class action turned on a statutory exception that
denies overtime pay to employees who are engaged in this work: “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.”

The phrase “packing for shipment or distribution” carried no serial comma between “shipment” and “or.” The plaintiff delivery drivers concededly did not “pack” the perishable foods, but did “deliver” them. Does Maine’s wage and hour law exempt workers who only pack or who only deliver, as the employer Oakhurst contended? Or does the law exempt only workers who pack (whether for shipping or for distribution), as the delivery drivers successfully contended?

In a 29-page opinion by Judge David J. Barron, the 1st Circuit in O’Connor held for the plaintiff delivery drivers, but only after a judicial trek through precedents, statutory language, legislative history, and statutory context.

Because none of these sources resolved the case, the court of appeals applied liberal construction. “[A]mbiguities in the state’s wage and hour laws must be construed liberally in order to accomplish their remedial purpose” of assuring that workers “receive wages sufficient to provide adequate maintenance and to protect their health, and to be fairly commensurate with the value of the services rendered.” The panel remanded for further proceedings, including possible trial, on the delivery drivers’ multimillion-dollar claims.

“For Want of a Comma”

Leading legal writing experts are right that when drafting legislation or when writing for clients, lawyers should use the serial comma. “When a sentence contains a series of three or more items joined with one conjunction, put commas after each item except the last,” instructs Professor Richard C. Wydick. “Bryan A. Garner’s advice? “Always use the serial comma.” Garner explains that “[o]mitting it may cause ambiguities, while including it never will.”

Careful editing and rewriting may also overcome ambiguity left by the absence of a serial comma. Reporting on O’Connor, The New York Times provided this example: “I’d like to thank my parents, Mother Teresa and the Pope.” A serial comma could enhance clarity and precision: “I’d like to thank my parents, Mother Teresa, and the Pope.” So could the addition of just a few words. “I’d like to thank my parents, and also thank Mother Teresa and the Pope.”

The Bar Association of San Francisco observes that “[o]f all punctuation marks, the comma is the one most often debated in courthouses; its presence or absence in statutes and other legal texts has determined the outcome of cases” for more than a century. O’Connor demonstrates that unlike typical lay debates in blogs, social media, or the popular press, “debates in courthouses; its presence or absence in statutes and other legal texts has determined the outcome of cases.”

Sign on to Westlaw, Lexis, or another legal search engine, engage the “Cases” file, and search for “serial comma,” “Oxford comma,” or “Harvard comma.” Examine the reported federal and state decisions that, like O’Connor, grapple with ambiguities that legislative drafters or clients’ lawyers might have prevented with foresight after careful deliberation. The decisions chronicle legal fees wasted, docket time consumed, and judicial ink spilled, all (as the O’Connor panel put it) “for want of a comma.”

Endnotes

1 Douglas E. Abrams, a University of Missouri law professor, has written or co-written six books. Four U.S. Supreme Court decisions have cited his legal review articles. His latest book is EFFECTIVE LEGAL WRITING: A GUIDE FOR STUDENTS AND PRACTITIONERS (West Academic Publishing 2016).

2 Thank you to Ellen M. Henriot, MU Law Class of 2017, for her valuable research on this article.

3 285 F3d 69 (1st Cir. 2017).

4 Examine the reported federal texts has determined the outcome of cases” for more than a century.

5 Garner explains that “[o]mitting it may cause ambiguities, while including it never will.”

6 In a 29-page opinion by Judge David J. Barron, the 1st Circuit in O’Connor held for the plaintiff delivery drivers, but only after a judicial trek through precedents, statutory language, legislative history, and statutory context.


8 Bryan A. Garner, The Winning Brief 368 (2014) (citing authorities); William Strunk & E.B. White, The Elements of Style 2 (4th ed. 1999); The New Fowler’s Modern English Usage 162 (3d ed. by R. W. Burchfield ed.) (citing Strunk & White) (“The ‘Oxford comma’ is frequently, but in my view unwisely, omitted by many other publishers. Their preference is to omit it as a general rule . . . but to insert it if there is a danger of misunderstanding.”).

9 The CHICAGO MANUAL OF STYLE § 6.18 at 312 (16th ed. 2010).


11 Philip B. Corbett, EDITQ on Style, N.Y. TIMES, June 23, 2015.


15 For Want of a Comma, supra note 2.

16 851 E3d 69 (1st Cir. 2017).


19 Henry Weinbofen, Legal Writing Style 4, 8-104 (2d ed. 1980) (discussing these four fundamentals).

20 O’Connor, 851 F3d at 71 (quoting 26 M.R.S.A. § 664(3)(F)).

21 Id.

22 17 Id. at 70, 79 (quoting 26 M.R.S.A. § 661).


25 Bryan A. Garner, The Elements of Legal Style, supra note 19, § 2.1, at 15. See also Mark Painter, supra note 19, at 90 (“Using the serial comma never creates ambiguity, leaving it out sometimes does.”).

26 Daniel Vician, supra note 3.

27 Savannah Blackwell, Legal Writing Tip: Seriously Just Use the Serial Comma, http://blog.sharaz.com/2017/05/23/legal-writing-tip-seriously-just-use-the-serial-comma/ May 23, 2017. See also Mark Painter, supra note 19, at 89 (“Many cases discuss the problems created by leaving out the serial comma.”); Legislative Council, Maine State Legislature, Maine Legislative Drafting Manual 113 (2009) (“Commas are probably the most misused and misunderstood punctuation marks in legal drafting and, perhaps, the English language.”).

28 O’Connor, 851 F3d at 70.
**DISCIPLINARY ACTIONS**

### Suspensions

5/16/17  
Michael P. Kelly  
#32137  
104 E. High St.  
Potosi, MO 63664

5/30/17  
David J. Riesenmy  
#34921  
2727 E. 32nd St., Suite 8  
P.O. Box 4495  
Joplin, MO 64803-4495

5/30/17  
Sylvia G. Titgemeyer  
#35339  
3636 Utah Place  
St. Louis, MO 63116

6/9/17  
David R. Deal  
#43857  
Campus Box 1120  
One Brookings Dr.  
St. Louis, MO 63130-4899

5/30/17  
Bruce A. Willey  
#41085  
3519 Center Point Rd. NE  
Cedar Rapids, IA 52402-2400

6/30/17  
Richard F. Haitbrink  
#21749  
P.O. Box 2532  
Shawnee Mission, KS 66201

5/30/17  
Anthony P. Gilbreth  
#59456  
121 W. Legion Ave.  
P.O. Box 167  
Columbia, IL 62236

### Reinstatements

5/17/17  
Richard B. Dempsey, Jr.  
#46671  
26A N. Central Ave.  
St. Louis, MO 63105-3813

5/17/17  
Michael S. Dodig  
#44595  
200 NE Missouri Road, Ste 200  
Lee’s Summit, MO 64086

5/17/17  
Justin M. Durel  
#65658  
2036 Lafayette, Apt. D  
St. Louis, MO 63104

5/17/17  
Michele M. Horn  
#56292  
1002 Seminole Ave.  
Branson, MO 65616-2510

5/17/17  
Barbara A. Knops  
#47081  
1467 Pawnee Ct.  
Leawood, KS 66224

5/17/17  
Peter C. Knops  
#43516  
2555 Grand Blvd.  
Kansas City, MO 64108

5/17/17  
Steven Lewis  
#35534  
818 Lafayette Ave.  
St. Louis, MO 63104-3820

5/17/17  
Daniel R. Smith  
#58812  
213 S. Main St.  
Rock Port, MO 64482

5/17/17  
David C. Vaughn, III  
#38173  
4650 S. National, Suite C-7  
Springfield, MO 65810

5/17/17  
Robert P. Warden  
#15986  
430 S. Pearl  
Joplin, MO 64801-5005

5/19/17  
Robyn R. Strange  
#15933  
1212 E. State Route 72, Suite 4  
Rolla, MO 65401-3984

5/23/17  
Alfred J. Rathert  
#16868  
334 Skinker Lane  
Fenton, MO 63026-4160

5/25/17  
Sam E. Poston  
#40589  
906 Olive, Suite 525  
St. Louis, MO 63101

5/25/17  
Joe B. Whisler  
#24309  
1100 Main St.  
2400 City Center Sq.  
Kansas City, MO 64105-2112

5/25/17  
Steve J. Wolf  
#46027  
11939 Manchester Road, #147  
St. Louis, MO 63131

6/2/17  
Kelsey G. O’Brien  
#62245  
4444 Lindell Blvd., Apt. 6  
St. Louis, MO 63108-2473

6/2/17  
Anthony C. Pepe  
#26328  
7388 Arlington Dr.  
Richmond Heights, MO 63108

6/7/17  
Lisa Savoy  
#48297  
11416 Northway Dr.  
St. Louis, MO 63136

6/15/17  
Thomas K. Hendrix, Jr.  
#22613  
102 Hout  
P.O. Box 1123  
Warrensburg, MO 64093

6/15/17  
Brady M. McAninch  
#67679  
5111 W. Main St.  
Belleville, IL 60006

6/22/17  
Kathryn E Pietarila  
#35712  
1121 SE 11th St.  
Lee’s Summit, MO 64081

### Completed Probation

5/25/17  
Edward Lander  
#17648  
185 Ladue Pines Dr.  
St. Louis, MO 63141

5/30/17  
Allison L. Bergman  
#45081  
1125 Grand Blvd., Suite 1200  
Kansas City, MO 64106

### Reprimands

5/4/17  
Richard F. Haitbrink  
#21749  
P.O. Box 2532  
Shawnee Mission, KS 66201

5/30/17  
Anthony P. Gilbreth  
#59456  
121 W. Legion Ave.  
P.O. Box 167  
Columbia, IL 62236

### Probations

5/23/17  
James W. Eason  
#57112  
124 Gay Ave., Suite 200  
St. Louis, MO 63105

5/30/17  
John L. Adamik, Jr.  
#50851  
210 Village Drive  
Marshfield, MO 65706

6/27/17  
John A. Lewright  
#30484  
903 Main St.  
P.O. Box 391  
Cassville, MO 65625-0391

5/17/17  
Steven Lewis  
#35534  
818 Lafayette Ave.  
St. Louis, MO 63104-3820

5/17/17  
Daniel R. Smith  
#58812  
213 S. Main St.  
Rock Port, MO 64482

5/17/17  
David C. Vaughn, III  
#38173  
4650 S. National, Suite C-7  
Springfield, MO 65810
VIDEO REPLAY DATES & LOCATIONS

SEPTEMBER 7, 2017 • ST. LOUIS
Sheraton Westport Plaza Tower Hotel

SEPTEMBER 8, 2017 • BLUE SPRINGS
Courtyard by Marriott

NOVEMBER 9, 2017 • ST. LOUIS (Earth City)
Holiday Inn Airport West

NOVEMBER 16, 2017 • KANSAS CITY
Hampton Inn

TOPICS INCLUDE:
- FAMILY LAW
- CRIMINAL LAW
- PROBATE
- TORTS & CIVIL ACTIONS
- CIVIL TRIAL & APPELLATE PRACTICE
- REAL PROPERTY
- WORKERS' COMPENSATION
- EMPLOYMENT LAW
- BUSINESS LAW

PROGRAM DATES & LOCATIONS

SEPT. 6 • SPRINGFIELD
DoubleTree by Hilton

SEPT. 27 • INDEPENDENCE
Hilton Garden Inn

SEPT. 8 • ST. LOUIS
Holiday Inn Airport West (Earth City)

SEPT. 28 • JEFFERSON CITY
The Missouri Bar

Ethics at Sunrise
Originally presented at the 2016 seminar, Annual Law Update

The Process of Deposition Practice: Basic and Advanced
Originally presented at the 2016 seminar, The Nuts and Bolts of Deposition Practice

What Can Go Wrong When Hanging Your Own Shingle – Ethical Considerations
Originally presented at the 2017 seminar, Hanging Your First Shingle: The Building Blocks to Starting Your Own Practice

DWI Defense: Field Sobriety Test and Cross-Examination
Originally presented at the 2017 seminar, DWI Defense – The Basics of the DUI/DWI Trial Process

If You Build It, Will They Come? How to Attract Clients to Your New Firm
Originally presented at the 2017 seminar, Hanging Your First Shingle: The Building Blocks to Starting Your Own Practice

Ethics and Information Security
Originally presented at the 2015 seminar, Stepping Up & Stepping Out: The New Lawyer Experience

Evidence at Trial: Everything You Do Matters, So It Should Be Genuinely Valuable
Originally presented at the 2015 seminar, Evidence for Civil Litigators: Real-World Applications
HIGHLIGHTS

More than a Form: Drafting Basics
How Public Benefits Affect an Estate Plan: Public Benefits 101
How to Identify a Probate Case and Select a Proper Procedural Path – Moving Forward with the Basics
First Party? Third Party? How Do I Choose? Special Needs Trust 101
Counseling Clients for #DigitalDeath
You Can’t Hide Your Head in the Sand: New and Proposed Federal Statutory and Regulatory Changes That Can Affect the Elder Law Practice
Fiduciary Litigation: What’s New
Drafting Pitfalls: Customizing the Durable Power of Attorney for Optimum Results
No More Wandrying in the Dark: Illuminating Defined Value Clauses That is So 2015! Missouri Probate Case Update
Testifying is Not for Sissies: The Truth, the Whole Truth, and Nothing but the Truth
Conquering Individuals with Disabilities – Important Changes to the Special Needs Trust Fairness Act
Coming to Grips with a Seismic Environment in 2017: Recent Developments in Estate Planning and the Taxation of Trusts and Estates
Read This...When I’m Dead
You Can’t Always Get What You Want: Interpretation and Drafting of Discretionary Clauses
Lowering Your Liability When Advising Clients’ Assets
Recent Case Law Under the UTC, Missouri and Beyond
Next Steps After a Medicaid Application is Rejected: Preparing and Briefing for Medicaid Fair Hearing
Don’t Distribute Quite Yet: TEFRA Liens/Estate Recovery
Planning for and Defense of Discounted Valuation for Estate/Gift Tax Purposes
I Do, Act II: Estate Planning for Second Marriages and Blended Families
The Ethical Alligators When Fiduciary Relationships Are Involved: How to Avoid Being Bit by One
MoBarCLE WILL BE PRESENTING its second luxury destination CLE experience in 2018 in Jupiter, Florida at the beautiful and award-winning Jupiter Beach Resort & Spa. MoBarCLE attendees will be greeted with gracious hospitality, personalized service, and other amenities that embody South Florida’s barefoot elegance.

*Please note: No Missouri Bar enrollment fees are being used to subsidize this professional development event.
Season Pass
Your Ticket to the Best CLE!

UNLIMITED

You will have access to an unlimited number of MoBarCLE programs presented during the 12-month term of the Pass. This includes multi-day, full day, half-day, luncheon programs, webinars and telephone seminars. (See Terms, Conditions & Exclusions*)

$1199

LIMITED

Attend up to 10 MoBarCLE programs during a 12-month period. That includes multi-day, full day, half-day, luncheon programs, webinars and telephone seminars. (See Terms, Conditions & Exclusions*)

$999

BASIC

Attend up to 5 MoBarCLE programs during a 12-month period. That includes multi-day, full day, half-day, luncheon programs, webinars and telephone seminars. (See Terms, Conditions & Exclusions*)

$699

TO REGISTER call 888-253-6013/573-635-4128; visit www.mobarcle.org, or see the order form located after our calendar pages.
EVERY DESKBOOK
AND
EVERY GUIDEBOOK

ONLINE ACCESS
SEARCH
CUT
PASTE
PRINT

ONE YEAR
ONE PRICE
$499

login > subscribe > save
Get CLE Publications on Fastcase
www.mobar.org
### SEPTEMBER 2017

<table>
<thead>
<tr>
<th>Sunday</th>
<th>Monday</th>
<th>Tuesday</th>
<th>Wednesday</th>
<th>Thursday</th>
<th>Friday</th>
<th>Saturday</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>3</td>
<td>4</td>
<td>5</td>
<td>6</td>
<td>7</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>8</td>
<td>9</td>
<td></td>
<td></td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>10</td>
<td>11</td>
<td>12</td>
<td>13</td>
<td>14</td>
<td>15</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Missouri Bar/Missouri Judicial Conference Annual Meeting Kansas City</td>
<td>Missouri Bar/Missouri Judicial Conference Annual Meeting Kansas City</td>
<td>Missouri Bar/Missouri Judicial Conference Annual Meeting Kansas City</td>
<td></td>
</tr>
<tr>
<td>17</td>
<td>18</td>
<td>19</td>
<td>20</td>
<td>21</td>
<td>22</td>
<td>23</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>CLE Rewind Video Replay Springfield</td>
<td>Annual Law Update Video Replay St. Louis</td>
<td>CLE Rewind Video Replay St. Louis</td>
<td></td>
</tr>
<tr>
<td>24</td>
<td>25</td>
<td>26</td>
<td>27</td>
<td>28</td>
<td>29</td>
<td>30</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Missouri Bar/Missouri Judicial Conference Annual Meeting Kansas City</td>
<td>Missouri Bar/Missouri Judicial Conference Annual Meeting Kansas City</td>
<td>Missouri Bar/Missouri Judicial Conference Annual Meeting Kansas City</td>
<td></td>
</tr>
</tbody>
</table>

### OCTOBER 2017

<table>
<thead>
<tr>
<th>Sunday</th>
<th>Monday</th>
<th>Tuesday</th>
<th>Wednesday</th>
<th>Thursday</th>
<th>Friday</th>
<th>Saturday</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td>6</td>
<td>7</td>
</tr>
<tr>
<td>8</td>
<td>9</td>
<td>10</td>
<td>11</td>
<td>12</td>
<td>13</td>
<td>14</td>
</tr>
<tr>
<td>15</td>
<td>16</td>
<td>17</td>
<td>18</td>
<td>19</td>
<td>20</td>
<td>21</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Collection of Judgments</td>
<td>Student Loan Law</td>
<td>Labor &amp; Employment Law Symposium Columbia</td>
<td></td>
</tr>
<tr>
<td>22</td>
<td>23</td>
<td>24</td>
<td>25</td>
<td>26</td>
<td>27</td>
<td>28</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Lex</td>
<td>Port St. Louis</td>
<td>Coffee &amp; Core Concepts: Dealing with Rent and Possession</td>
<td>Lex</td>
</tr>
<tr>
<td>29</td>
<td>30</td>
<td>31</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**TO REGISTER** call 888-253-6013/673-635-4128, visit www.mobarcle.org, or see the order form located after our calendar pages.
Order Information

Name ________________________________
Bar Number ____________________________
Street Address ____________________________ P.O. Box _______
City/State/Zip ____________________________
Phone ________________________________
Email ________________________________ (Required for electronic course materials)

Special Dietary Needs (for programs that include meals)

Payment Information

Total Cost of Item(s) $_________ __________

Credit/Debit Card Card # __________
Check # __________
Debit/Credit Card No. __________
Exp. Date __________ CVV __________

The Missouri Bar does not accept cash