The Devil's in the Details

When it comes to legal documents, **typos and simple grammatical errors** can become costly mistakes.

BY **JOHN BROWNING**
ILLUSTRATION BY **PHIL FOSTER**

PROOFREADING IS IMPORTANT, NOT JUST FOR LAWYERS but for anyone in a profession where details matter. Pacific Yellow Pages once featured an ad for Sonoma, Calif.-based Banner Travel Service. The agency wanted to attract customers to its specialty of exotic travel. Unfortunately, a small typo led to a huge loss of business when readers saw Banner's advertisement touting its focus on "erotic" travel. In Great Britain, DDS Media had to scrap 10,000 copies of a spelling game DVD when the cover accidentally featured—you guessed it—a misspelled name.

Individuals who make the laws don't always pay enough attention to detail, either. Last year, Illinois Green Party gubernatorial candidate Rich Whitney was hoping to gain the support of a heavily African-American district in Chicago. But thanks to a glitch by a computer programmer for the Chicago Board of Elections, a number of the wards in that district reported that their choices for governor included "Rich Whitey," and that the screen allowing voters to review their ballot would reflect only that a vote was cast for "Whitey."

The effort to correct this unfortunate error included reprogramming and testing more than 4,000 voting machines in 1,400 precincts, at an estimated cost to the Board of Elections in the tens of thousands of dollars. And in November 2006, one missing "L" on the Ottawa County, Mich., election ballot proved just as costly—and embarrassing. The ballot included the text of a proposal for amending the state constitution to ban any affirmative action programs granting preferential treatment in public employment for individuals based on race, national origin, or gender. Unfortunately, however, "public" became "pubic" due to a typo. The mistake was corrected—$40,000 in reprinting costs and 170,000 ballots later.

For lawyers, of course, attention to detail and careful proofreading are especially important. In 2004, one lawyer got an expensive reminder that neatness and spelling still count, long after you leave the classroom. Disgusted with the sloppiness of and frequent typos in the lawyer's pleadings, Judge Jacob Hart of Philadelphia took a red pen to the motion for attorney's fees. For the "winning" lawyer, his attorney's fees were cut in half, costing him over $31,000.

Spelling and grammatical mistakes can have devastating results for a lawyer's clients as well. Toronto-based Rogers Communications is the largest cable television provider in Canada. In 2006, Rogers and Canadian telephone company Bell Aliant were at loggerheads over Bell Aliant's attempt to cancel a contract

regarding Rogers' use of its telephone poles. The dispute hinged on the placement of a single comma in the 14-page agreement, and just what effect that placement might have. The pertinent sentence read, "This agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year notice in writing by either party."

Rogers' position was that the pole contracts themselves lasted for five years and then renewed automatically for another five years, subject to any cancellation of the agreement by Bell Aliant prior to the start of the last 12 months. Citing "rules of punctuation," however, the Canadian telecommunications regulatory authority sided with Bell Aliant. Calling the meaning of the clause "clear and unambiguous," the regulator held that the placement of the comma gave the phone company the right to get out of the contract at any time so long as the requisite notice was given. The regulatory authority interpreted the one-year notice provision as applying to both the initial five-year term as well as any renewal. The ruling cost Rogers Communications 1 million Canadian dollars (about $888,000 U.S.). Although the cable provider even hired a New York lawyer as an expert on grammatical interpretation as part of its appeal of the ruling, it was to no avail. Rogers' vice president for regulatory affairs, Kenneth G. Engelhart, acknowledged that he and his company's legal counsel may have miscalculated the impact of having a government regulator who's a stickler for grammatical niceties.

SHADES OF MEANING

Rob Walters, chief legal officer at Energy Future Holdings Inc., has witnessed "more than a few" potentially disastrous drafting errors, including one case with "the unfortunate omission of an essential 'not.'" He says that sometimes such mistakes are the product of good intentions, as when parties who have failed to reach consensus on a point "leave interstices in an agreement to avoid killing the deal and in the hope the issue never emerges."

When it does, however, be forewarned that the trial lawyers are ready to pounce. "Precision and accuracy is the heart of the business lawyer's craft, but errors lead directly to the trial lawyer's lair," says Richard Faulk, chair of the litigation department at Gardere Wynne Sewell. "Even the most simple mistake can sometimes create new shades of meaning—leading to creative arguments that juries find appealing. When the drafter fails, the trial lawyer prevails."

One illustration of such costly lawyer mistakes can be found in real estate contracts. At the height of the New York City real estate market a couple of years ago, buyers paying in the millions of dollars (in some cases) for luxury high-rise condominiums at The Rushmore had no idea that the economy would soon begin its downward spiral, taking their pricy real estate investments with it. Buyers and their lawyers hoping to escape their contracts and cut their losses found a possible loophole, courtesy of a mistake made by the prestigious Manhattan law firm that had prepared the 732-page offering plan.

Pursuant to New York real estate law, a property's sponsor is required to provide an operating budget for a condominium development's first year. The rationale is simple: let buyers know what they can expect when they move in. Should the first closing not occur before the end of the budget year, the sponsor is required to submit a whole new budget. Condo purchasers who've already bought have the right to rescind their contracts, since the budget they were counting on will presumably change.

Unfortunately, even 732 pages of largely boilerplate language has to be proofread carefully. A drafting mistake in the offering plan gave buyers the right to back out if the first closing didn't happen before the first day of the budget year (September 1, 2008), not the last day of the budget year (September 1, 2009). Given that the first closing didn't occur until February 2009, buyers eager to get out of the contracts and recover millions of dollars' worth of deposits made a beeline for the New York attorney general's office.

In response, real estate sponsors Extell Development Group and the Carlyle Group contend that this typo in the year shouldn't be read to undermine the plain meaning and intent of the state regulations. The buyers' lawyers counter that Extell had the right to choose a 2008 date, and that their clients relied on that earlier date.

As the cases continue their inexorable journey through the courts, no one has yet explained how the expensive error went unnoticed by the 750-lawyer firm that prepared the offering plan.

SCRIVENER'S ERRORS

It's frequently left up to the courts to determine whether a drafting blunder by an attorney is truly a "scrivener's error"—an unintentional mistake that doesn't reflect the parties' true intent—or something more serious. As Mark Twain once observed, the difference between using the right word and the almost-right word is often the difference between lightning and lightning bug.

In November 2009, Verizon avoided a lightning bolt of staggering proportions when a federal judge in Illinois ordered a reformation of the telecommunications giant's ERISA plan documents from 1996 and 1997. Because of a drafting error, the plan called for a transition factor to be used twice in the benefit formula instead of the

which was used in all other communications and documents referencing the plan; the mistake could have cost Verizon over $1 billion. Although the company had discovered and fixed the error, it still faced litigation from plan beneficiaries who wanted the incorrect formula applied. Ruling that such a result would be "absurd" and a "windfall," the court ordered the contract to be revised in order to correct the mistake.

Texas has a rich tradition when it comes to grammatical disagreements with potentially huge consequences. The Texas Supreme Court once invalidated the results of the general election of 1873, on the grounds that the Legislature's action in having the polls for the election open for only one day violated the Texas Constitution. Specifically, the court held that a clause, beginning with a semicolon, that polls should be open for four days was independent of and couldn't be modified by another clause "until otherwise provided by law." But the outgoing Gov. Edmond Davis refused to enforce the ruling and the victorious candidate Richard Coke chose to ignore it and took office anyway. Implementing a constitutional amendment that allowed the governor to increase the number of justices and to appoint new ones, Coke simply removed the three judges who'd become known as "the Semicolon Court" and appointed new ones. And in November 2009, Democratic candidate for attorney general Barbara Ann Radnofsky clashed with Republican incumbent Greg Abbott over the meaning of a clause in a 2005 constitutional amendment designed to ban same-sex marriages. Radnofsky maintained that the wording, "This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage" had the effect of eliminating all marriages in Texas, including common-law marriage. The attorney general stood behind the amendment, although Radnofsky insisted that what she called an "error of massive proportions" could have been "avoided by good lawyering."

MARRIAGE MINEFIELD

In fact, documents affecting marriage and marital property are perhaps the biggest minefield for attorney drafting mistakes, according to one of the premier matrimonial lawyers in the state. Mike McCurley, CEO of Dallas-based McCurley Orsinger McCurley Nelson & Downing, says that when it comes to documents like prenuptial agreements, postnuptial agreements, and final decrees of divorce, "errors in the wording of what you're supposed to have, or the omission of that, can be catastrophic." McCurley attributes many mistakes to lawyers' excessive reliance on forms, a practice he notes "poses serious dangers. If the actions taken don't match what's in the form, that's trouble."

At his firm, McCurley says, they seek to prevent such mistakes by applying the "dual eyes" rule. "We never have just one lawyer, one set of eyes, draft a document. The meaning may be crystal clear to the person who drafted it, but we have someone else read it to see how the document might be interpreted, even several years down the road," says the veteran family lawyer.

Real estate magnate Frank McCourt may wish he'd hired someone like McCurley. McCourt's September 2010 divorce trial from Jamie, his wife of nearly 31 years, had more at stake than the typical marital property case, especially since the marital property in question could include the L.A. Dodgers baseball franchise. In 2004, both McCourts signed a marital property agreement prepared by attorney Larry Silverstein, a partner in the large Boston-based law firm Bingham McCutchen. The trial took on the twists and turns of a courtroom novel, thanks to the revelation that there were two different versions of the property agreement, each with a pivotal difference in wording. In one version, Frank's sole property is characterized as "inclusive" of the Dodgers.

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But in another version the word "exclusive" is used, a difference in terminology that could result in the $700 million team being community property and effectively making Jamie McCourt co-owner of the venerable franchise. The drafting error loomed over the case and was compounded by Silverstein's damaging admission that he made a change in the documents and switched them without telling either McCourt.

Although Frank and Jamie McCourt were officially divorced on Oct. 26, that decree doesn't address the validity of the postnuptial agreement that was the subject of the September trial. California Superior Court Judge Scott M. Gordon was expected to rule on the validity of this agreement by the end of December. Legal experts believe that regardless of how this ruling pans out, Silverstein and his firm could be facing malpractice claims from either Mr. or Mrs. McCourt, perhaps for amounts in excess of $100 million.

McCurley points out, "The idea that a lawyer is drafting a document for two people with an adverse interest is irreconcilable."

Proofreading may be dull, but, as we've seen, it's definitely important. Paying attention to detail today beats paying someone else big bucks tomorrow. D