On the Papers

THE NUMBER TWO PROBLEM IN LEGAL WRITING: SOLVED

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The number one problem in legal writing in this country, which afflicts more than 90 percent of legal writers, is the failure to place the most important information in the sentence’s stress position. The stress position is any moment of full syntactic closure—signaled by the presence of a period or a properly used colon or semicolon. For a fuller discussion on the stress position, see my earlier article in this series, The Importance of Stress: Indicating the Most Important Words in a Sentence, Litigation, Vol. 38, No. 1 (Fall 2011), at 20–21. Failing to place the material to be emphasized in a stress position will disguise its importance far more often than one might imagine.

The number two problem, discussed below, is a subset of the number one problem. Readers get reading instructions from a writer not only by structural locations like stress positions but also by the “weight” of the kind of unit of discourse in which information appears. Although that might sound too technical for a nonspecialist in language to understand, it is not. You will understand it by the end of this article.

A “unit of discourse” is a group of words that has a beginning and an ending. Thus, a phrase, a clause, a sentence, a paragraph, or a whole document are all units of discourse—of different sizes, shapes, and functions. Our grammar teachers in high school tried to teach us about many sentence-level units of discourse. Their efforts, and ours in trying to learn the material, were sadly wasted. You may have struggled with trying to understand the difference between a compound clause, a complex clause, and a compound-complex clause. Forget it. None of that information is of any help in writing. You need to know about only three units of discourse:

1. The “main clause.” It has a subject and a verb and can stand by itself as a sentence.
2. The “qualifying clause.” It has a subject and a verb but cannot stand by itself as a sentence—usually because it starts with a word like “that” or “although.”
3. The “phrase.” Although recognizable as a unit, it lacks either or both a subject and a verb.

It is essential to know the difference between these three because readers value the information in a phrase much less than the information in a qualifying clause; and they value the information in a qualifying clause much less than the information in a main clause. If a writer puts the most important information in any unit other than a main clause, the reader may well not perceive its importance.

The number two problem in legal writing is simply this: In creating a sentence with two or more clauses, lawyers tend to start with a main clause and end with a qualifying clause.

MAIN CLAUSE [comma], QUALIFYING CLAUSE [period].

The problematic moment for the reader occurs at the comma that follows the main clause. At this moment, the reader is receiving conflicting instructions from the writer:

Instruction No. 1:
Dear reader, this is a main clause. Thus, the information in it is meant to be considered of the utmost importance. Emphasize it.

Instruction No. 2:
Dear reader, this comma tells you there is no stress position here. Thus, you should not read the previous information as containing anything of utmost importance.

Which of these conflicting messages is the reader to rely on?
At that precarious moment of encountering the comma, readers are faced with a number of interpretive choices:
We knew we should begin to use some of your complement; then end with a period."

The solution would be to give both the defendant’s and the plaintiff’s actions equal structural weight—by making them both main clauses:

1b. The plaintiff had sent several notices—three of them in January alone—about the necessity of delaying the shipment. Despite this, the defendant persisted in promising its customers the inventory would be available as previously scheduled.

All the same information is present in (1c) as in the original version. The writer knows exactly how much emphasis the reader is intended to exert in reading all three main pieces of information; but the reader has to figure out that important matter of emphasis by guessing. Read (1c) again, as if the defendant’s actions were the most important. It can be done. But read it yet again, this time assuming the plaintiff’s actions are to be most highly emphasized. Again, it can be done. Reread it a third time, emphasizing the three notices in January as the most important information. Again, it can be done. So with sentence (1c), we still have all the information; but we lack an instructor’s manual for how to read it. That manual should be provided by the sentence’s structure.

To solve the number two problem in legal writing, become aware of when the unit of discourse you are composing is a main clause, or a qualifying clause, or just a phrase. Put the most important material in the main clause; and, as often as possible, give that main clause a mark of punctuation—period, colon, or semicolon—that will create for it a stress position. Sometimes you’ll find yourself moving that main clause to the end. Sometimes you’ll find your self reaching for that salt shaker full of colons or that pepper shaker full of semicolons.

Problem solved.

I will go into these solutions in greater detail in the next issue of Litigation.