

On the Papers

THE NUMBER TWO PROBLEM IN LEGAL WRITING: SOLVED

GEORGE D. GOPEN

The author is Professor Emeritus of the Practice of Rhetoric at Duke University, Durham, North Carolina.

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:

- (a) Emphasize something in that first clause. (But then the reader would have to decide *which* piece of information to weigh most heavily.)
- (b) Do not emphasize anything here; wait instead for the emphasis to be provided by the period at the end of the sentence.
- (c) Delay the decision concerning emphasis until the rest of the information in the sentence has been encountered. (But then the reader will have to revisit the whole sentence retroactively. Once the reader travels backward, the writer is in trouble.)

Why is this problem so widespread? Until we were about 16, most of our sentences contained only a single clause. We had gradually constructed a sentence-writing machine in our brain that functioned like this: “To write a sentence, first choose a subject; then choose a verb; then unravel your complement; then end with a period.”

When we went to college, we were handed reading assignments, in all disciplines, written by professional authors. We noticed that all these important people sounded different from us—for two main reasons: (1) They used many hard words unknown to us; and (2) their sentences extended at least twice as long as ours did. (Professionals tend to use multi-clause sentences about 50 percent of the time.) We knew we should begin to use some of those hard words ourselves; and we tried to sound more professional by extending the length of our sentences.

Writing those college papers, we quite naturally relied on our long-trusted sentence-writing machine. But our wish to create longer sentences caused the machine to malfunction: “Choose a subject; choose a verb; unravel your complement; end with a period—wait! No! Insert a comma, and keep on going.” Because for so long beginning a sentence was the same for us as beginning a main clause, we persisted in beginning our sentences in that old, now unhelpful way. We still do. We had no

idea it was going to cause such problems for our readers.

Here is an example. We begin with sentence (1a), a long but perhaps unproblematic sentence.

- 1a. Although the plaintiff had sent several notices about the necessity of delaying the shipment, three of them in January alone, the defendant persisted in promising its customers the inventory would be available as previously scheduled.

The “although” clause is a qualifying clause; “three of them in January alone” is a phrase; and the rest of the sentence, beginning with “the defendant,” is a main clause. Most readers will read this sentence with the greatest emphasis on the main clause—in part because of its status as a main clause, and in part because it contains the sentence’s only stress position.

The qualifying clause, concerning the plaintiff’s actions, will be read with some weight; but that weight will be in support of the later arrival of the information in the main clause.

Because the fact that three notices were sent in January exists only as a phrase, most readers will consider it not to be the sentence’s most important information.

If that interpretation is what the writer intended, all is well. But if the writer intended us (e.g.) to give equal weight to the plaintiff’s actions, this sentence would fail to send the proper reading instructions. 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.

Version (1c), which follows, is revised to create the number two problem in legal writing: It begins with the main clause and ends with a weaker unit of discourse:

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

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 yourself 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*. ■