

On the Papers

WHO DONE IT? CONTROLLING AGENCY IN LEGAL WRITING, PART II

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In our culture, lawyers have an affinity for abstract nouns. The original fault is Aristotle's. Before him, most people had noticed that things moved. Aristotle turned this into an abstract concept by using the Greek equivalent of the word "motion." An idea stated as a noun tends to sound far more profound than when it is stated as a verb. We call nouns made out of verbs "nominalizations." They successfully keep nonprofessionals at a distance from the concepts being invoked.

Legal writing is often attacked for relying too heavily on these nominalizations. But the problem here is neither their nature nor their number: It is their use at inappropriate moments. Quite simply, nominalizations are consistently treacherous when they are allowed to state what is going on. That job should be left to the verb.

Lawyers are so in touch with who did what in their cases that any word they use to refer to an action will immediately bring to their mind the people and events involved. As legal writers, they would like

to believe that the same immediate association will happen in the minds of all their readers. To make matters worse, readers fool themselves into thinking they understand a sentence as long as it sounds professional and makes some sense. As soon as a sentence makes *some* sense, readers tend to assume that is the sense it was intended to make.

It is insufficient to write a sentence that is merely capable of making the sense you intend. The sentence is sufficient only when it is highly likely to communicate that thought to more than 90 percent of its readers.

Nominalized sentences can sound so intellectually professional that readers are not aware of how incomplete the communication actually was. Here is an example of multiple nominalizations making readers mistakenly believe they know what the sentence is saying. How well do you understand the following sentence on first reading?

1a. If there could be the presentation of data that would indicate the representation of the status of the problem was

accurate, then a decision could be made.

The author of (1a) tells me she meant to refer to three specific actions. Here it is again, with her actions italicized:

1b. If there could be the *presentation* of data that would indicate the *representation* of the status of the problem was accurate, then a *decision* could be made.

Did that help you better understand the sentence's meaning? If you think you now understand it, you are still deceiving yourself. And that is not your fault: It is a trick nominalizations play on readers. The fault lies in the writer. Here's why.

Because readers look to the verb to discover the action of a sentence, putting it elsewhere hides it from the reader. When actions are articulated as active verbs, their subjects necessarily and automatically reveal the agents who did those actions. If we revise (1a) so that the three actions appear as verbs, we discover how ignorant we have been of who is doing what:

1c. If [?] *presents* data that would indicate that [?] had accurately *represented* the status of the problem, then [?] *could decide* to . . .

Not only do we not know who these agents are, but we cannot even tell how many people are involved—one, two, or three. Put the same person in all three brackets: The sentence makes sense. Put three different people in the three brackets: The sentence makes a different kind of sense. Put any combination of one-and-two or two-and-one in the brackets: The sentence makes six additional kinds of sense. We are woefully ignorant of what this writer was trying to convey—no matter how hard we have tried nor how successfully comprehending we might feel.

When these nominalizations-representing-actions pile up in great numbers, leaving agency continually unarticulated,

readers have great trouble following the story. Another example:

2a. To obligate a corporation upon a contract to another party, it must be proven that the contract was its act, either by corporate action, that of an authorized agent, or by adoption and ratification and such ratification will be implied by acquiescence or the acceptance of the benefits of such contract, it being essential to implied ratification that the acceptance be with knowledge of all pertinent facts.

A non-lawyer will be dizzied by this sentence. Lawyers will be less dizzied, because they have to read so much prose like this; but they will be severely hampered in their comprehension all the same. I asked the author to bold-face the terms that denoted the actions he intended to convey. Here is what he bolded:

2b. **To obligate** a corporation upon a contract to another party, it **must be proven** that the contract was its **act**, either by corporate **action**, that of an authorized agent, or by **adoption** and **ratification** and such **ratification** will be implied by the **acquiescence** or the **acceptance** of the benefits of such contract, it being essential to implied **ratification** that the **acceptance** be with **knowledge** of all pertinent facts.

Note that after the first two, all the other ten are nominalizations.

I then asked him to change the bold-faced words to verbs and to supply the appropriate subject for each verb. With this list of agent-actions now expressed as subject-verbs, I asked him to reconstruct the story he had wanted to tell us, expressing the action as verbs. Another example:

2c. For a contract **to obligate** a corporation to another party, the other party **must prove** that the corporation **acted** in one of two ways:

(1) The corporation or its authorized agent **explicitly acted** to enter the contract; or

(2) the corporation **implicitly adopted** and **ratified** the contract when it **acquiesced** in or **accepted** its benefits.

In this second circumstance, the other party **must show** that when the corporation **accepted** the benefits of the contract, the corporation **knew** all the pertinent facts.

Even non-lawyers recognize this as English they could understand—if they had a pressing enough need. But, you might query, how did this become two sentences instead of one—with the first of these divided into two subsections? That happened because the author discovered the shape of the story he was telling. This is no mere cosmetic or mechanical revision process I am suggesting: It is a controlled way of revisiting your thought process.

While doing this revision, my client realized that he had been referring to two main alternatives, and he had then offered a smaller qualification of the second one. It made sense to state the general rule in a single sentence, reserving the smaller qualification for a separate sentence. He created the numbers and indentations for the first sentence when he realized its two-fold nature. The structure of the revision flowed from the inherent re-organization of the thought. We have a technical term for this healthy relationship between structure and substance: We call it “good writing.”

The moral of this tale: When agents and actions are constantly expressed as subjects and verbs, the story is likely to be perceived by most readers with great clarity.

The constant omission of agency can raise ethical issues. Here is a quote from a news report of a 1972 press conference in which the secretary of the interior was intentionally understating the downside of the controversial practice of strip mining.

(In the 1970s, strip mining companies would cut down all the trees on a hill, extract the minerals from the ground, and leave a ravaged-looking mess behind when finished.) I have italicized the nominalized phrases that disguise the actions.

3. The Secretary also concedes that surface coal mining operations will destroy wildlife. He contends that “while *reduced populations* will result from *increased human activity* in the areas and from the *loss of habitat*, no adverse long-term impact is anticipated.”

What did he say? It sounds like he was telling us that although there may be some rough moments along the way with strip mining, everything will be just fine in the long run.

Let us look at the italicized noun phrases.

“Increased human activity” refers to the act of strip mining.

“Reduced populations” does not refer to groups of people losing weight: The appropriate verb-centered translation might be “kill the bunnies.”

“Loss of habitat” does not refer to creatures misplacing their houses: It translates to the verb phrase “destroy their homes.”

Given this, by whom is “no long-term impact [to be] anticipated”? Not by the bunnies; but rather by the people who stand to profit from the strip mining.

The full translation: “By strip mining, we kill the bunnies and destroy their homes; but it doesn’t bother us.”

When we explore this environmental problem by using grammatical subjects to identify the agents and verbs to identify the actions, we get to the core of the debate. On the one hand, bunnies suffer; on the other hand, people benefit. That, in a nutshell, is the environmental problem. How much suffering by the bunnies are we willing to impose in order for us to benefit from the activity? The problem is no longer hidden by the language. ■