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Be Cautious Using 'And' as a Connector

Look for relationships beyond the additive

By Kenneth F. Oettle

“**A**nd” is one of the most useful words in the English language. It connects just about anything. If water is the universal solvent, “and” is the universal connector.

But the virtue of “and” is also its vice. The connective power of “and” is seductive to legal writers because they have so many facts and arguments to shape, sort and join, and it is insidious because writers often stop looking for relationships between thoughts when they have made a connection with “and.”

The writer’s job is to show how facts interact, not merely to join them. Connecting thoughts with “and” can be like laying out the materials to build something but never building it.

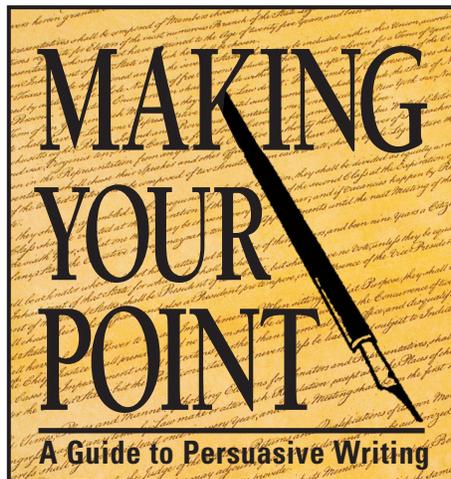
Consider the following classic misuse of “and”:

Smith v. Jones concerned a petition for a writ of habeas corpus and whether the petitioner failed to exhaust his remedies to challenge his conviction under state law.

This sentence says that *Smith v. Jones* addressed two subjects: a petition for writ of habeas corpus and exhaus-

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tion of remedies under state law, but the sentence does not show the relationship between the two subjects. (Also, “petition” and the “whether” clause violate the rules of parallel construction, but we’ll ignore that for this discussion.)



If you do habeas corpus work — challenging convictions on federal constitutional grounds — you will understand the connection. A defendant incarcerated in a state facility has to exhaust all remedies under state law before challenging his conviction by means of a habeas corpus petition in federal court.

If you don’t do habeas work, you may be confused. You won’t know what the exhaustion of remedies under state law has to do with a habeas petition. The sample sentence connects the concepts only with “and,” leaving the relationship unclear to everyone except readers who already know of the relationship or can deduce it.

The issue in *Smith v. Jones* was

whether a petition for a writ of habeas corpus brought in federal court by a person convicted under state law should be denied because the petitioner failed to exhaust all possible state law remedies first. The relationship between the two parts of the sentence is causative. Failure to exhaust remedies under state law can result in the petition for a writ of habeas corpus being denied.

The relationship can be expressed as follows:

Smith v. Jones concerns whether a petition for a writ of habeas corpus should be denied because the petitioner failed to exhaust all possible state law remedies for challenging his conviction.

The writer who wrote that *Smith v. Jones* concerns a petition for a writ of habeas corpus “and” whether the petitioner exhausted remedies under state law was thinking in steps and writing as each step was completed rather than thinking through all steps and then writing.

The writer focused first on the broad subject of habeas corpus, the “set,” and then on the subset of exhausting state law remedies. This is a natural progression — thinkers tend to focus from the broad to the narrow — but it is not the best template for writing. The writer did not show the causative relationship between failure to exhaust state law remedies and denial of a petition for a writ of habeas corpus.

Other examples of misusing “and” by means of the “and whether” construction include:

The case involved a requirements contract and whether the defendant failed to fulfill its obligations thereunder.

The court was concerned about the possibility of forfeiture and whether plaintiff had missed the deadline for exercising his option.

A Related Misuse of 'And'

Understanding the relationship between thoughts is likely to require extra effort where the writer fails to subordinate one thought to the other. In the following example, the writer defaulted to “and” rather than figure out how to show the relationship between two ideas:

Parcel A is closer to the highway, and Parcel B benefits from an access agreement over Parcel A.

Neither of the foregoing thoughts is subordinated to the other. The reader is told that Parcel A is closer to the highway, but initially, the reader is not told why that matters. Parcel A's proximity to the highway is just a floating fact. That Parcel B benefits from an easement over Parcel A (an access agreement) should be featured as follows:

Parcel B benefits from an access agreement over Parcel A, which is closer to the highway.

The idea is easier to understand as revised because the reader is first given the core fact (that Parcel B benefits from an access agreement) and then the explanation (an access agreement is necessary

because Parcel A is closer to the highway). Also, you have eliminated one mention of “Parcel A,” which saves words.

An associate reports that one of her high school English teachers ran an exercise in which the class had to write a paper without using “and” except to connect two nouns or two verbs, as in “toast and jam” or “ran and jumped.” The point was to force the students to show the relationship between thoughts rather than just tack them together with “and,” leaving the reader to deduce the relationship.

That was an excellent assignment — subtle but powerful. Writers use “and” more than they realize. It allows them to leave the driving to someone else.

Puzzler

How would you fix the following sentence?

The land, through which the stream runs, was at all times relevant, owned by the defendant.

The sentence suffers sorely from interruptive thoughts and interruptive punctuation. Once a reader sees a subject, the reader expects to find out quickly what the subject did or had done to it. In other words, the reader wants to see a verb. Here, we don't find out what the land is doing or having done to it (it was owned by the defendant) until nearly the end of the sentence.

Writers create these predicaments by recording words as they think of them and then failing to revise. The

word “land” evidently came to this writer's mind first because the sentence is about land ownership. Then

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the writer had a thought about the land (e.g., a stream runs through it) and dutifully recorded the thought as it emerged.

An easy fix is to move the temporal reference — “at all times relevant” — to the beginning. Say “relevant times” rather than “times relevant” because adjectives tend to precede the nouns they “modify” (describe).

Make the sentence active rather than passive by converting the defendant from the object of a preposition to the subject (“defendant owned”). You could conclude with “through which the stream runs,” but one word conveying that concept would be tighter and more graphic.

The new version:

At all relevant times, defendant owned the land crossed [traversed] by the stream. ■