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## Is the Glass Half Empty or Half Full?

Permissive and restrictive words give different slants to the same rule

By Kenneth F. Oettle

One of the classic techniques of persuasive writing is to portray the glass as half full, if full is good for you, or as half empty, if empty is good for you.

For example, if an advocate were looking to characterize a stock exchange rule regarding audit committee membership as permissive, the advocate might write:

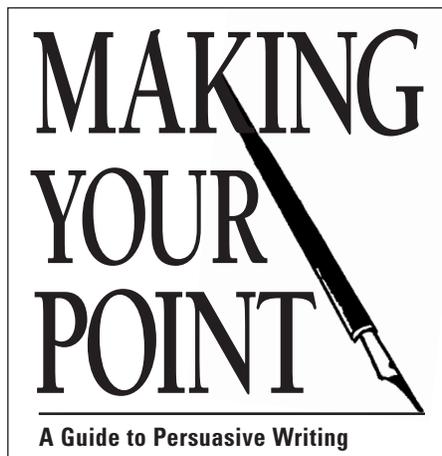
Subject to a cooling-off period, the rules of the exchange per-mit former officers to serve on the audit committee of the board of directors as long as the board determines that such person will exercise independent judgment and will materially assist the committee's function.

If the advocate were looking to characterize the same rule as restrictive, the advocate might write:

The rules of the exchange exclude former officers from

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...serving on the audit committee of the board of directors, even after a cooling-off period, unless the board determines that such person will exercise independent judgment and will materially assist the committee's function.



In the first version, the words “per-mit” and “as long as” denote permissiveness. In the second version, the words “ex-clude” and “un-less” denote restriction.

Either characterization of the rule — as permissive (half full) or restrictive (half empty) — is correct. They are just “spun” differently.

Another element of spin in the foregoing examples is the placement of the “cooling-off period.” The permissive version acknowledges the cooling-off period and quickly leaves it behind, minimizing its restrictive impact.

In contrast, the restrictive version gives the cooling-off period a central position and a major role, suggesting that the test for audit committee membership is so tough that “even after” the

cleansing effect of a cooling-off period, former officers will not easily be approved.

### A Second Example

Suppose you wish to discover the opinion of a nontestifying expert whom the adversary retained in anticipation of litigation. You would argue as follows:

The Rules of Court allow the discovery of the opinion of a nontestifying expert whom the party retained in anticipation of litigation upon a showing of “exceptional circumstances.”

Your right to this discovery is qualified by the need to show exceptional circumstances, but you state the proposition affirmatively (“The Rules of Court allow the discovery”) because you seek access to the information.

If you oppose discovery, you state it differently:

The Rules of Court do not allow the discovery of the opinion of a nontestifying expert whom the party retained in anticipation of litigation without a showing of “exceptional circumstances.”

The same proposition has now been stated in the negative (“The Rules of Court do not allow the discovery”).

Actually, the Rules do allow discovery under exceptional circumstances, but you are not overstating your case to say the rules do not allow discovery “without a showing.” To you, the glass is half empty — no discovery should be permitted unless. To your adversary, the glass is half full — discovery is allowed if the right circumstances (exceptional) can be shown.

Both statements are true. Neither of you is pushing the envelope.

### **Don't Say Won't**

The antithesis of the “glass-half-full” technique is the self-flagellatory tactic of stating a proposition adversely to one’s own case in an attempt to build credibility.

For example, a lawyer seeking a preliminary injunction began his brief as follows: “Courts will not issue a preliminary injunction where all material facts are controverted.” Counsel then contended that all material facts weren’t controverted, but the damage had been done. The harmful proposition was imprinted on the reader’s mind.

Never say that courts won’t grant the relief you seek, even if you immediately qualify the statement. Say that courts will grant the relief with a proper showing.

The protocol of presenting one’s case affirmatively is so deeply embedded in our practice that to do otherwise marks you as a novice, or worse, as

injudiciously candid. It may cause a reader to question your judgment — and your point.

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### **Puzzler**

How would you tighten and sharpen the following sentence?

The combination of steady, well-conceived internal growth and the periodic acquisition of other firms, which fulfilled various needs of the maturing company, created the platform for XYZ Company’s growth to its present position as one of the largest investment banking firms in the United States.

“The combination of” is implicit and therefore unnecessary, as is the phrase “of other firms.” “Various” is almost always unnecessary. Here, it drops out anyway because the clause in which it appears — “which fulfilled various needs of the maturing compa-

ny” — is implicit and can be deleted.

Because internal growth and acquisition weren’t really the “platform” for growth — they were the growth — you can substitute “became” for the platform metaphor.

Though it is a form of the dreaded “to be” verb, “became” seems better than “evolved into” or “developed into,” both of which connote change in nature more than change in size, or “emerged as,” which connotes revelation as well as evolution (butterflies emerge). “Became” has no connotational conflicts.

The phrase “present position” is understood and therefore unnecessary.

The revised version begins with a phrase that grows, like the company, and carries the reader to the core thought:

Through steady, well-conceived internal growth and periodic acquisition, XYZ Company became one of the largest investment banking firms in the United States. ■