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A Rose By Any Other Name Might Not Be as Popular

The lawyer's job is to find the optimum spin

By Kenneth F. Oettle

Sooner or later, you will call prunes "dried plums." You may resist (maybe you don't think an operation is a "procedure," either), but your children will call them dried plums. Never mind that raisins aren't sold as "dried grapes." Prunes are on the way out.

Prunes connote age and irregularity. They are a metaphor for sour facial expressions ("She screwed up her face like a prune"). Prunes are, potentially, an embarrassment, whereas dried plums are not. To sell more prunes, advertisers have begun to eliminate the word from their marketing vocabulary. The new spin is that prunes are dried plums.

Years ago, the results of a vocational preference test suggested I might be comfortable in one of the professional fields grouped as "law/advertising/author-journalist." At the time, the combination of law and advertising seemed strange. Why would the dignified profession of law be joined with the seemingly slick field of advertising?

Now I know. Lawyers, like advertisers, spin. We use words to cast our client's position in its best light, just as advertisers use words, pictures and sounds to cast products and services in their best light. Our facility with spin is one reason we are paid so much by those who can afford us.

Top lawyers are spin masters. They know when to call a spade a spade, when to call it a club, and — perhaps the greatest test of good judgment — when not to mention it at all.

Consider the following two versions of a sentence stating that a plaintiff looking to recover for injuries suffered on State property must prove that the property was in "dangerous condition" at the time of the injury. A plaintiff suing the state would use the first version, and the state would use the second.

MAKING YOUR POINT

A Guide to Persuasive Writing

> Plaintiff's Version:
> The provisions of the Tort Claims Act include the requirement of establishing a dangerous condition on public property.
>
> State's Version
> The stringent provisions of the Tort Claims Act require a plaintiff to prove that public property was in "dangerous condition" at the time of the injury.

The plaintiff's version acknowledges the act's requirement of proving a dangerous condition on public property, but it does so passively, seeking to be as unobtrusive as possible. The verb "include" is unassuming and nonthreatening. The act doesn't demand anything. It just "includes" it. The plaintiff doesn't have to prove anything, merely "establish" it.

The defendant's version emphasizes the burden of proof in several ways. It characterizes the provisions of the Tort Claims Act as "stringent," suggesting that tough barriers stand in the way of recovery against the state. It states affirmatively that the provisions of the act "require" something; it reminds the reader that plaintiff bears the burden of "prov[ing]" the dangerous condition; and it requires that the dangerous condition have existed "at the time of the injury."

It also places quotation marks around, and thus highlights, "dangerous condition," a statutorily defined term that is chock full of tests the plaintiff has to pass. Under the Tort Claims Act, "dangerous condition" means a condition of property that [1] creates a substantial risk of injury [2] when the property is used with due care [3] in a manner in which it is reasonably foreseeable that it will be used. Each of those elements of the definition is a hurdle for the plaintiff to overcome.

If you represent the plaintiff, you would think twice before saying the

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Tort Claims Act requires "that a plaintiff prove." You would tend to soft-pedal the plaintiff's burden by referring, perhaps, to "the requirement of establishing a dangerous condition."

Similarly, you would not refer to the "stringent" provisions of the Tort Claims Act. That is a defendant's word because stringency represents a barrier to recovery. You also would not gratuitously place quotation marks around "dangerous condition" because the marks call attention to its being a defined term with elements the plaintiff must satisfy.

Both versions of this sentence are legitimate. They are just spun differently. Spinning is part of the lawyer's job.

Puzzler

Which Version is best, A, B or C?

Version A: The trial judge, applying the test in *Smith v. Jones*, held that defendant owed plaintiff a duty.

Version B: The trial judge applied the test in *Smith v. Jones* and held that defendant owed plaintiff a duty.

Version C: Applying the test in *Smith v. Jones*, the trial judge held that defendant owed plaintiff a duty.

One should get to the verb quickly because readers like action. In Version A, the verb is the tenth word and is separated from the subject by two commas and a six-word phrase. In Version B, the verb is the fourth word and follows immediately upon the subject. Version B has better pace and more punch than Version A. Phrases that interrupt the progression from subject to verb annoy readers for whom time is a meaningful parameter. Nearly all legal readers fall into this category.

Arguably, Version C is better than Version B. Version C shows the reader that the relationship between the test and the holding is not merely additive. Version B says only that the judge applied a test and made a holding, leaving the reader to deduce — albeit without much effort — that the holding derived from the test. Version C makes the cause and effect clearer.

Nevertheless, one can make a case for Version B. Suppose, for example, that the writer wishes to create the image of a court having little trouble reaching its decision. The writer reports the court's actions succinctly and in sequence to reflect how easily the court made its decision: "The court applied the test and held…"

Though the reader has to deduce cause and effect, the task is easy because legal readers know that when a judge applies a test and makes a holding, the holding is based on the test. The extra work for the reader is minimal, whereas the gain in pace is palpable. In balance, the value of getting to the action immediately, as in Version B, may outweigh the value of guiding the reader by subordination, as in Version C.

When you break a traditional rule of writing, as by failing to subordinate, splitting an infinitive or using a preposition at the end of a sentence, a reader may react poorly simply because you are breaking a rule the reader honors. Here, I don't think many readers would be offended. The failure to subordinate is relatively innocent because you aren't using "and" to suggest cause and effect where it doesn't exist. ■