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Grammatical Patterns Dictate the Reader's Response

Arrange your sentences to account for embedded reactions

By Kenneth F. Oettle

In arranging the elements of a sentence, lawyers sometimes forget to account for the reader's likely reaction to common grammatical patterns. Consider the following "Question Presented" at the beginning of a brief:

Is an employee who causes an accident while driving to work acting within the scope of his employment such that his employer might be held liable for torts committed by that employee under the doctrine of respondeat superior?

Read literally, this sentence says the employee committed torts "under the doctrine of respondeat superior," which makes no sense. One does not commit a tort under a doctrine.

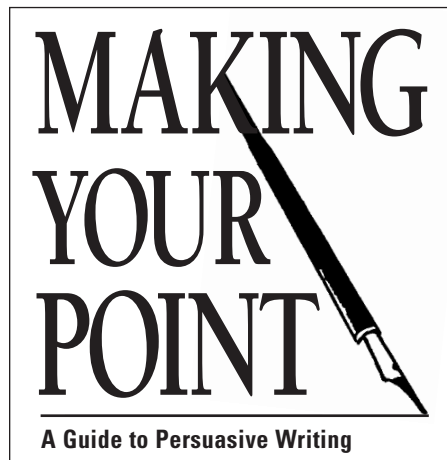
The reader will eventually decipher the sentence but may be confused, momentarily, by the illogic of committing a tort "under a doctrine." In that moment, as in every moment of confusion, the reader's attention may be lost.

The author of this "Question Presented" evidently thought the phrase "for torts" should follow the word "liable" because a person is, after all, liable for torts. But the precise question

The author is a partner and co-chair of the Appellate Group and writing and mentor programs at Sills Cummins Radin Tischman Epstein & Gross. He invites questions and suggestions for future columns to koettle@sillscummis.com. "Making Your Point" appears every other week.

is not whether someone may be liable for torts but whether someone may be liable under the doctrine of respondeat superior. Therefore, the phrase "under the doctrine of respondeat superior" should come immediately after the word "liable."

This is accomplished by dropping the phrase "for torts committed by that



employee," which is unnecessary anyway because it is implicit in the reference to the employee causing an accident.

The revised sentence reads as follows:

Is an employee who causes an accident while driving to work acting within the scope of his employment such that his employer might be held liable under the doctrine of respondeat superior?

The writer knew that the concluding phrase "under the doctrine of respondeat superior" explained the

word "liable," and the writer assumed, incorrectly, that the reader would automatically make that connection despite the intervening phrase "for torts committed by that employee."

But a reader doesn't have the writer's intimate knowledge of the material and won't necessarily make connections that override grammatical signals. Here, the phrase "torts committed by that employee" indicates that a description may be forthcoming of how, when, where or why the employee committed torts, as "torts committed by that employee in a negligent manner"; "in his vehicle"; "on public streets"; or "in a fit of rage."

The writer doesn't mean it this way, but the reader experiences it this way because the reader responds instinctively to the grammatical signal in the phrase "torts committed by that employee."

Such mistakes can be avoided by reviewing each sentence from the reader's perspective. To attain such a perspective, try sounding the passage out in your mind. Misplaced phrases should have a hard time getting past that screen.

A Second Example

Another example of improper sequencing is the following effort to qualify (describe, limit) a group of restaurants:

Defendants submitted affidavits showing the existence of restaurants within walking distance of the office that would have been open at the time of the accident.

The writer meant to limit the category “restaurants” in two ways: (1) to a subset of restaurants within walking distance of the office and (2) to a subset of restaurants open at the time of the accident.

But the sentence refers not to a restaurant being open but to an office being open (“...the office that would have been open at the time of the accident”). The sentence should be revised as follows:

Defendants submitted affidavits showing that restaurants within walking distance of the office would have been open at the time of the accident.

The key to this revision is the deletion of the passive, nondescriptive phrase, “the existence of.” The word “that” can then be moved from after the word “office” to before the word “restaurant,” resolving the problem.

Verbal communication follows rules, just as baseball is played according to rules, or music is written according to rules. The implicit rules of verbal communication are described in gram-

mar books that lawyers don’t read, which doesn’t really matter because we internalized the rules of grammar when we were very young.

One such rule is that a “that clause” following a noun modifies (describes) the noun. In the above example, the noun followed by a that clause is “office.” The reader’s instinctive reaction to the that clause (“that would have been open”) is that the clause modifies office because it immediately follows office.

This is an embedded reaction. You can anticipate it because you would have the same reaction if you were the reader. Because the reaction to grammatical structures is embedded not only in the reader but in you, you can preview the passage as the reader would receive it and can determine if the passage could be misunderstood.

Puzzler

How would you tighten and sharpen the following sentence?

If a trial had occurred, after cross-examination of all experts, it is

unclear as to what position any of the parties would have taken on these issues.

This sentence makes the reader wait for the main idea by beginning with a secondary thought (if a trial had occurred), then narrowing to cross-examination of the experts and finally ending with the gist of the sentence — the uncertainty regarding the parties’ positions.

Try beginning with the key idea, uncertainty. Words and phrases that can be dropped as implicit include “all,” “as to,” “any of” and “on these issues.” Depending on the context, “at trial” may be implicit as well.

The revised version:

It is unclear what positions the parties would have taken had they cross-examined the experts at trial.

If you dislike the “It is” construction, you could write:

We do not know what positions the parties would have taken had they cross-examined the experts at trial. ■