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Do Not Make a Thought Long Just Because It Is Good

Unnecessary elaboration can produce a net loss rather than a net gain

By Kenneth F. Oettle

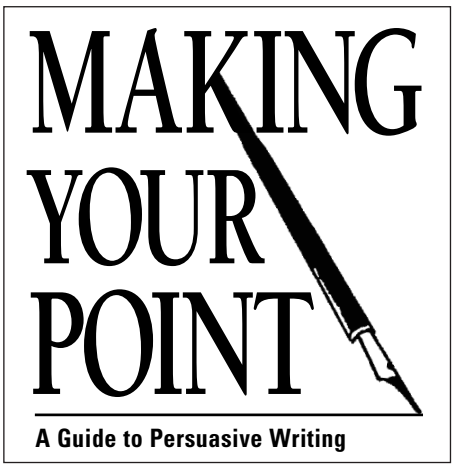
Good ideas can be hard to come by, so when we have a decent point, we sometimes drone on, repeating ourselves in the mistaken view that more is better, that if we keep railing against the other side's argument, our position will appear stronger, and the reason for our righteous indignation will be confirmed. Sometimes we elaborate because we are afraid we have nothing else to say.

Suppose your client XYZ Corp. prevailed in a jury trial against claims for fraud and breach of contract. Before the court sent the case to the jury, you asked the judge to require separate verdicts on each count, but plaintiff ABC Co. demanded — and the court agreed — that the jury should render a single general verdict, either for or against recovery. To plaintiff's chagrin, the jury found "no cause."

After the verdict, plaintiff interviewed jurors and concluded that they were confused by the court's instructions, thinking they couldn't find fraud unless they also found breach of contract. Apparently, several jurors thought they had to find for plaintiff on both causes of action to render a general verdict in plaintiff's favor.

Your associate drafts a brief in opposition to the motion for a new trial and makes two points — that the jury instructions were not confusing (which is not discussed here) and, by way of the following example, that plaintiff got what it deserved by insisting on a single general verdict:

> Plaintiff ABC Co. sought an undifferentiated general verdict despite defendant XYZ Corp.'s objection. XYZ Corp. requested that the jury be asked to render a verdict on each count, but ABC Co. convinced the court that a single general verdict would be more appropriate. ABC Co. must now be compelled to accept the consequences of having prevailed on that issue. Dissatisfied with the result, plaintiff now seeks to discredit the very process it proposed.



This is a good thought. Plaintiff demanded a single general verdict, prevailed over objection, and should be stuck with the result. But the writer elaborates unnecessarily.

The writer initially considered using a metaphor, either that the plaintiff "made its bed and must sleep in it" or that plaintiff was "hoist on its own petard." The former seemed too casual, and the latter seemed esoteric, especially because the writer didn't know what a petard is. So the writer chose length, as if elongating the thought would drive the point home.

Let's see what length added. The first sentence says the plaintiff ABC Co. sought a unitary general verdict rather than separate general verdicts for each count and that defendant XYZ Corp. objected. Fair enough. "Despite" isn't the right word — it should have been "over" — but we get the point: that plaintiff has no basis for objecting to the form of verdict it requested other than being unhappy with the result, which isn't an acceptable reason.

The second sentence says exactly the same thing, adding only that the court ruled for the plaintiff. This reiteration is unnecessary as an aid to comprehension because the thought is simple. It describes a straightforward procedural request with which the reader is likely to be familiar.

Reiteration does create emphasis, but that rhetorical gain has to be balanced against other consequences. For example, you have to factor in the potential insult to the reader's intelligence from spelling out what an ordinary reader should be able to grasp. Or, the reader may suspect you are elongating the thought to create an appearance of weight that the substance won't sustain.

You also have to consider the impact on pace. When more words cover the same distance, the story slows. To use a vehicular metaphor, one adds strong words and ideas to gain "traction" and culls duplicative words and ideas to reduce "friction."

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The last sentence in the sample paragraph has an additional problem. "Dissatisfied with the result" is ad hominem, directed to the person rather than to the point. It merely states the obvious, and it identifies the writer with advocates who make personal attacks because they lack a basis on which to attack the issues.

The sample paragraph has the feel of a writer extruding a story, as casual speakers do, extending it to hold the floor. The language is not as far removed as you might think from a classic teenage conversation, which might proceed as follows if engrafted on a legal context: "So the lawyer for XYZ Corp. goes, 'Judge, we should have separate general verdicts,' and then the lawyer for ABC Co. goes, 'Judge, we should have a single general verdict,' and the judge is like, 'I think it should be a single general verdict.'" Casual listeners don't mind the blow-by-blow, but judicial readers do.

Judicial readers prefer compression. If elaboration will drive a point home or help the reader understand, fine. But otherwise, compress. Get to the point and save the reader time. Following that advice, we might rewrite the above paragraph as follows:

> Plaintiff ABC Co. sought a general verdict, prevailed over objection, and must accept the consequences.

The idea is now conveyed in 15 words rather than 73. The good news is that brevity has been served. The bad news for the writer is that the illusion of power that may have attended the sheer weight of words is now dissolved. Realizing that one has less to say than anticipated can be unsettling. It is one reason writers don't trim as much as they should.

Puzzler

How would you tighten and sharpen the following sentence?

> The destruction of electronic data or the data's inadvertent loss after a litigant is on notice of a potential dispute can subject the litigant to very significant sanctions or even an adverse instruction to a jury that may seriously compromise the likelihood of success in an otherwise meritorious action.

Say "intentional" destruction to contrast it with inadvertent loss and to create parallel adjectives and nouns (intentional destruction and inadvertent loss). Drop "The" at the beginning because it is implicit. Add "even" in front of inadvertent loss to indicate that losing electronic data is serious even if inadvertent. Use "and" rather than "or" between intentional destruction and inadvertent loss because, together with "even," it builds.

The phrase "after receiving notice" would be an improvement because it is shorter than "after a litigant is on notice," but you don't need "receiving." "After notice" implies receipt. Compress "instruction to a jury" to "jury instruction." This not only tightens the phrasing, but it eliminates the gratuitously ambiguous combination, "a jury that may seriously compromise."

Don't use "or" between "very significant sanctions" and "adverse jury instruction" because an adverse jury instruction is included in the set called "significant sanctions," not coordinate to it. Use "including" instead of "or" and set it off with dashes rather than commas to highlight the seriousness of the sanction.

Delete "the likelihood of success in" as implicit. The word "compromise" conveys the concept. Also, you don't need both "significant" and "seriously." Minimize your editorials.

In what appears to be a close call but isn't, I would use "that" rather than "which" after the second dash. The dashes and the material between them create a pause, like a comma, suggesting that "which" might work, but the operative phrase is "sanctions…that may seriously compromise." Because not all sanctions seriously compromise, the clause is restrictive and takes "that" rather than "which."

Keep the phrase "otherwise meritorious." It highlights the harshness of the sanctions.

The revised version:

> Intentional destruction and even inadvertent loss of electronic data after notice of a potential dispute can subject a litigant to sanctions — including an adverse jury instruction — that may seriously compromise an otherwise meritorious action. ■