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Dross Disappears and Points Emerge as Groupings Improve

Beware of bland connectors like "In addition"

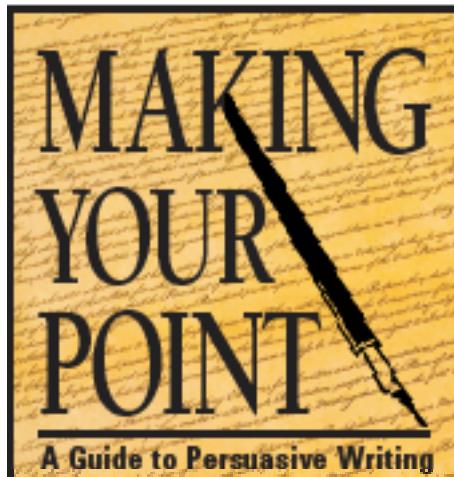
By Kenneth F. Oettle

Legal writing is all about groupings—sets and subsets; categories. These are the building blocks of logic. Accurate sets and subsets (accurate categories) increase the efficiency with which information is delivered, and the process of shaping sets and subsets forces a writer to confirm that the message is on point. Regrettably, the kind of precise grouping that typically takes place late in the editing process, *e.g.*, rearranging items in sentences and short paragraphs, is sometimes skipped in the rush to get product out the door.

A principal cause of weak grouping is the tendency to put undue faith in the first or second rubric we choose for a set (*i.e.*, the name we choose for a category). After all, we figure, if the thought came to us naturally, how could it be wrong? Life would be intolerable if we had to rethink all our thoughts.

The tendency to trust our initial groupings—or resist distrusting them—is compounded by the desire to be done with the task. To counter this unwholesome synergy,

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a writer should ask two questions before deeming any work concluded: "Are the characterizations of my sets accurate?" and "Are they the best available?"

Recently, an associate was asked to prepare a memo addressing whether an investment adviser can vote shares of stock owned by the mutual fund it advises. After presenting the question and short answer, the associate began the discussion by identifying the sources from which the answer was drawn:

This memo focuses on New Jersey's relevant case law in conjunction with the law as it is set forth in the New Jersey Business Corporations Act, Title 14A of the New Jersey Code. In addition, guidance can be found in the SEC release governing proxy voting by investment advisors and in the New Jersey Corporations and other Business Entities Practice Manual.

As a reader, I go where the words take

me, like a driver following road signs. The memo said it would focus on two sources and then suggested, with the phrase "In addition," that it would focus on more sources ("This memo focuses on . . . In addition, [it focuses on . . .]"). Consequently, I formed an expectation. The memo then disappointed me by changing direction with what seemed to be a new idea—that "guidance can be found."

I experienced this phrase as a new idea, and I was confused by it, because it presented not only a shift in actor (from memo to guidance) but a shift in voice, from active ("This memo focuses . . .") to passive ("guidance can be found"). With this double shift—actor and voice—I received the message that the memo was about two categories of information, not one. As it turns out, the four items can be grouped in one category—sources consulted.

To be sure, the writer had a plan. Writers usually do. (I look for the writer's plan even in dysfunctional prose on the theory that acknowledging a bad plan may free the writer to embrace a better one.) Here, the writer intended to say that the memo would spend more time on the two primary sources—case law and statute—than on the secondary sources—the SEC release and the practice manual.

Unnecessarily, the writer grouped the four sources of information in two sets. The first set consists of items on which the memo "focuses," and the second set, following the phrase "In addition," consists of items from which "guidance can be found." The dichotomy of "focus" and "guidance" was not helpful.

Also, between the two sets, the connector "In addition" did more harm than good. Initially, it led me to think that the memo would identify more points of focus. When the memo didn't, the phrase "In addition" seemed to confirm that sources presented under the phrase "guidance can be found" comprised a new set rather than more items in the same set.

One generalization would have sufficed — either “The memo focuses” or “Guidance can be found.” Focus is the weaker choice because everything the memo discusses is a point of focus. “Guidance can be found” conveys more information. Not only does it identify the subject of the memo (sources of information), but it describes their value (they provide guidance).

Having settled on one generalization, we can reduce the two sentences to one. The rewrite can also delete verbiage: “Relevant [case law]” (would you focus on irrelevant case law?), “in conjunction with the law as it is set forth” (I dare you to find a useful word in that phrase), “of the New Jersey Code,” and, last but not least, the unhelpful transition, “In addition.” In the first cut, the rewrite looks to organize the set:

Guidance can be found in New Jersey’s case law, in its Business Corporations Act (Title 14A), in the SEC release governing proxy voting by investment advisors, and in the New Jersey Corporations and Other Business Entities Practice Manual.

The sentence is organized around the point that guidance can be found in four sources. Whether to precede each of the sources with “in” is a judgment call. I like the repetition of “in” because it slows the sentence down, increasing the chance that the reader will absorb rather than skim over the information. Also, by the end of the long sentence, the signal from just one “in” would be attenuated.

Because the writer intends to say that the discussion will pay significantly more

attention to case law and statute, the revision should incorporate the modifiers “principally” and “to a lesser degree,” situating the four sources along a continuum of importance:

Guidance can be found *principally* in New Jersey’s case law and Business Corporations Act (Title 14A) *and to a lesser degree* in the SEC release governing proxy voting by investment advisors and in the New Jersey Corporations and Other Business Entities Practice Manual.

I chose this paragraph for a column in part because I had to read it several times to understand it. Now that I have studied it, I no longer experience that confusion. I understand the paragraph in its original state. Ironically, this puts me in almost the same position as the writer, who could not achieve sufficient distance from the material to sense how difficult the text can be for a reader. Nevertheless, this converse of the “observer effect” doesn’t compromise our analysis of the paragraph.

The writer built the paragraph stepwise, beginning with the thought that the memo would focus on case law and statute. Then the writer sought a rubric (a name, a characterization) for the other two sources — the SEC release and the practice manual. The writer apparently did not notice that all four sources could be grouped under “Guidance can be found” and that modifiers (“principally” and “to a lesser degree”) could be used to place the focus on the first two sources. Awkward prose is often built this way — by committing to the first category that comes to mind. The

beginning of the paragraph was like a false path into a maze: It worked until it didn’t work. To avoid this kind of misdirection, ask yourself each time you are describing a multipart set whether your description is accurate and whether it is the best available.

Puzzler

Which is better, Version A or Version B?
ABC Corp. is your client.

Version A: ABC Corp. does not believe that that the Court’s August 15 Order applies.

Version B: ABC Corp. believes that the Court’s August 15 Order does not apply.

Look to be affirmative rather than negative when your client is the actor. ABC Corp. appears more firm in its conviction if you say that “ABC Corp. believes” than if you say that ABC Corp. does not believe.

Also, in Version B, you get to say that the Order “does not apply,” which is your point. In the weaker Version A, not only do you suggest that your client is wishy washy (ABC Corp. “does not believe”), but you conclude the sentence with the thought — thus giving it prominence and power — “that the Court’s August 15 Order applies.” This is precisely the position you oppose.

If ABC Corp. were the adversary, I might go with Version A for the reasons given above and because it sets ABC Corp.’s personal belief against the dignity of a court order. ■