

An Excerpt from *When Lawyers Write*

By Richard H. Weisberg

This article is meant to complement the articles by Joseph Williams in the January and February columns. He said put the crucial actions in strong verbs; and make the central characters (or agent) the subject of the verbs. He called these "the first two principles of clear writing."

Richard Weisberg stresses the same principles in two chapters from *When Lawyers Write* (published by Little, Brown). This excerpt is from the chapter called "Mastery of the Sentence: Keeping the Subject in Mind."

—JK

§4.1 Who or What is Performing the Action?

Noun and verb marry to form a good sentence. Although the verb choice seems especially to bog lawyers down, noun choice often causes a bad marriage, too. If every sentence begins with "It" or "There," then most of the potential spouses line up as "is," "seems," "may," or "can"—not a very attractive list.

RULE 4. Choose the real, not the passive, subject of your sentence.

Lawyers have the freedom to name enjoyed by all other writers. If the lawyer-writer knows who (or what) is performing the sentence's action, he should ordinarily make that person (or thing) the subject of the sentence. Lawyers often disobey this deceptively simple rule. Thus: "In a 1976 amendment to the Federal Energy Administration Act, additional remedies were added." (Since the amendment added

the remedies, why did the writer avoid making it the subject?) Or "After a satisfactory outline has been completed, the actual writing of the note remains." (Why have inanimate objects become subjects, instead of the really active force, "you," implied in the sentence?)

Many lawyers suffer from a fear of naming. The result is a peculiar kind of sentence in which the noun shows up late, if at all:

Borrowing from the reasoning in the cases, and applying the time-worn canons of construction, it may be concluded that the interpretation accorded the predecessor of Section 6511 has been accepted by Congress.

This sentence typifies faulty writing due to noun aversion. It exemplifies a pervasive way in which lawyers demonstrate their fear of naming—by turning verbs into nouns. The result is a poor choice of subject and a weak sentence. The question *who* is doing the concluding is put off as long as possible and then answered by the impersonal "it"; even Congress as an active force disappears into yet a second passive construction as the sentence ends.

Sometimes lawyers need to fudge. Usually, however, they can and should specifically name the subject that is the active force in their sentence. Thus:

I conclude, having read the cases and applied the canons of construction, that Congress has accepted the interpretation accorded the predecessor of Section 6511.

Many lawyers, in their unwillingness to name the real subject, will take a verb and, by adding *-ing*, create an inappropriate subject. Thus:

Applying the firm commitment rule to the plan affects the participant's beneficial ownership.

The effect of substituting such words (which are called *gerunds*) for real subjects is to diminish the force of the sentence. Compare, "The firm commitment rule affects the participant's beneficial ownership." Fewer words, and a truer subject, produce a better sentence.

Or consider the supervisor who wished to advise a colleague to adopt a different legal argument. "Stating the case that way is not a helpful approach," she writes. The verb "state," once turned into a noun-subject, depersonalizes and weakens the sentence. Furthermore, it virtually compels the writer to use the weak verb "is." What has been gained, aside from twice as many words, over "Please state the case differently"?

Along with *-ing*, lawyers often retreat to words ending in *-tion*; the result is the same. Here is an example of that habit taken to an extreme:

The ultimate termination of this litigation would be materially advanced by correction, at this stage, of the deprivation of due process resulting from denial to X of access to information at issue.

"Plain Language" is a regular feature of the **Michigan Bar Journal**, edited by Joseph Kimble for the State Bar Plain English Committee. Assistant editor is George H. Hathaway. Through this column the Committee hopes to promote the use of plain English in the law. Want to contribute a plain English article? Contact Prof. Kimble at Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901.

Any sentence with five *-tion* words is a bad sentence. The subject, "termination," sets the weak trend, for it avoids the central thought, namely that "the court should allow X access to the information, hence curing the deprivation of due process and hastening the end of this litigation."

RULE 5. Do not avoid your true subject by lengthening a verb into a noun.

§4.2 Keep The Subject Constantly in Mind

Once the subject has been named, the sentence is off to a good start. But then the writer must never lose sight of that subject. Consider this phrase from a court decision:

When resolved into plainer English, it is clear to us that all of the quotation, preceding the words "I have some very valuable papers," relate to the predicted bad weather...

Like many legal writers, the court starts moving through subordinate clauses and impersonal constructions until finally naming the subject, "quotation." But then the court errs again by forgetting what it had named. As happens fairly often, an intervening noun ("words") confuses the writer, and by the time he arrives at the verb ("relate"), the court makes the verb agree with "words" instead of the sentence's true subject.

Failure to keep the subject in mind often leads to grammatical error and syntactical confusion. Sometimes a writer can lose concentration and fall into the trap from word to word:

The city and county of Los Angeles has adopted a Realty Transfer Tax.

But more frequently the lapse takes place in the course of a long sentence, in which intervening nouns confuse the writer into forgetting the number (or gender) of the true subject:

The equitable standards applied by the federal courts in most circuits in determining a motion for relief made

under this third provision of clause (5) has been strict—nothing less than a clear showing of grievous wrong.

The lesson for the legal writer is simple and forms the next rule.

RULE 6. Having named the true subject of your sentence, keep him, her, it, or them constantly in mind until the sentence is over or a new subject has been named.

§4.3 Feature the Subject; Do Not Bury It

No one has definitively tracked the thought patterns that lead to the written sentence, but common sense tells us that the subject of the sentence must be close to uppermost in the thinker's mind. While in some forms of creative or philosophical writing symbols and abstract nouns may predominate, in legal writing the sentence's true subject is usually a person (meaning also a corporate or legislative entity) or a tangible thing. So for lawyers, as much as other expository writers, people and things usually begin the process of turning a thought into a sentence.

If we instead (as we usually must) analyze from the finished product, we should not have to work our way back

to the original thought that inspired the sentence. Too often, in legal writing, the reader must recapture the author's thought through an act of reconstruction; as we see in the following example, this sometimes happens even when the writer takes pains to identify the subject explicitly:

The subject of this appeal is from an order of the court below affirming an order of the trial court that confirmed a report of the Social Referee upholding as valid the service of process upon defendant.

If the writer had deleted the preposition "from," she might have had a grammatical sentence, but the subject would be just as difficult to find. Rule 4 commanded us to choose the real subject, and had this writer done so, the reader might have been spared the search. Instead, the sentence runs on and on, throwing false subjects at the reader and attaching needless words to those subjects.

False subject 1: "subject"; extra words: "The subject of"

False subject 2: "appeal"; extra words: "this appeal is from"

False subjects 3, 4, 5: "order," "order," "report"; extra words: everything from "affirming" to "Referee"

Shanker & Stout, P.C.

Business Valuation and Litigation Support Services

- *Employee Stock Ownership Plans*
- *Estate and Gift Tax Valuations*
- *Marital Dissolutions*
- *Other Tax Related Valuations*
- *Purchase and Sale Advisement*

*31513 Northwestern Hwy - Farmington Hills, MI 48334 (313) 932-2950
839 North Pennsylvania Avenue - Lansing, MI 48906 (517) 484-1310*

But what is the real subject of this sentence? The answer leads us, as is not uncommon, to the end of the written utterance. What starts as first in the lawyer's mind somehow winds up last on the page. Suppose the writer had kept that vital subject in mind, making it the star of the sentence, instead of a bit player?

■ *Defendant appeals an order of the court below [...] upholding as valid against it the service of process.*

I have placed the ellipsis in brackets because the sentence as rewritten with its "star" as subject probably needs no additional verbiage. (Whether the intervening decisions need reiteration is a secondary issue.) By featuring the active subject, the writer strongly enhances the sentence.

RULE 7. Do not bury the subject, but place it as close to the beginning of the sentence as possible.

§4.4 The Rest of the Sentence Follows

Some analysts of legal writing have suggested that its major fault is poor verb choice. Weak verbs constitute, without a doubt, a stumbling block to

effective writing, and I treat that problem in the next chapter. However, once the lawyer *seizes and uses* the true subject of her thought, strong verbs will follow as the night the day. In the following example of passive verb use, we can detect the writer's original error, which was one of incorrect noun choice:

□ *Moreover, in specific relation to Rule 16-a-6, not only is it required that an insider report the acquisition of a put, call, or straddle (Sec. Exch. Act Rel. No. 9499), but it is also provided that the reporting of the exercise of an option is not excused from reporting requirements.*

This 49-word sentence includes three repetitions of the verb "is" and can surely be criticized for blandness in that regard. Closer analysis reveals that both its verbosity and its weak verbs derive from a failure to seize the true subject. Fudging with the twice-used impersonal "it," the writer also tried the suffixes *-tion* and *-ing*, forming the weak nouns (see Rule 5) "acquisition" and "reporting." The latter is then repeated as an adjective. Neither "it" nor these remaining nouns track the writer's true thought patterns. What is the real subject? The SEC rulings of course,

one of which is cited almost as an afterthought in the cumbersome sentence's midstream parenthetical. Suppose the writer had moved effectively from thought to subject? Here is a possible outcome:

■ *In relation to Rule 16-a-6, the Commission requires that an insider report not only the acquisition of a put, call, or straddle (Sec. Exch. Act. Rel. No. 9499) but also the exercise of an option.*

The real subject, once seized, virtually dictates a strong verb ("requires," instead of "is") and, with a minimum of additional fine tuning, converts an overweight blob into a slim (35-word) powerhouse of information.

Colorful and precise verbs always please a reader more than bland and impersonal ones. However, with little time to pick and choose verbs, and perhaps little training in the act of writing, the legal writer can achieve strength through the more simple identification of the subject matter.

We all remember the comparisons made in elementary school such as "The dog ate the cat" with "The cat was eaten by the dog." For the professional writer, involved in seemingly more complex thoughts, the sixth-grade model stands the test of time. Compare "The Commission requires" with "It is required by the Commission," and the final sentence analyzed in this section comes again into focus, as does much of the needless bland wordiness so frequently found when lawyers write. ■

WE VALUE YOUR CLIENT

Soundly based valuations are vital to your client for:

<ul style="list-style-type: none"> <input type="checkbox"/> closely held and publicly traded businesses <input type="checkbox"/> divorce property settlements <input type="checkbox"/> ESOP feasibility studies <input type="checkbox"/> minority interest or restricted stock <input type="checkbox"/> going public or private 	<ul style="list-style-type: none"> <input type="checkbox"/> fairness opinions <input type="checkbox"/> recapitalizations <input type="checkbox"/> shareholder disputes <input type="checkbox"/> buy-sell agreements <input type="checkbox"/> leveraged buyouts
--	---

estate or gift tax filings

Properly determined damages are vital to your client in cases involving:

<ul style="list-style-type: none"> <input type="checkbox"/> patent infringement <input type="checkbox"/> wrongful discharge <input type="checkbox"/> lost profits or lost value 	<ul style="list-style-type: none"> <input type="checkbox"/> ERISA/Securities Acts violations <input type="checkbox"/> fraudulent conveyance <input type="checkbox"/> breach of contract
--	--


We've been providing litigation support for over 20 years and we've testified as experts for plaintiffs, for defendants, and for the Court. Let us serve you and your client.

Call us at (313) 528-2373



THE LEFKO GROUP
Orville B. Lefko, Director

707 E. Maple Rd., Suite 100
P.O. Box 778
Troy, MI 48099



Richard Weisberg is a professor of law at Benjamin N. Cardozo School of Law, Yeshiva University. He has just published Poethics: And Other Strategies of Law and Literature (Columbia University Press), which includes a substantial section on legal writing skills. He frequently consults with various state agencies on legislative drafting and judicial opinion writing.