PLAIN LANGUAGE

Decluttering sentences

BY MARK COONEY

After 40 years, we have published lots of columns that (in my view) are worth revisiting. Here's one, from October 2021. We'll continue to dip into the archive from time to time. —JK

At the annual seminar of the Kimble Center for Legal Drafting, I offered this tip: "Use words in your sentences." Knowing beforehand that I'd need to support this bold suggestion, I skimmed random cases, looking for cautionary examples. It took me seven minutes to find this:

> In fact, the definition of a compilation in the Act, 17 U.S.C. § 101 ("*selected*, coordinated, or arranged") (emphasis added), the commentators, see, e.g., 1 M. Nimmer, supra, § 2.04[B], at 2-41-2 ("originality involved in the *selection* and/*or* arrangement of such facts" protected literary work) (footnote omitted) (emphasis added); Denicola, supra, at 530 ("originality in plaintiff's *selection* or *choice* of data"; Denicola, however, believes that the labor in compiling facts is protected) (emphasis in original), and the cases, see, e.g., *Roy Export Co. v. Columbia Broadcasting System, Inc.*, 672 F.2d 1095, 1103 (2d Cir.), cert. denied, 459 U.S. 826, 103 S.Ct. 60, 74 L.Ed.2d 63 (1982); *Dow Jones & Co. v. Board of Trade*, 546 F.Supp. 113, 116 (S.D.N.Y.1982), suggest that selectivity in including otherwise nonprotected information can be protected expression.[1]

An easy read? Did the writer connect with you? Make a strong, clear point?

Parsing the sentence reveals a buried compound subject. The three grammatical subjects are bolded below. Also bolded, at the end, is the verb (*suggest*):

> In fact, the **definition** of a compilation in the Act, 17 U.S.C. § 101 ("*selected*, coordinated, or arranged") (emphasis added), the **commentators**, see, e.g., 1 M. Nimmer, supra, § 2.04[B], at 2-41-2 ("originality involved in the *selection* and/*or* arrangement of such facts" protected literary work) (footnote omitted) (emphasis added); Denicola, supra, at 530 ("originality in plaintiff's *selection* or *choice* of data"; Denicola, however, believes that the labor in compiling facts is protected) (emphasis in original), and the **cases**, see, e.g., *Roy Export Co. v. Columbia Broadcasting System, Inc.*, 672 F.2d 1095, 1103 (2d Cir.), cert. denied, 459 U.S. 826, 103 S.Ct. 60, 74 L.Ed.2d 63 (1982); *Dow Jones & Co. v. Board of Trade*, 546 F.Supp. 113, 116 (S.D.N.Y.1982), **suggest** that selectivity in including otherwise nonprotected information can be protected expression.

My word-counting software shows that the first subject, *definition*, is 115 words away from its verb. Experts advise lawyers to average about 20 words per sentence,[2] so this 115-word gap could easily swallow five sentences.

Yet this is misleading. There aren't truly 115 words in that gap, as my software and I would have you believe. In fact, only 11 words — meaning words that make up the core grammatical sentence — appear between the first subject and its verb.

So what's the rest?

Citations. Midsentence citations, that is, complete with parenthetical notes and other hangers-on. More than 100 items of gobbledygook are in the sentence's text, obstructing flow and obscuring

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the writer's message. Those midsentence citations inflate what's actually a 27-word sentence into a dizzying 131-"word" sentence.

This is a glaring example of a citation-choked sentence. But it's no anomaly. Again, I found it — in a U.S. Court of Appeals opinion, by the way — after just seven minutes of random reading. And legal professionals routinely encounter this sort of midsentence clutter. Even in less extreme passages, the clutter is hard on readers and counterproductive.

How can legal writers avoid the clutter?

The first possible fix is to use words in the sentence and cite after the sentence:

> In fact, the Act, cases, and commentators all suggest that copyright protection can be based on a compiler's selectivity in assembling otherwise unprotected information. [citations]

This was easier to read than the original version, I trust. And it made more of an impact. The idea was out front, accessible. Even readers who aren't fond of postsentence string citations would surely prefer this to the original. You may find this solution obvious, but my readings (and yours, I suspect) reveal that it is not universally obvious.

Another decluttering tactic is to tuck citations into footnotes:

> In fact, the Act,[1] cases,[2] and commentators[3] all suggest that copyright protection can be based on a compiler's selectivity in assembling otherwise unprotected information.

Readers who aren't fans of citational footnotes still forgive their occasional use, especially when they prevent the type of clutter that we saw in the original.

A third fix is to turn the core sentence into a topic sentence. We'd follow with three sentences that support the topic sentence's idea, and we'd cite after — and only after — each of those sentences:

> In fact, the Act, cases, and commentators all suggest that copyright protection can be based on a compiler's selectivity in assembling otherwise unprotected information. For instance, the Act's definition of *compilation* refers to "selected, coordinated, or arranged" information. 17 U.S.C. § 101. Courts have likewise acknowledged that compilers can earn copyright protection for their "skill and creativity in selecting and assembling an original arrangement" of unprotected works. *Roy Exp. Co. v. Columbia Broad. Sys., Inc.*, 672 F.2d 1095, 1103 (2d Cir. 1982), *cert. denied*, 459 U.S. 826 (1982). And a leading treatise observed that copyright protection can arise from "originality involved in the selection and/or arrangement" of information. 1 M. Nimmer, *supra*, § 2.04[B], at 2-41-2.

The fact that legal writing involves complex factual scenarios and sophisticated legal concepts does not excuse dense, cluttered prose. Just the opposite is true: legal writing's inherent complexity demands every possible strategy toward enhanced readability. One of those strategies is to shed citations from our sentences, with only occasional exceptions.

Of course, lawyers do need to make quick, clean midsentence references to cases ("but *Jones* is distinguishable") and statutes ("under § 3135"). But if a formal citation is also necessary, it can wait until after the sentence.

Statutes may pose the highest risk of midsentence clutter. Statute citations — abstract strings of abbreviations, numerals, and parentheses — are rarely easy or informative for busy readers. If you're dealing with a single act or provision, the fix is simple: prefer words. Use the statute's popular name ("the statute of limitations expires"), an act title ("the Clean Water Act prohibits"), or, for later references, a clear shorthand reference ("the Act's broad definition"; "the statute's broad definition"; "the notice provision"). Cite after the sentence if you need to.

The fix becomes more challenging when comparing or contrasting multiple statutes. In this scenario, there's a temptation to revert to midsentence citations, which can leave difficult, noisy text for readers. Here's an example from an appellate opinion:

> We see no inconsistency between Minn. Stat. § 86B.205, subd. 5(3), and Minn. Stat. § 412.221, subd. 12. Minn. Stat. § 86B.205, subd. 5, has no application here, as discussed, and Minn. Stat. § 412.221, subd. 12, unambiguously authorizes a statutory city "by ordinance [to] regulate the location, construction and use of . . . docks."[3]

My possible revision may leave you unsatisfied, but I hope to earn at least a few points for improved readability:

> We see no inconsistency between subdivision 5(3) of the surface-use statute and subdivision 12 of the special-powers statute. The surface-use provision does not apply here, as discussed. And the special-powers statute unambiguously authorizes a statutory city "by ordinance [to] regulate the location, construction and use of . . . docks." § 412.221(12).

Contriving apt shorthand references can be difficult. Check cases to see whether courts have already gravitated to an easy handle. If so, follow their lead.

Finally, try words before reflexively dipping into an "alphabet soup"[4] style. Acronyms and initialisms may seem innocuous at first, but they quickly accumulate, adding clutter to your prose. And they smack of insider jargon. Consider this passage from a litigant's trial brief:

> Because WADOE was working with EPA and the dairy industry to develop a general NPDES permit during this time, WADOE did not require dairies to apply for, nor did WADOE issue, general NPDES permits. . . . WADOE nevertheless had the ability to issue individual NPDES permits to CAFOs and WADOE's hiatus from issuing general NPDES permits did not excuse dischargers from CWA liability.[5]

A possible revision:

> Because the Department was working with the EPA and the dairy industry to develop a general permit during this time, the Department did not require dairies to apply for, nor did it issue, general permits. . . . Still, it was able to issue individual permits to feeding operations, and its hiatus from issuing general permits did not excuse dischargers from liability under the Act.

The legal profession isn't famous for reader-friendly style. That's puzzling because in this business, our reader is, by definition, a person worth impressing. After all, our reader is the judge deciding our case, a judicial clerk recommending a decision, a client paying us to write, or a boss evaluating our performance. We desperately want to connect with, and earn goodwill from, all these people.

Something as simple as using words in our sentences — free from citational noise or alphabet soup — can help us make that connection.

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ENDNOTES

1. *Eckes v Card Prices Update*, 736 F2d 859, 862–863 (CA 2, 1984).
2. Kimble, *Lifting the Fog of Legalese: Essays on Plain Language* (Durham: Carolina Academic Press, 2006), pp 71, 96.
3. *City of Waconia v Dock*, unpublished opinion of the Carver County District Court, issued June 30, 2020 (Docket No. 10-CV-17-678).
4. Scalia & Garner, *Making Your Case: The Art of Persuading Judges* (St. Paul: Thomson/West, 2008), p 120.
5. *Community Assoc for Restoration of the Environment v Bosma Dairy*, unpublished opinion of the United States District Court for the Eastern District of Washington, issued February 27, 2001 (Docket No. CY-98-3011).