

# Carefully Craft Your Sets and Subsets

By Kenneth F. Oettle

**A** topic always worth visiting is sets and subsets—categories, big and small; groups; lists. Items in a list should generally be coordinate to, not more or less inclusive than, other items in the list.

Take a statement of reasons why similar cases before the same court should be consolidated:

Consolidation is appropriate because it will encourage the orderly and expeditious adjudication of this controversy, conserve judicial resources, save witnesses' time and expense, and avoid duplicative trials.

Sounds pretty good, doesn't it? It's strong on emphasis because it uses active verbs and invokes efficiency five times (*orderly*, *expeditious*, *conserve*, *save*, and *avoid duplicative*). It also uses parallel construction well—four consecutive verbs of the same form: *encourage*, *conserve*, *save*, and *avoid*.

Parallel construction lulls readers because the good grammar disturbs no patterns and inspires confidence. (In fact, many writers have trouble creating a fluid structure for such a long sequence.) Yet the list

is not precise because the writer mixes sets and subsets, causing overlap and thus duplication. This compromises the communication, leaving the reader to puzzle it out or miss part of the message.

The first item in the sequence, the *orderly and expeditious adjudication of this controversy*, is essentially the purpose of consolidation. It is a very broad category. The next item, *conserve judicial resources*, is a subset. It is one effect of an orderly and expeditious result.

Already, the list has a problem. It begins with a set and continues with a subset without alerting the reader to the switch, as by saying *for example*. This suggests that the list is padded, as if the writer were claiming two categories while providing only one.

The next item in the sequence—saving witnesses' time and expense—is also a subset. Like the subset of saving judicial resources, it is another effect of an orderly and expeditious adjudication.

The fourth and last element in the sequence, *avoid duplicative trials*, is a subset of the second and third items in the list, *conserve judicial resources* and *save witnesses' time and expense*. Avoiding duplicative trials is one way to conserve judicial resources and save witnesses' time and expense. Thus, the fourth item is a subset of the preceding two subsets. The list does

not include saving parties' time and expense, which is an omission.

To shape up the list, we could use the broadest category as a controlling set (orderly and expeditious adjudication) and limit the list to subsets—resource-saving items. We already have two such items: *conserve judicial resources* and *save witnesses' time and expense*. We could replace *duplicative trials* with *saving time and expense for the litigants*, correcting the omission of the parties' time and expense:

Consolidation is appropriate because it will encourage the orderly and expeditious adjudication of this controversy: it will conserve judicial resources, save time and expense for witnesses, and save time and expense for the parties.

Now the set and subsets work together. The set is presented first, and the subsets follow. The reader knows which is the set and which are the subsets, and the writer does not appear to be faking sets. And because *time and expense* is duplicated, we can trim further:

Consolidation is appropriate because it will encourage the orderly and expeditious adjudication of this controversy: it will conserve judicial resources and will save time and expense for the witnesses and the parties.

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This is pretty good, but we sacrificed something to tighten the list. We gave up an example of how to save time and expense—avoid duplicative trials. Our current version of the list speaks of conserving resources but does not say how we'll do it. If we resurrect our reference to avoiding duplicative trials and add a reference to discovery, thus covering pretrial activities as well as trial, we can improve the presentation.

We can group witnesses and parties as “private” interests, create a set called “private and judicial resources,” and say that resources for both elements of this set—private and judicial—will be conserved by eliminating duplicative discovery and trial. The reformulation would read as follows:

Consolidation is appropriate because it will encourage the orderly and expeditious adjudication of this controversy: it will conserve both private and judicial resources, eliminating duplicative discovery and trials.

This reformulation of the second sentence has better pace and in some respects stronger impact. It not only states the conclusion (save resources) but also provides examples (eliminate duplicative discovery and trials). It adds balance in that the elements “private and judicial” parallel the elements of discovery (private) and trial (judicial).

One final concern. We lost our reference to the convenience of witnesses. A court may be sympathetic to third-party witnesses drawn into a fight not of their making. By moving the elimination of duplicative discovery and trials to the beginning of the second sentence, we have a solution:

Consolidation is appropriate because it will encourage the orderly and expeditious adjudication of this controversy. Eliminating duplicative discovery and trials will conserve both private and judicial resources, reducing the burden on the parties, on third-party witnesses, and on the court.

Reduced burden is a function of (a consequence of) resources being conserved. By adding the concept of burden to the

concept of conservation, we can add back the witnesses.

Much work goes into reformulating sets and subsets to find the optimum way to articulate what is essentially the same group of related facts. We consider the scope of the sets and subsets; the grammatical flow, including, among other things, parallel construction; the sound, including assonance (successive vowels) and alliteration (successive consonants); and the placement of words for impact.

In a consolidation motion, the court probably knows the arguments by heart, so the main virtue of coordinating sets and subsets is defensive—to avoid sending the signal that you fake your sets and thus may fake other things, or that you just don't think things through. You get some offensive credit as well because the reader will instinctively respect a rigorous treatment of sets and subsets.

Close editing like this is a fascinating and sometimes frustrating puzzle. Many writers consider the puzzle solved when they have rattled off several items that seem to relate reasonably well. Some writers don't notice alternatives; others don't care. Readers care, though they sometimes don't realize it.

Few attorneys who review draft briefs challenge a list. At most, a writer might be told, “I think the point could have been a little tighter.” Then the dedicated writer will go back to the drawing board to see what could have been tighter. Often, it's the list. ■

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