THE WRITER'S GOLDEN RULE

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In our last Writing Tips column, we explained what might be called the principle of "Focus in Writing": You can shape how readers understand your story by placing different characters in the focus position of each sentence in a sequence of sentences or clauses.

Compare these:

1a. Hillary Clinton prepared the document used by Susan McDougal to obtain illegal loans in the Whitewater matter. The First Lady ...

1b. Susan McDougal used a document prepared by Hillary Clinton to obtain illegal loans in the Whitewater matter. Ms. McDougal ...

Which sentences would the Clintons prefer to see as the lead in a Washington Post story?

Here's how the principle works: Sentences tell stories. When you put one character in the focus position (usually but not always as the subject), you make that character the focus of your story, at least for that moment. When you put a character in the focus position of a series of sentences or clauses, you put a continuing spotlight on that character so that he or she emerges as the main character for that episode of the story.

In our last column we showed how this principle works when you write as an advocate. We excerpted passages from Statements of Facts in two briefs concerning an appeal from a judgment of false arrest (it was an actual case in an exercise done by more than 200 lawyers for an ABA institute). The officers based their appeal on a claim of qualified immunity, the standard for which focuses on what a reasonable officer might have perceived and done in a similar situation. Both briefs represent the appellant officers.

2a. On the evening of September 13, 1995, Maurice Turner and Doak Walker, both black, in their mid-twenties, and residents of Canton, attended a football game between Austintown High School and Canton McKinley High School. Turner's mother also attended the game, but they did not sit together and agreed to meet at the McDonald's in Austintown after the game. Canton McKinley won the game.

After the game, Walker and Turner drove to McDonald's to meet Turner's mother. As he and Turner drove to the restaurant, Walker, along with other McKinley fans, was honking his car horn. As they drove into the restaurant parking lot, they saw several hundred teenagers milling about.

As he was parking his car, Walker was approached by Austintown Officer James Sheridan, who told him to stop blowing his horn and to park between the lines. Walker complied. As Walker got out of the car to go into the restaurant, the crowd started to surround his car. Turner waited in the car. Walker walked to the restaurant, but decided that the lines were too long and returned to his car. To reach his car, he had to push his way through the milling crowd.

2b. This action arises from an incident on the evening of September 13, 1995, involving a large crowd and two men in their mid-twenties, Maurice Walker and Doak Turner, who were to meet Turner's mother at a McDonald's restaurant in Austintown, Ohio. The incident followed a high school football game in which Canton McKinley defeated Austintown.

Austintown police officers James Sheridan and Richard Schaeffer were working a detail at the McDonald's restaurant parking lots. At about 10:25 p.m., Officer Schaeffer was in the rear parking lot, and Officer Sheridan was in the front lot. Sheridan observed a car pull into the lot with two black men in the front seat. Walker was driving. Walker acknowledges blowing his car horn repeatedly as he entered the parking lot. Officer Sheridan
told Walker to stop blowing the horn and to park between the lines of the parking space, which he did.

When we have asked judges, lawyers, and others to report what they remembered after reading one of the passages from which these excerpts were taken, we found systematic differences in how readers understood them. We can summarize those differences in three predictions about how most readers read. When a writer spotlights a main character by putting that character in the focus position of most of its sentences and clauses, readers respond as follows:

- They tend to see the story from the point of view of the main character. This means, among other things, that they understand events in terms of the values they associate with that character.
- They tend to remember more details relevant to the main character than those relevant to minor characters.
- They tend to see the main character as more central to the action than other characters. In many cases, they will judge the main character to be most responsible for what happens.

When you write as an advocate, you face a choice: Do you best serve the interests of your cause by focusing on only one of the characters in your story? On different characters at different points in your argument? On no one character? There are no rules for choosing: you have to consider what kind of story you have to tell, who the players are, and who does the judging. The choice is seldom obvious and can often tax your best skills as a legal tactician.

But what about those instances when you write not to advocate a position but to convey information? In those cases, you have to select a focus not to serve the interests of your cause but to serve the interests of your reader. Now the question is, which focus will help your readers best?

Consider the following paragraph. It is the major part of a letter to a client, a banker who is having trouble with foreclosures on loans for boats and mobile homes. This particular text was the product of six lawyers working together to give focus to a draft presented in a tutorial session:

3. Both the Unruh Act and the mobile home statutes contain anti-deficiency provisions. If either of these statutes applies, it will bar the Bank from obtaining a deficiency judgment, regardless of who purchases at the repossession sale. The Unruh Act applies if the underlying transaction is a retail installment contract involving consumer goods (i.e., goods purchased primarily for personal, family, or household purposes) (Civil Code §1812.5). Thus, the Unruh Act will prevent the Bank from obtaining a deficiency judgment against the obligor on the contract if the contracts are Unruh contracts purchased from dealers. However, the Unruh Act will not apply if the underlying transaction is a direct loan from the Bank to the borrower, and the proceeds are then used to buy consumer goods. In that case, the Bank is free to seek a deficiency judgment (Civil Code §1801.6). In addition to the anti-deficiency provision in the Unruh Act, the mobile home statutes of the Health & Safety Code will prohibit deficiency judgments in some instances following a repossession sale of a mobile home (Health & Safety Code §18038.7). However, the anti-deficiency provision of the mobile home statutes does not apply (i) if the mobile home has been substantially damaged other than normal wear and tear or (ii) if the underlying transaction was a direct loan from the Bank rather than a direct purchase of an installment contract from a dealer.

The writers gave this passage a strong focus. If we underline the first six words in each sentence or clause, we can see that

- the passage consistently focuses on two main characters (the Unruh Act and the mobile home statutes) and
- each sentence begins with a character and its action as the subject and verb.²

This might lead us to predict that the passage will be clear, flowing, and focused. But when we ask people to read it, those who are not lawyers find it dense, legalistic, impersonal, and often irritating, a judgment that they predictably extend to the writer. When we ask them what a banker is supposed to do, they rarely get it right.

² For further discussion of the principle of making characters the subjects of verbs and making the verbs specific actions, see Joseph M. Williams & Gregory G. Colomb, Telling Clear Stories: A Principle of Revision That Demands a Good Character. Perspectives: Teaching Legal Research and Writing 14 (1996).
The Unruh Act passage is a classic example of tribal writing. Like most professionals, lawyers belong to a knowledge tribe. They identify themselves as members of that tribe by their tribal knowledge, language, genres, canons of argument and evidence, and even habits of mind. So it was perhaps inevitable when six lawyers wrote together, they focused on the law—a tribal character that offers what most lawyers think is the “natural” way to think about the problem, but that baffles and irritates most clients. It baffles them because they do not understand their problems in terms of legal provisions. It irritates them because it forces them to understand the problem not in their “home territory” but in yours, a point of view that feels to them alien and alienating.

Once you recognize the effects of tribal writing, you can easily test it against the golden rule: Does it help or hurt readers? For most clients and other nonlawyers, when you focus your writing on the law and other tribal characters,

- you highlight their ignorance by building your story around characters they don’t know instead of ones they do;
- you implicitly demand that they think as you do, rather than doing the work of putting things in ways that suit their habits of mind; and
- you burden their memory, since it is harder to organize information in terms of new and unfamiliar categories.

The conclusion seems obvious: You help readers not trained in the law far more when you avoid tribal characters and instead focus on those characters they know best. (You might, for example, try rewriting so that it focuses on the bank rather than the law, by putting the bank into the focus position at the beginning of as many sentences as possible.)

But what about readers trained in the law? For these readers, we have to apply the principle in more varied ways, but the question remains the same: Which focus most helps your reader? If your lawyer-readers deal with many such cases and want a general account, you probably serve them best by focusing on the law. But if they are new to the question of deficiency provisions in light of the Unruh Act, you help them more by focusing on the bank. (In our experience, writers usually overestimate how familiar readers are with a topic.) And if they have to pass your information on to clients, you help them by giving it to them with the focus that their clients need.

Finally, whenever you give instructions, focus those instructions on the person who has to carry them out. Here, for example is some tax advice:

4a. The primary reason for changing domiciles to Florida is the favorable tax structure that exists there. There is not an individual state income tax as that is specifically prohibited under the Florida Constitution. Instead, a tax is levied on intangible personal property, wherever that property is located. Intangible personal property is defined for these purposes as all personal property that is not in itself intrinsically valuable, but which derives its value from that which it represents. This includes (but is not limited to) stocks, mutual fund shares, notes, bonds, and other obligations for the payment of money and certain leases of property. For taxation purposes intangible personal property is divided into two general classes. The first includes all notes, bonds, and other obligations for the payment of money, which are secured by a mortgage or other lien on Florida real estate. This class of intangibles is subject to a one-time tax of 2 percent of the value of the intangible property, payable generally within 30 days following the creation of the obligation. The second, and more common class includes all other intangible personal property, except exempt property. This class of intangibles is subject to an annual tax of up to 1.5 percent of the value of the property. The first $20,000 of property owned is exempted, and the next $80,000 is subject to a tax of 1 percent of value of property owned. Value in each case is determined as of January 1 of the year. An intangible tax return for that year must be filed by June 30. Modest discounts are allowed if the tax is paid early. Double the application exemption is available to husband and wife filing a joint return and claim.

You can do a quick analysis by looking at the first six or seven words of every sentence or clause. The story told in 4a is about intangible property, values, discounts, and other terms of law. While some clients might enjoy a story about Florida tax law, most are better able to follow instructions when the instructions tell them a story about themselves and what they are supposed to do. If we revise that story to focus it on the client-reader by putting him or her into the focus position of as many sentences as possible, the result is more reader-friendly:
4b. Some people move to Florida because it has a better tax structure than Illinois. You won't pay state income tax there, because its constitution prohibits it. Instead, you pay a tax only on your intangible property. Florida defines intangible property as anything you own that has no intrinsic value, but that represents a value, no matter where that property is located. You would thus pay an intangible property tax on your stocks, mutual fund shares, notes, bonds, certain leases of property, and anything else that obligates another party to pay you money.

You would divide this intangible property into two kinds.

- The first is all your notes, bonds, and mortgages on property in Florida. On this kind of property, you pay a one-time tax of 2 percent on its value within 30 days after you create the obligation.

- The second kind of intangible property is more common: It includes all other personal property, except exempt property. On this property you exempt the first $20,000, then pay an annual tax of up to 1 percent on the next $80,000. Then you would pay 1.5 percent on everything over that.

You must set the value of the property by January 1 of each year and file a return by June 30. If you and your spouse file a joint return, you can double these exemptions. And you can take a modest discount if you pay the tax early.

Having been on the receiving end of a good deal of tax advice over our lifetimes, your two authors can say that 4b is for us much clearer and more compelling—even though we have read far more tax law than your average client.

But here is a point that no lawyer should trivialize. We also get from the revised version a picture of the person who wrote it that is quite different from the picture we get from the original. The first was written by someone who seems to care more about the law than about the reader. The second was written by someone who cares about the reader as much as the law. By no means do we denigrate the importance of the law. Our point is how clients feel after getting a letter like that first one. The judgments they make about what they read are judgments they extend to those who write it.

The first principle of writing effective legal prose is to get it right. But the second is to follow the golden rule that your writing has to help readers understand what they need to know. Or, in words you may remember: Write to Others As You Would Have Others Write to You.

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