

Sentences That Do Too Much

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The example below is from the second half — the second half, mind you — of a lovely 286-word sentence. I have used boldface numbers to help map out the structure.

[1] and upon any such declaration of acceleration or dissolution or winding up or liquidation or reorganization, [2] any distribution of assets of the Obligor of any kind or character, whether in cash, property or securities, to which the holders of Junior Indebtedness would be entitled except for the provisions hereof, [3] shall be paid by the Obligor or by any receiver, trustee in bankruptcy, liquidating trustee, agent or other person making such payment or distribution, or by the holders of Junior Indebtedness if received by them, [4] directly to the holders of the Superior Indebtedness of the Obligor (pro rata to each such holder on the basis of the respective amounts of such Superior Indebtedness held by such holder), or their representatives to the extent necessary to pay all such Superior Indebtedness in full, in money, after giving effect to any concurrent prepayment or distribution to or for the benefit of the holders of such Superior Indebtedness, [5] before any payment or distribution is made to the holders of Junior Indebtedness.

The first thing to note is that the drafter obviously should have started a new sentence with *upon any such declaration*. That would have created two minimonsters instead of one megamonster.

At any rate, here is an outline of our example's structure:

[1] and upon any such declaration of acceleration or distribution . . .
[2] any distribution of assets of the Obligor . . . [3] shall be paid . . .
[4] directly to the holders of the Superior Indebtedness . . . [5] before any . . . distribution is made to . . .

This wouldn't be impossibly complicated were it not for the 35 words between [3] and [4] and the 70 words between [4] and [5]. The reader is overwhelmed by verbiage well before he or she can discern the logical structure. How much better the world would be if the half-sentence read as follows:

[1] and upon any such declaration of acceleration or dissolution or winding up or liquidation or reorganization, [2] any distribution of assets of the Obligor ~~of any kind or character, whether in cash, property or securities, to which the holders of Junior Indebtedness would be entitled except for the provisions hereof,~~ [3] shall be paid by the Obligor ~~or by any receiver, trustee in bankruptcy, liquidating trustee, agent or other person making such payment or distribution, or by the holders of Junior Indebtedness if received by them;~~ [4] directly to the holders of the Superior Indebtedness of the Obligor ~~(pro rata to each such holder on the basis of the respective amounts of such Superior Indebtedness held by such holder), or their representatives to the extent necessary to pay all such Superior Indebtedness in full, in money, after giving effect to any concurrent prepayment or distribution to or for the benefit of the holders of such Superior Indebtedness;~~ [5] before any payment or distribution is made to the holders of Junior Indebtedness.

Without blackline or numbering:

and upon any such declaration of acceleration or dissolution or winding up or liquidation or reorganization, any distribution of assets of the Obligor shall be paid by the Obligor directly to the holders of the Superior Indebtedness to the extent necessary to pay all such Superior Indebtedness in full before any payment or distribution is made to the holders of Junior Indebtedness.

Not the clearest provision ever penned but substantially less fog-bound at 61 words than its 167-word progenitor. And, of course, nothing will be lost because we'll add a new sentence that reads:

In the preceding sentence,

- a “distribution of assets of the Obligor” means a distribution of assets of any kind or character, whether in cash, property, or securities, to which the holders of the Junior Indebtedness would be entitled except for this agreement; and
- “paid by the Obligor” means

The trick is to slim down by transferring most of the bulk to a second sentence. We trade an incomprehensible half-sentence for one and a half comprehensible ones. The overall document is a bit longer unless we can use one of those definitions again, thus shortening the overall document.

Our second trick deserves more study. Note that the added sentence doesn’t define any new terms. Readers understand “distribution of assets [of the Obligor]” without more; the added sentence states only what most readers would have naturally understood the phrase to mean. It’s a bit of legal hyperfastidiousness. So our second trick can be stated like this: if you must explain at length what most people know, do it somewhere else.

For example, what’s wrong with the following sentence?

If the Company registers any shares of its common stock under the Securities Act of 1933, or any successor statute, or the regulations promulgated by the Securities and Exchange Commission (or any successor body) thereunder, as then in effect, the Stockholder may, in its sole discretion, at any time and from time to time, request the Company to register not less than 250,000 of the Shares under such Act, and the Company shall promptly comply with each such request.

From one point of view, nothing is wrong. The drafter has identified and resolved two potential ambiguities. First, the sentence makes it clear that registration is not limited to the Securities Act as currently in effect. Second, the drafter has removed any implication that the stockholder's registration rights are a one-time-only affair or that the Company has any right to object to a request.

Wait a minute. The drafter has removed the specified ambiguities but has also given the sentence a bad case of the meanders. Consider how much clearer the sentence was before our careful drafter decided to quadruple its comma allotment:

If the Company registers any shares of its common stock under the Securities Act of 1933, ~~or any successor statute, or the regulations promulgated by the Securities and Exchange Commission (or any successor body) thereunder, as then in effect,~~ the Stockholder may, ~~in its sole discretion, at any time and from time to time,~~ request the Company to register not less than 250,000 of the Shares under such Act, and the Company shall promptly comply with each such request.

Without blackline:

If the Company registers any shares of its common stock under the Securities Act of 1933, the Stockholder may request the Company to register not less than 250,000 of the Shares under such Act, and the Company shall promptly comply with each such request.

Lawyers often say that each sentence should be susceptible of only one interpretation. One imagines a judge years hence giving the longer sentence a careful reading and concluding that the stockholder may request a second registration under the rules promulgated by the Securities and Commodities Commission under the Financial Instruments Act of 2017. Surely the right result,

but should every intervening reader suffer through the longer sentence when a judicial misreading is so unlikely? Most sentences aren't litigated, and a judge would probably do as well with the shorter sentence as the longer. Moreover, we can give our judge all the help he or she needs without turning every sentence into a maze.

The flaw in the longer sentence's approach is that it tries to handle all possible ambiguities within the sentence itself. But the sentence is part of a document; therefore, ambiguities can be resolved elsewhere. For example, suppose our judge could refer to a section near the end of the document that reads as follows:

In this agreement, unless otherwise stated or the context otherwise requires, the following usages apply:

- An action permitted under this agreement may be taken at any time and from time to time in the actor's sole discretion.
- A reference to a statute refers to the statute and any successor statute, and to all regulations promulgated under or implementing the statute or successor, as in effect at the relevant time.

You can imagine other provisions for this section that could help clear the undergrowth of legal prose, and I'll offer some additional provisions shortly. First, however, a general principle: if a reader will normally understand a simple sentence a certain way, or if a reader is unlikely to think of a set of complications that are in fact unlikely, the drafter can leave the sentence alone or tuck the precise explanation in the back. If, however, the reader is likely to take the wrong track in a dual-meaning sentence or is likely to ignore a real and present possibility, then the point should be addressed in the sentence or in the immediate vicinity.

A legal document should teach a reader how a transaction works. The best teaching follows the order of importance: first outline and structure, then details, beginning with the most relevant. Documents should flow in the same way — make the general structure clear, then explain the details that people are likely to get wrong, and lastly confirm the details that people usually get right.

It's easier to say than do, but let's at least do the simple part — put the unimportant stuff at the end. Here, for example, are a few more usages you can add at the end of the document:

- In computing a period from a specified date to a later specified date, the words “from” and “commencing on” (and the like) mean “from and including,” and the words “to,” “until,” and “ending on” (and the like) mean “to but excluding.”
- A reference to a governmental or quasi-governmental agency, authority, or instrumentality also refers to a regulatory body that succeeds to the functions of the agency, authority, or instrumentality.
- An indication of time of day means [pick the time zone where most of your readers are] time.
- “A or B” means “A or B or both.”
- “Including” means “including but not limited to.”

Our tricks are just applications of a basic rule: make the sentence structure clear. It's not just length that's at fault in our examples; it's length that obscures structure. A thousand crisply worded sentences do not raise the dust of a hundred convoluted ones. I've never read a legal document as long as *The Red and the Black*, but Stendhal is comprehensible, whereas Messrs. Dewey, Cheatham & Howe are obscure.

If we make the structure of sentences, paragraphs, and documents readily apparent, our readers will have a framework on which all those words can hang. Nothing we draft will be as memorable as Stendhal, but at least we'll give our readers documents they can understand. Who knows — we might save them time enough to take up *The Charterhouse of Parma*.

