

Courtspeak

Rhetorical Effects of Our Grammatical Choices



Courtspeak

Writing in the Voice of the Court

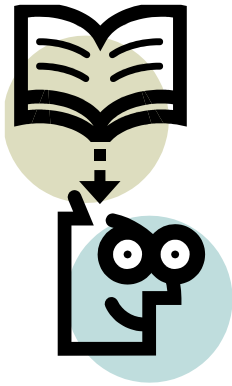
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Three Editing Levels

1. Correcting errors
2. Choosing between options based on audience and consistency
3. Choosing between options based on rhetorical effect

Sentence Lifts





1. Moreover, Mr. Stevens' counsel's readiness at trial to discuss the time periods relevant to statutory and common law adverse possession, as well as prescriptive easement, and to quote our Supreme Court's decision in *Cumulus*, 226 S.W.3d 366, demonstrate that counsel was aware of the potential defense and, in fact, engaged in a counter-defense without raising an objection.

Mr. Stevens's s counsel's readiness

Generally, the possessive form of a proper noun (name) ending in “s” is the full name plus an apostrophe and another “s.”

Except when:

- The name is Biblical or Classical (“Jesus’ name” or “Oedipus’ crown”)
- The name was formed from a plural noun (“General Motors’ reputation” or “United States’ foreign aid”)
- The name is a place or organization but refers to a single entity (“United States’ foreign aid”)
- The name ends in a syllable pronounced “eez” (“Sophocles’ poetry”)

OR . . .

You are writing under the guidelines of the Associated Press (“AP”), which would recommend:

Mr. Stevens’ counsel’s readiness



The STEVENSES' counsel's readiness

- Plural Possessive (Mr. and Mrs. Stevens)
 - The Stevens' House



Moreover, Mr. Stevens's counsel's readiness at trial to discuss the time periods relevant to statutory and common law adverse possession, as well as prescriptive easement, and to quote our Supreme Court's decision in *Cumulus*, 226 S.W.3d 366, demonstrates that counsel was aware of the potential defense and, in fact, engaged in a counter-defense without raising an objection.

Which noun is the subject?

(singular-plural disagreement)

Singular or Plural Subject? Does the main verb agree?

2. Each of these orders or pleadings bear certificates of service demonstrating that copies were sent via the United States Postal Service.

Each of these orders or pleadings

- ▶ Here, “each,” used as an indefinite pronoun, is the subject of the sentence and is followed by a prepositional phrase (“of these orders or pleadings). As the subject of the sentence, “each” is singular and takes a singular verb. Notice that the singular form then needs to follow through the remainder of the sentence:
- ▶ **Each of these orders or pleadings bears a certificate of service demonstrating that a copy was sent via the United States Postal Service.**

3. The Tennessee Supreme Court has held that a Memphis food-service employee may not file a lawsuit against her employer for distributing tips in a way that violates Tennessee's tip statute, because the law does not allow a private party to file suit for a violation. *See Hardy v. Tournament Players Club at Southwind, Inc.*, 513 S.W.3d 427, 429-30 (Tenn. 2017).

“Because”

The Tennessee Supreme Court has held that a Memphis food-service employee may not file a lawsuit against her employer for distributing tips in a way that violates Tennessee’s tip statute because the law does not allow a private party to file suit for a violation.

When a sentence ends with a dependent clause (one that cannot stand on its own), no comma should be placed before a subordinating conjunction that begins the closing dependent clause. In the example, “because” is a subordinating conjunction that begins the closing dependent clause.

Other common subordinating conjunctions include when, after, before, since, until, while, if, although, unless, provided that, as, whereas, as if

4. The father has appealed, asserting, among other things, that the trial court erred by finding that the child had resided with the mother for 205 days per year during the time period of June 1, 2013, through May 31, 2017, because the child resided with the mother's stepmother on weekdays while attending high school.

Punctuating Dates

The father has appealed, asserting, among other things, that the trial court erred by finding that the child had resided with the mother for 205 days per year during the time period of June 1, 2013, through May 31, 2017, because the child resided with the mother’s stepmother on weekdays while attending high school.

The comma before “because” is correct in this example because the comma is needed to set off the year, 2017, in a complete date.

5. Trespass, assault, and other torts were alleged.

Passive v. Active Voice

The plaintiffs alleged trespass, assault, and other torts.

[passive voice edited to active voice]

Passive voice eliminates the agent of the action (the one doing the action) from the subject position, sometimes placing the agent in a prepositional phrase (“Trespass, assault, and other torts were alleged by the plaintiffs.”) but more often leaving out the agent of the action entirely.

Usefulness of Passive Voice

- To place emphasis on the direct object of the sentence, often used when connecting to a preceding passage that explained the direct object (“Trespass assault, and other torts were added by the plaintiffs in their amended complaint.”).
- To mask the agent in the sentence (“committee speak”) or to emphasize the action when the agent is unknown (“Various acts of trespass were allegedly witnessed by several neighbors.”).

Problems with Passive Voice

Who is performing the action? Misuse or overuse of passive voice creates a sense of vagueness, lack of direct ownership of the action, and distance from the reader.



6. Father testified, however, that no visitation was offered to him on weekends.

“However” Options

As a conjunctive adverb, “however” (like “therefore,” “moreover,” and “similarly,” to name a few examples) functions as a transition and can be placed within the sentence using paired commas (parenthetical), at the beginning of a sentence with one comma following it (introductory), or at the beginning of the second clause in a compound sentence (joining two independent clauses with a semi-colon and then functioning in its introductory capacity).

- **Father testified, however, that no visitation was offered to him on weekends.**
- **However, Father testified that no visitation was offered to him on weekends.**
- **The DCS case manager testified that Father failed to appear for scheduled weekend visits with the Child; however, Father testified that no visitation was offered to him on weekends.**

7. The defendant also filed a motion for summary judgment, averring that because the corporation never transferred the shares of capital stock to the plaintiff on the vesting date, the plaintiff's cause of action accrued in 1999, rendering the plaintiff's present action time-barred by the applicable statute of limitations.

Hyphen Use

The defendant also filed a motion for summary judgment, averring that because the corporation never transferred the shares of capital stock to the plaintiff on the vesting date, the plaintiff’s cause of action accrued in 1999, rendering the plaintiff’s present action time barred by the applicable statute of limitations. ????

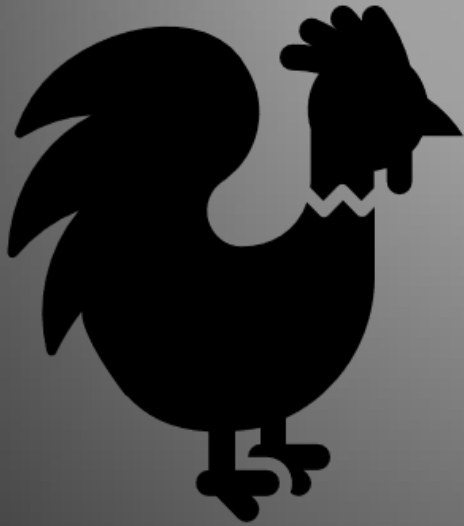
In the example, “action” is a noun followed by its description, “time barred,” meaning that by the general rule, the description would not require a hyphen. However, the phrase is hyphenated in Tennessee state appellate opinions more often than not. What choice do we make?

General Rule: Use a hyphen to join two or more words that describe a noun they are preceding.

A hyphen should not be used to join words in the following:

- an accepted compound noun (“child support”)
- noun followed by its description (“the brief is well written”)
- adverb ending in “ly” and verb combining to describe a noun (“newly acquired property”)

There is a man eating chicken.



- ▶ How does a hyphen change the meaning?

8. Father testified that he did not visit the Child between February 20, 2018 and late November 2019 due to the visitation fee.

Punctuating Dates

Father testified that he did not visit the Child between February 20, 2018, and late November 2019 due to the visitation fee.

General Rule: Use a comma to set off the year in a complete date (also to set off a state when naming a city and state).

EXCEPT

Complete Date as Adjectival

The adjectival function of complete dates is somewhat unique to legal writing because it can be avoided in most other types of writing. Bryan Garner, in *The Redbook: A Manual on Legal Style*, recommends eliminating the comma after the year if the date is used as an adjective because the comma interrupts the flow between the date/adjective and the noun it is modifying. Although not all style manuals agree or even mention the possibility of omitting the comma after the year in a complete date functioning as an adjective, the practice has become accepted in legal writing.

Example:

“The February 20, 2013 visit was Father’s last one with the Child.”

But, if Father visited the Child only once in February 2013, consider instead:

“The February 2013 visit was Father’s last one with the Child.”

9. Although the plaintiff acknowledges that the defendant was not the decedent's treating physician, it is asserted that a special relationship arose because of the personal relationship between the defendant and the decedent.

Who is asserting?

Although the plaintiff acknowledges that the defendant was not the decedent's treating physician, the plaintiff asserts that a special relationship arose because of the personal relationship between the defendant and the decedent.

Misuse or overuse of passive voice creates a sense of vagueness, lack of direct ownership of action, and distance from the reader.

10. In no event shall the youngest child's parenting time be effected.

Generally: affect=verb; effect=noun

Except

“Effect” as a Verb

In the rare instances when “effect” is used as a verb, it means to achieve or bring about.

Example:

“The modification to the permanent parenting plan order effected the decrease in Mother’s residential co-parenting time.”

“Affect” as a Noun

In the rare instances when “affect” is used as a noun, it is a psychological term for an emotional state.

Example:

“Mother exhibited a depressed affect upon learning that her residential co-parenting time had been decreased.”

11. The Child's bond with his foster family, coupled with Father's persistent housing and substance abuse issues and Father's incarceration at the time of trial, support the trial court's conclusions that termination of Father's parental rights was in the Child's best interest.

Which noun is the subject?

The Child's bond with his foster family, coupled with Father's persistent housing and substance abuse and Father's incarceration at the time of trial, supports the trial court's conclusion that termination of Father's parental rights was in the Child's best interest.



Rhetorical Note: When it becomes difficult to discern which noun is the subject, the subject may well be too far away from the verb for the reader to understand the sentence without backtracking.

12. The court found that Mr. Jones did not exercise the power of attorney to make any changes to the ownership status of the checking account and that therefore, no presumption of undue influence was created as to that account.

WHAT CLAUSES DO WE HAVE IN THIS SENTENCE?

- **The court found**
- **that Mr. Jones did not exercise the power of attorney to make any changes to the ownership status of the checking account**

[and]

- **that therefore, no presumption of undue influence was created as to that account.**



Parsing the Sentence

- The court found
(subject) (verb)

- that Mr. Jones did not exercise the power of attorney to make any changes
(nominalizer) (subject) (verb phrase) (direct object) (infinitive phrase)
to the ownership status of the checking account.
(prepositional phrase) (prepositional phrase)

and
(coordinating conjunction)

- that therefore, no presumption of undue influence was created
(nominalizer) (conjunctive adverb) (passive subject) (prepositional phrase) (verb phrase)
as to that account.
(prepositional phrase with “that” functioning as determiner)

NOMINAL “THAT” CLAUSE

A nominal clause functions as a noun. When we use a nominal “that” clause as in the example, we take a complete sentence and use it as a direct object in another sentence. In the example, we have two nominal clauses functioning as direct objects of the original subject and verb (i.e., two things the court found).

- The overall sentence structure is: subject—verb—direct object—
coordinating conjunction—direct object.
- A similar structure would be:
- Plaintiff’s counsel filed the motion and the affidavit.
(subject) (verb) (direct object) (coor. conj.) (direct object)

Would you punctuate the following sentence as:


“Plaintiff’s counsel filed the motion, and the affidavit.”

No, a coordinating conjunction joining two items does not take a comma.

For the same reason, no comma should be inserted between two “that” nominal clauses.

Is a comma needed before “therefore” in the original example?

The court found that Mr. Jones did not exercise the power of attorney to make any changes to the ownership status of the checking account and that therefore, no presumption of undue influence was created as to that account.




13. The trial court noted that if Ms. Jones was seeking “redress for the underlying convictions,” she could petition for habeas corpus relief.

Subjunctive Hypothetical

The trial court noted that if Ms. Jones were seeking “redress for the underlying convictions,” she could petition for habeas corpus relief.

When we signal a hypothetical situation in a sentence, we are using the subjunctive mood of a verb phrase. The past subjunctive form, which is actually used to signal a future hypothetical, consists of “were” plus the past participle (in the example, “were removed”). Even though the subject is singular, “was removed” would be incorrect to signal the hypothetical possibility of the allegation’s removal.



14. The trial court in its memorandum opinion relied on the amended version of Tennessee Code Annotated § 35-1-113(g)(9)(A) which became effective on March 23, 2016. *See* 2016 Tenn. Pub. Acts, Ch. 636 § 5 (S.B. 2531).

Restrictive and Nonrestrictive Clauses

The trial court in its memorandum opinion relied on the amended version of Tennessee Code Annotated § 35-1-113(g)(9)(A), which became effective on March 23, 2016. *See* 2016 Tenn. Pub. Acts, Ch. 636 § 5 (S.B. 2531).

General Rule:

“that” is used for a restrictive relative clause, and “which,” with a comma preceding it, is used for a non-restrictive relative clause.



Punctuation Note:

A non-restrictive relative clause adds information not integral to its antecedent and should be punctuated outside the main sentence structure.

15. Father contends that the trial court erred by modifying the permanent parenting plan (1) without making a specific finding that a material change in circumstance affecting the Child had occurred, (2) without properly weighing the statutory best interest factors contained in Tennessee Code Annotated § 36-6-106, and (3) without an assessment of the statutory limiting factors on co-parenting time provided in Tennessee Code Annotated § 36-4-406.

Parallelism Options

Repeated preposition, “without”

Father contends that the trial court erred by modifying the permanent parenting plan (1) without making a specific finding that a material change in circumstance affecting the Child had occurred, (2) without properly weighing the statutory best interest factors contained in Tennessee Code Annotated § 36-6-106, and (3) without assessing the statutory limiting factors on co-parenting time provided in Tennessee Code Annotated § 36-4-406.

One preposition, “without”

Father contends that the trial court erred by modifying the permanent parenting plan without (1) making a specific finding that a material change in circumstance affecting the Child had occurred, (2) properly weighing the statutory best interest factors contained in Tennessee Code Annotated § 36-6-106, and (3) assessing the statutory limiting factors on co-parenting time provided in Tennessee Code Annotated § 36-4-406.



Parallel Structure

Parallel Structure, or Parallelism, refers to the structural concept of maintaining coordinate structures in a sentence in the same form.

Father contends that the trial court erred by modifying the permanent parenting plan (1) without making a specific finding that a material change in circumstance affecting the Child had occurred, (2) without properly weighing the statutory best interest factors contained in Tennessee Code Annotated § 36-6-106, and (3) without assessing the statutory limiting factors on co-parenting time provided in Tennessee Code Annotated § 36-4-406.

In the example, the gerunds (progressive or “ing” verbs functioning as nouns) are “making,” “weighing,” and “assessing”—all are objects of the preposition, “without.”

15. *See* Tenn. Code Ann. § 55-8-136 (2020) (requiring exercise of due care).

Proofreading!!!



16. While the plaintiff was walking from her vehicle to the building, she tripped on a buckled area of the asphalt surface that was the same color as the rest of the parking lot and was severely injured.

Who or what was injured?

While the plaintiff was walking from her vehicle to the building, she tripped on a buckled area of the asphalt surface that was the same color as the rest of the parking lot and was severely injured.

Misplaced Modifier:

“that” begins a relative clause, giving us a description of “the asphalt surface.” However, “that” also leads the reader to “was severely injured.” How could the phrase, “was severely injured” be moved to modify “she”?

17. This Court explained that a “jurisdictional pleading,” such as a complaint or notice of appeal, that was not properly signed pursuant to Tennessee Rule of Civil Procedure 11.01 was a nullity and could not serve to toll the expiration of the jurisdictional time limitation. *See Beard v. Branson*, No. M2014-01770-COA-R3-CV, 2016 WL 1705290, at *1 (Tenn. Ct. App. Apr. 26, 2016) (op. on reh’g).

Restrictive and Nonrestrictive Clauses

- A clause is restrictive if only the items to which the relative pronoun refers are included in the description or definition of the clause.
- Use “that” for a restrictive relative clause, and “which,” with a comma preceding it, for a nonrestrictive relative clause.

Here is the sentence lift again:

This Court explained that a “jurisdictional pleading,” such as a complaint or notice of appeal, that was not properly signed pursuant to Tennessee Rule of Civil Procedure 11.01 was a nullity and could not serve to toll the expiration of the jurisdictional time limitation.

Correct or incorrect?

18. Restrictive or Nonrestrictive?

- During the first day of trial that was a Friday, the guardian *ad litem* announced in open court the Child's request that she be allowed to speak with the trial court judge in private.
 - During the first day of trial, which was a Friday, the guardian *ad litem* announced in open court the Child's request that she be allowed to speak with the trial court judge in private.
- ♪ Rhetorical Note: How is the emphasis on Friday affected in these examples?

19. Pursuant to Tennessee Rule of Appellate Procedure 13(b), and based on the jurisdictional question acknowledged by the appellees, this Court reviewed the record for this appeal after briefing was complete to determine whether subject matter jurisdiction existed to hear this appeal.

No Punctuation Needed Between Coordinate Pairs

Pursuant to Tennessee Rule of Appellate Procedure 13(b) and based on the jurisdictional question acknowledged by the appellees, this Court reviewed the record for this appeal after briefing was complete to determine whether subject matter jurisdiction existed to hear this appeal.

The example contains two prepositional phrases (a coordinate pair) introducing the main clause of the sentence, so no comma is needed between the two prepositional phrases.

20. The officer exited her vehicle to approach the obviously-intoxicated defendant.

No Hyphen with “ly” Adverb

The officer exited her vehicle to approach the obviously intoxicated defendant.

Because the adverb’s function is to modify the verb, a hyphen unnecessarily (and incorrectly) repeats the signal of connection already given by the “ly” ending on the adverb.

21. Expletive “there”

The trial court found that there was sufficient evidence to support the jury’s verdict.

The trial court judge found sufficient evidence to support the jury’s verdict.

Reason for using: the expletive “there transformation” shifts word order to put greater emphasis on the subject (here, “evidence”).

Overuse of the expletive “there” clutters a sentence and may detract from the point.

General Sources

- BRIAN A. GARNER, *THE REDBOOK: A MANUAL ON LEGAL STYLE* (2nd ed., West 2006).
- CHERYL GLENN & LORETTA GRAY, *HODGES' HARBRACE HANDBOOK* (16th ed., Thomson Wadsworth 2007).
- MARTHA KOLLN & LORETTA GRAY, *RHETORICAL GRAMMAR: GRAMMATICAL CHOICES, RHETORICAL EFFECTS* (8th ed., Pearson 2017).
- PATRICIA T. O'CONNER, *WOE IS I: THE GRAMMARPHOBE'S GUIDE TO BETTER ENGLISH IN PLAIN ENGLISH* (2nd ed., Riverhead 2003).

