

Advanced

In a formbook or ordinance book, find a short contract or ordinance in which definitions account for at least 20% of the length. Rewrite it without definitions. If you're part of a writing group or class, be prepared to discuss any difficulties you might have had.

§ 34. Break down enumerations into parallel provisions. Put every list of subparts at the end of the sentence—never at the beginning or in the middle.

Statutes and contracts typically contain lists, often long ones. These lists are the main cause of overlong sentences. Break them up—set them apart—and, for purposes of calculating readability, the pieces won't count as a single sentence.¹

Although it's sometimes useful to have a (1)–(2)–(3) enumeration within a paragraph of ordinary expository writing, in legal drafting it's almost always better to set off the enumerated items. No one should have to trudge through this kind of marshy prose:

In the event that by reason of any change in applicable law or regulation or in the interpretation thereof by any governmental authority charged with the administration, application or interpretation thereof, or by reason of any requirement or directive (whether or not having the force of law) of any governmental authority, occurring after the date hereof: (i) the Bank should, with respect to the Agreement, be subject to any tax, levy, impost, charge, fee, duty, deduction, or withholding of any kind whatsoever (other than any change which affects solely the taxation of the total income of the Bank), or (ii) any change should occur in the taxation of the Bank with respect to the principal or interest payable under the Agreement (other than any change which affects solely the taxation of the total income of the Bank), or (iii) any reserve requirements should be imposed on the commitments to lend; and if any of the above-mentioned measures should result in an increase in the cost to the Bank of making or maintaining its Advances or commitments to lend hereunder or a reduction in the amount of principal or interest received or receivable by the Bank in respect thereof, then upon notification and demand being made by the Bank for such additional cost or reduction, the Borrower shall pay to the Bank, upon demand being made by the Bank, such additional cost or reduction in rate of return; *provided, however*, that the Borrower shall not be responsible for any such cost or reduction that may accrue to the Bank with respect to the period between the occurrence of the event which gave rise to such cost or reduction and the date on which notification is given by the Bank to the Borrower.

Drain the marshes, add some headings and subheadings (see § 4), and you have a presentable piece of writing, even though the material is fairly complex:

¹ § 34. 1. See Rudolf Flesch, *The Art of Plain Talk* 36–37 (1946); see also Rudolf Flesch, *The Art of Readable Writing* 226–27 (1962).

8.3 Payment of Reductions in Rates of Return

- (A) ***Borrower's Obligations.*** The Borrower must, on demand, pay the Bank additional costs or reductions in rates of return if the conditions of both (1) and (2) are met:
- (1) the law or a governmental directive, either literally or as applied, changes in a way that:
 - (a) increases the Bank's costs in making or maintaining its advances or lending commitments; or
 - (b) reduces the principal or interest receivable by the Bank; and
 - (2) any of the following occurs:
 - (a) the Bank becomes—with respect to the Agreement—subject to a tax, levy, impost, charge, fee, duty, deduction, or withholding of any kind whatever (other than a change that affects solely the tax on the Bank's total income);
 - (b) a change occurs in the Bank's taxes relating to the principal or interest payable under the Agreement (other than a change that affects solely the tax on the Bank's total income); or
 - (c) a reserve requirement is imposed on the commitments to lend.
- (B) ***Exceptions to Borrower's Obligations.*** The Borrower is not responsible for a cost or reduction that accrues to the Bank during the period between the triggering event and the date when the Bank gives the Borrower notice.

A fix like that is mostly a matter of finding enumerated items, breaking them out into subparts, and then working to ensure that the passage remains readable.

You'll need to use this technique almost every time you see parenthesized romanettes (i, ii, iii) or letters (a, b, c) in the middle of a contractual or legislative paragraph. Spotting the problem is relatively easy in a paragraph like this one:

5.4 Termination Fees Payable by Pantheon. The Merger Agreement obligates Pantheon to pay to OJM an Initial Termination Fee if (a) (i) OJM terminates the Merger Agreement because of either a Withdrawal by Pantheon or Pantheon's failure to comply (and to cure such noncompliance within 30 days' notice of the same) with certain Merger Agreement covenants relating to the holding of a stockholders meeting, the solicitation of proxies with respect to the Pantheon Proposal, and the filing of certain documents with the Secretary of State of the State of Delaware, (ii) Pantheon terminates the Merger Agreement prior to the approval of the Pantheon Proposal by the Pantheon stockholders, upon Pantheon having received an Acquisition Proposal and the Pantheon Board having concluded that its fiduciary obligations under applicable law require that such Acquisition Proposal be accepted, or (iii) either party terminates the Merger Agreement because of the failure of Pantheon to obtain stockholder approval for the Merger Agreement and the transactions contemplated thereby at a duly held stockholders' meeting, and (b) at the time of such termination or prior to the meeting of the Pantheon stockholders there has been an Acquisition Proposal involving Pantheon or certain of its significant subsidiaries (whether

or not such offer has been rejected or withdrawn prior to the time of such termination or of the meeting).

Breaking down the list into parallel provisions, with cascading indents from the left margin, makes the provision much clearer:

5.4 Termination Fees Payable by Pantheon. The Merger Agreement obligates Pantheon to pay to OJM an initial termination fee of \$250 million if both of the following conditions are met:

(A) any of the following occurs:

- (1) OJM terminates the merger agreement because Pantheon's board withdraws its support of the merger or because Pantheon fails to comply (and fails to properly cure its noncompliance within 30 days of receiving notice) with its merger-agreement covenants relating to the holding of a stockholders' meeting, the solicitation of proxies on the Pantheon proposal, and the filing of certain documents with the Delaware Secretary of State;
- (2) Pantheon terminates the merger agreement before the Pantheon stockholders approve the Pantheon proposal, upon Pantheon's having received a business-combination offer involving at least 15% of Pantheon's stock and the Pantheon board's having concluded that its fiduciary obligations under applicable law require acceptance of that proposal; or
- (3) either party terminates the merger agreement on grounds that Pantheon has failed to obtain stockholder approval for the merger agreement and the related transactions at a duly held stockholders' meeting; and

(B) at the time of the termination or before the meeting of the Pantheon stockholders there has been a business-combination offer involving at least 15% of Pantheon's stock or of its significant subsidiaries (whether or not the offer has been rejected or withdrawn before the termination or the meeting).

There's another point here: you can't have the main verb come after the list. The core parts of the English sentence are the subject and the verb (and sometimes an object). One key to writing plain English is ensuring that your readers reach the main verb early on. That way, the structure of the sentence becomes transparent.

One of the worst habits that drafters develop is putting long lists of items in the subject so that the main verb is delayed. This results in what linguists call "left-branching" sentences: ones with lots of complex information that branches out to the left side of the verb. The metaphor is that of a tree. As you read from left to right, and remembering that the tree's trunk is the verb, imagine a sentence configured in this way:

Subject and verb

That's going to be fiendishly difficult to get through.
But imagine the tree reconfigured:

Subject and verb

If all this talk of trees sounds too botanical, look at actual examples of sentences done both ways. Here's a typical left-brancher:

Except as may otherwise be provided in these rules—

- (a) every order required by its terms to be served;
- (b) every pleading subsequent to the original complaint unless the court orders otherwise because of numerous defendants;
- (c) every paper relating to discovery required to be served upon a party unless the court orders otherwise;
- (d) every written motion other than one that may be heard *ex parte*; and
- (e) every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper

—must be served on each of the parties to the action.

The language after the enumeration—sometimes called “unnumbered dangling flush text”—is uncitable. That can be a problem. Once you put the enumeration at the end, however, the problem is cured. Here's the same sentence done as a right-brancher, with the enumeration at the end.

Notice the newly added foreshadowing language (*the following papers*):

Except as these rules provide otherwise, the following papers must be served on every party:

- (a) an order required by its terms to be served;
- (b) a pleading filed after the original complaint, unless the court orders otherwise because of numerous defendants;
- (c) a discovery paper required to be served on a party, unless the court orders otherwise;
- (d) a written motion, other than one that may be heard *ex parte*; and
- (e) a written notice, appearance, demand, offer of judgment, designation of record on appeal, or similar paper.

This is only a special application of the principle announced in § 7: keep the subject and verb together toward the beginning of the sentence.

Here's the upshot: find the operative verb in the sentence and move it toward the front, putting your lists at the end of the sentence. Even with fairly modest lists, this technique can make a tremendous difference in readability.

Exercises

Basic

Revise the following paragraph to put the enumerated items in separate subparagraphs. At the same time, be sure that you don't create unnumbered dangling flush text.

7.7 Insurance. Borrower shall provide or cause to be provided the policies of insurance described in *Exhibit I*, together with such other policies of insurance as Lender may reasonably require from time to time. All insurance policies (i) shall be continuously maintained at Borrower's sole expense, (ii) shall be issued by insurers of recognized responsibility which are satisfactory to Lender, (iii) shall be in form, substance and amount satisfactory to Lender, (iv) with respect to liability insurance, shall name Lender as an additional insured, (v) shall provide that they cannot be canceled or modified without 60 days' prior written notice to Lender, and (vi) with respect to insurance covering damage to the Mortgaged Property, (A) shall name Lender as a mortgagee, (B) shall contain a "lender's loss payable" endorsement in form and substance satisfactory to Lender, and (C) shall contain an agreed value clause sufficient to eliminate any risk of coinsurance. Borrower shall deliver or cause to be delivered to Lender, from time to time at Lender's request, originals or copies of such policies or certificates evidencing the same.

Intermediate

Revise the following passage to cure the left-branching problem:

If at any time the Federal Energy Regulatory Commission should disallow the inclusion in its jurisdictional cost of gas, cost of service, or rate base any portion of the cost incurred because of this gas purchase or the full amount of any costs incurred by Buyer for any field services or facilities with respect to any well subject hereto, whether arising from any term or provision in this Agreement or otherwise, including but not limited to price and price adjustments, the prices provided for herein, then Seller agrees that the price will be reduced to the maximum price for gas hereunder which the Federal Energy Regulatory Commission will allow Buyer to include in its jurisdictional cost of gas, cost of service, or rate base and Seller shall promptly refund with interest all prior payments for gas purchased hereunder which exceed the amount Buyer is permitted to include in said cost of gas, cost of service, or rate base.

Advanced

In a contract formbook, find a 200-plus-word paragraph that contains a series of romanettes (i, ii, iii). Rewrite the paragraph to set off the listed items, and make any other edits that improve the style without affecting the meaning. If you're part of a writing group or class, bring a copy of the before-and-after versions for each colleague. Be prepared to discuss your edits.

§ 35. Delete every shall.

Shall isn't plain English. Chances are it's not a part of your everyday vocabulary, except in lighthearted questions that begin, "Shall we . . . ?"

But legal drafters use *shall* incessantly. They learn it by osmosis in law school, and the lesson is fortified in law practice. Ask a drafter what *shall* means, and you'll hear that it's a mandatory word—opposed to the permissive *may*. Although this isn't a lie, it's a gross inaccuracy. And it's not a lie only because the vast majority of drafters don't know how shifty the word is.

Often, it's true, *shall* is mandatory:

Each corporate officer in attendance shall sign the official register at the annual meeting.

Yet the word frequently bears other meanings—sometimes even masquerading as a synonym of *may*. Remember that *shall* is supposed to mean "has a duty to," but it almost never does mean this when it's preceded by a negative word such as *nothing* or *neither*:

- Nothing in this Agreement *shall* be construed to make the Owners partners or joint venturers.
- Neither the Purchaser nor any Employer *shall* discriminate against any employee or applicant for employment on the basis of race, religion, color, sex, national origin, ancestry, age, handicap or disability, sexual orientation, military-discharge status, marital status, or parental status.
- Neither party *shall* assign this Agreement, directly or indirectly, without the prior written consent of the other party.

Does that last example really mean that neither party has a duty to assign the agreement? No. It means that neither party is allowed to (that is, *may*) assign it.

In just about every jurisdiction, courts have held that *shall* can mean not just *must*¹ and *may*,² but also *will*³ and *is*.⁴ Even in the U.S. Supreme Court, the holdings on *shall* are cause for concern. The Court has:

- held that a legislative amendment from *shall* to *may* had no substantive effect;⁵

§ 35 1. See, e.g., *Bell Atlantic-N.J., Inc. v. Tate*, 962 F. Supp. 608 (D.N.J. 1997).

2. See, e.g., *Northwestern Bell Tel. Co. v. Wentz*, 103 N.W.2d 245 (N.D. 1960).

3. See, e.g., *Cassan v. Fern*, 109 A.2d 482 (N.J. Super. 1954).

4. See, e.g., *Local Lodge No. 1417, Int'l Ass'n of Machinists, AFL-CIO v. NLRB*, 296 F.2d 357 (D.C. Cir. 1961).

5. *Moore v. Illinois Cent. Ry.*, 312 U.S. 630, 635 (1941).