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## Writing From a Legal Perspective by George D. Gopen

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# BOOK REVIEW

WRITING FROM A LEGAL PERSPECTIVE. By George D. Gopen. St. Paul, Minn.: West Publishing Co., 1981. Pp. xii, 225. \$11.95.

*Reviewed by Jay Wishingrad\* and Douglas E. Abrams\*\**

Is there room in the literature for yet another book about legal writing skills?<sup>1</sup> If the widespread dissatisfaction with lawyers' writing is an accurate indication, the answer is undoubtedly "yes."

Criticism of legal writing has come with increasing frequency and stridency in recent years from lawyers and nonlawyers alike. Judges have criticized the writing of advocates,<sup>2</sup> and lawyers have complained about the writing of judges<sup>3</sup> and other lawyers.<sup>4</sup> Law professors have bemoaned both their students' inability to write the King's English<sup>5</sup>

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1. Many books treat various aspects of legal writing. *See, e.g.*, ADVOCACY AND THE KING'S ENGLISH (G. Rossman ed. 1960); E. BISKIND, SIMPLIFY LEGAL WRITING (2d ed. 1975); G. BLOCK, EFFECTIVE LEGAL WRITING (1981); N. BRAND & J. WHITE, LEGAL WRITING (1976); F. COOPER, WRITING IN LAW PRACTICE (2d ed. 1963); R. FLESCHE, HOW TO WRITE PLAIN ENGLISH (1979); M. FREEMAN, THE GRAMMATICAL LAWYER (1979); M. PITTONI, BRIEF WRITING AND ARGUMENTATION (3d ed. 1967); E. RE, BRIEF WRITING AND ORAL ARGUMENT (4th ed. 1974); M. ROMBAUER, LEGAL PROBLEM SOLVING (3d ed. 1978); W. STATSKY & R. WERNET, CASE ANALYSIS AND FUNDAMENTALS OF LEGAL WRITING (1977); H. WEIHOFEN, LEGAL WRITING STYLE (2d ed. 1980); F. WIENER, BRIEFING AND ARGUING FEDERAL APPEALS (1967); R. WYDICK, PLAIN ENGLISH FOR LAWYERS (1979).

2. *See, e.g.*, Slater v. Gallman, 38 N.Y.2d 1, 4, 339 N.E.2d 863, 864, 377 N.Y.S.2d 448, 450 (1975) ("[U]nfortunately it is not always the rare case in which we receive poorly written and excessively long briefs, replete with burdensome, irrelevant, and immaterial matter").

3. *See, e.g.*, Stevenson, *Writing Effective Opinions*, 59 JUD. 134 (1975), in which the author summarizes a feeling long expressed by lawyers, that many judicial opinions are "too long, . . . filled with unnecessary detail, . . . overloaded with footnotes, . . . couched in jargon unclear to many of their readers, [and] . . . poorly arranged and carelessly worded." *Id.* at 134.

4. A senior partner in a prominent Wall Street law firm recently wrote, for example, that many legal memoranda are "mystery stories" which require that "a great deal of time and effort . . . be spent reading and rereading them to discover the ideas meant to be conveyed." Clare, *Teaching Clear Legal Writing—The Practitioner's Viewpoint*, 52 N.Y. St. B.J. 192 (April 1980).

5. William L. Prosser, for one, bitterly complained that many of his students displayed an "appalling lack of ability to organize a paragraph or even a sentence, to say simply and clearly

and their own tendency to write "unintelligible gibberish."<sup>6</sup> And all law school graduates have been pilloried by a general public that has grown increasingly resentful of the unnecessary complexity of "legalese."<sup>7</sup>

George D. Gopen, Assistant Professor of English and Director of Writing Programs at Loyola University of Chicago, has responded to the tidal wave of criticism with a textbook entitled *Writing From a Legal Perspective*.<sup>8</sup> The book is about the art of composition and is for law students and undergraduates planning on careers in law.<sup>9</sup>

### I. A LAWYER'S LANGUAGE

Professor Gopen begins chapter one with two fundamental premisses that lawyers, as well as aspiring lawyers, should ponder before putting pen to paper. He tells the reader that "[a]side from the redefinition of certain vocabulary for technical use, lawyers have no needs for language that are unique to their profession."<sup>10</sup> We agree. The language of the law is English. The characteristics of good writing are the same for lawyers as for anyone else.<sup>11</sup>

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what is meant." Prosser, *English As She Is Wrote*, 7 J. LEGAL EDUC. 155, 158 (1954), *revising*, Prosser, *English As She Is Wrote*, 28 ENG. J. 38 (1939).

6. See, e.g., Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279, 287-88 (1962) ("Without a style that conceals all content and mangles all meaning, or lack of same, beneath impressive-sounding but unintelligible gibberish, most of the junk that reaches print in the law reviews and such scholarly journals could never get itself published anywhere—not even there").

7. See, e.g., Gerhart, *Improving Our Legal Writing: Maxims from the Masters*, 40 A.B.A.J. 1057, 1057 (1954) ("Lawyers' language has long been regarded as the prime example of complex, unreadable, often unintelligible English. Such phrases as 'legal technicality', 'fine print', 'lawyers' Mumbo-Jumbo', etc. should be a warning to legal writers. Maury Maverick summed it up in a new word he coined himself—'gobbledygook!'").

8. G. GOPEN, *WRITING FROM A LEGAL PERSPECTIVE* (1981). The book had its genesis in 1975 at the University of Utah, where the author created an advanced composition course for pre-law students. *Id.* at vii. Many of the ideas and exercises contained in the book were first set out in Gopen, *A Composition Course for Pre-Law Students*, 29 J. LEGAL EDUC. 222 (1978). See also Gopen, *A Question of Cash and Credit: Writing Programs at the Law Schools*, 3 J. CONTEMP. L. 191 (1977).

9. This dual focus is particularly timely because, beginning in the summer of 1982, the Law School Admission Test is expected to include an unscored writing sample. LAW SCHOOL ADMISSION BULL. 1 (Dec. 1980).

10. G. GOPEN, *supra* note 8, at 5.

11. See Wishingrad & Abrams, Book Review, 184 N.Y.L.J., Dec. 12, 1980, at 2 (reviewing R. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (1979)). Many commentators share our view. See, e.g., F. RODELL, *Woe Unto You, Lawyers!* 12 (Berkley Books ed. 1980) ("[D]espite what the lawyers say, it is possible to talk about legal principles and legal reasoning in everyday non-legal language") (emphasis in original); Bordwell, *A Writing Specialist in the Law School*, 17 J. LEGAL EDUC. 462 (1965) ("[L]inguistically and rhetorically speaking, legal writing on any level is simply a matter of embedding extraordinary legal words and phrases in ordinary English syntax and vocabulary"); Kirp, *The Writer as Lawyer as Writer*. . . ., 22 J. LEGAL EDUC. 115 (1969) ("At its best, writing by lawyers and judges and legislators . . . differs from garden variety expository

Lest the reader think that there is nothing unique about “writing from a legal perspective,” Professor Gopen quickly points out that legal writing does differ from most other writing in at least one fundamental respect. “Writing clear and precise prose is a most difficult task even under ideal conditions,” he tells us, “but the lawyer faces the worst of all conditions, a hostile audience,” one that “will do its best to find the weaknesses in the prose, even perhaps to find ways of turning the words against their intended meaning.”<sup>12</sup>

The “hostile” reader is certainly well-known to the legal writer. A party seeking to evade contractual obligations searches for any loophole. Judges and law clerks parse a brief to test whether its arguments can withstand attack, but only after opposing counsel has scrutinized them to see whether they can be made to mean precisely what the writer did not intend. Even judicial writing is not immune—consider the energy that advocates expend distinguishing, and at times even distorting, a troublesome precedent.

What this hostility means, Professor Gopen says, is that legal writers have a “special combination” of needs, which he lists in chapter one and elaborates on in subsequent chapters: (1) the need for precision and “anti-precision”; (2) the need to articulate the steps and connections in a logical argument; (3) the need to recognize that persons with varying viewpoints and interests may differ in their responses to words and arguments (a version of the familiar maxim, “Know your reader”); and (4) the need to maintain clarity of expression despite complexity of thought.<sup>13</sup>

## II. LANGUAGE AND PRECISION

To write with precision, one must be aware of the dynamics of the English language. Chapter three reminds the reader that language evolves over time: old words acquire new meanings or fade into disuse, and new words as well as foreign words enter the language. To make this indisputable point, however, the chapter consumes about thirty

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prose only in subject matter”). *But see* Aiken, *Let's Not Oversimplify Legal Language*, 32 ROCKY MOUNTAIN L. REV. 358, 364 (1960) (“To communicate upon matters of technicality and complexity . . . is impossible with (and for) the nontechnical and simple person; and to use the language of simplicity in addressing a learned profession is to insult that profession”).

12. G. GOPEN, *supra* note 8, at 1. Shortly after publication of the first edition of his *Legal Writing Style*, Professor Henry Weihofen made the same observation:

Because the lawyer can never know when something he has written will be set upon by opponents who want to twist its meaning to their own ends, he must be more careful than most writers to make sure that his words say precisely what he means, no more and no less.

Weihofen, *Word-Watching for Lawyers*, 50 A.B.A.J. 663 (1964).

13. G. GOPEN, *supra* note 8, at 6-7.

pages and includes, among other curiosities,<sup>14</sup> nearly six pages of dictionary definitions and etymologies of such words as “nicotine” and “poinsettia.”<sup>15</sup> Although the reader learns, for example, that “nicotine” was named after Jean Nicot, France’s ambassador to Portugal who introduced tobacco to the French in 1560, and that the “poinsettia” was named after Joel Roberts Poinsett (1779-1851), an American minister to Mexico who discovered the plant, we question the usefulness of page after page of these admittedly interesting trifles. Then, to make matters worse, chapter four contains more than thirty pages stating and restating the self-evident proposition that although words are the only tools we have to convey meaning in writing, they are imprecise.<sup>16</sup>

### III. THE CLASSIC FORMS OF LEGAL WRITING

In chapter five, Professor Gopen departs from his general treatment of composition to provide some advice concerning the classic forms of legal writing—agreements, appellate briefs, and memoranda—which are the focus of first-year programs and of upper-class seminars on drafting in American law schools.<sup>17</sup>

In his excellent discussion of agreements, Professor Gopen points out the problem, sometimes overlooked in drafting seminars, resulting from the lawyer’s inability to predict every contingency that may arise after an agreement is signed. Because of this problem, a lawyer must make calculated use of imprecise language when drafting an agreement intended to leave as little as possible open to question, a technique Professor Gopen calls “anti-precision.”<sup>18</sup> Anti-precision does not call for purposeful creation of ambiguity that might thwart the parties’ intent

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14. Chapter III concludes with this exercise:

Comment as thoroughly as possible on the effects of the following word choices.

- . . . . (6) A restaurant tries to decide what sign to put on the doors of the rooms that contain toilets and sinks for the use of patrons. What are the messages communicated by each of the following possibilities, and what would the restaurant be saying about itself in each case?
- (a) Gentlemen/Ladies
  - (b) Men/Women
  - (c) Rest room
  - (d) Bathroom
  - (e) Toilet
  - (f) The Loo
  - (g) W.C.
  - (h) The Head
  - (i) Powder Room

*Id.* 73.

15. *Id.* 58.

16. *Id.* 74-108.

17. *Id.* 109-25.

18. *Id.* 122-25.

or lead to litigation. Rather, it calls for a clear statement of the parties' intentions and precise definition of their respective obligations, with sufficient allowance for unforeseeable situations.<sup>19</sup>

Professor Gopen's short discussion of brief writing makes one perspicacious point: because the statement of facts must be purely narrative, scrupulously accurate, and devoid of all opinions, inferences, and argumentation, the appellate advocate should study the opponent's statement and note where facts seem colored, because coloration invariably indicates the other side's weak points.<sup>20</sup> Unfortunately, an equally abbreviated discussion of legal memoranda—a subject of importance to law students and to young lawyers—has little to offer.<sup>21</sup>

In chapter six, Professor Gopen reminds us that the first step in every form of legal writing is to "Know your reader."<sup>22</sup> Good writing, he correctly observes, calls not only for sound logic, completeness, clarity of expression, and consistency, but also for sensitivity to the audience, including use of the appropriate tone. As Professor Gopen notes, many otherwise careful writers recognize the need for the first four qualities, yet fail to communicate their ideas effectively because they write above or below the reader's level of comprehension.<sup>23</sup> The chapter gives meaning to this advice in a unique way—by teaching how to write effective instructions, a task lawyers are often called on to perform.

#### IV. ARGUMENTS OR CONCLUSIONS?

Legal argumentation, like other forms of logic, requires the writer to articulate each argument that leads to the conclusion. In his early pages, Professor Gopen reminds advocates to avoid the common pitfall of becoming so convinced by their own position that they forget to put all the supporting arguments on paper.<sup>24</sup> Unlike many other writers, advocates cannot rely on the audience—the court or an adversary—to supply a missing argument. If the brief is missing an argument, the advocate may lose both the reader and the case.

In chapter eight, Professor Gopen moves one step further and discusses an important skill that our own experience pinpoints as a major problem for most law students: how to recognize the difference be-

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19. *Id.* 111.

20. *Id.*

21. *Id.* 119-21.

22. *Id.* 121-22.

23. *Id.* 127.

24. *Id.* 6-7.

tween an argument and a conclusion.<sup>25</sup> We have found that many students, though mindful of the need to support each conclusion with all necessary arguments, nonetheless fail to do so. Instead, they often support their conclusion with other conclusions.

Professor Gopen offers some useful tests to enable an advocate to determine whether a sentence contains an argument or a conclusion. One test is to consider the sentence and keep asking "Why?" until that question has been answered.<sup>26</sup> For example, even to the experienced ear, a forceful statement such as this one smacks of argumentation:

Alabama's death penalty statute violates the cruel and unusual punishment clause of the eighth amendment and the due process clause of the fourteenth amendment because it precludes lesser included offense verdicts.

But Professor Gopen explains that this type of sentence does not offer an argument "why" Alabama's statutory preclusion of lesser included offense verdicts should be held unconstitutional. It is no more than a sheep in wolf's clothing—a conclusion that sounds like forceful argumentation but offers little or no support for the intended proposition. As many advocates can painfully testify, conclusory statements like this one, unsupported by thorough argumentation, fall like a house of cards during oral argument the first time a judge disputes the assertions. In this uncomfortable moment, the advocate has no choice but to think quickly and articulate all the arguments that should have been in the brief.

A second test to distinguish an argument from a conclusion is to juxtapose the sentence with its negative.<sup>27</sup> The more sense that can be made of the negative, the more conclusory is the original:

*Original*—Alabama's death penalty statute violates the cruel and unusual punishment clause of the eighth amendment and the due process clause of the fourteenth amendment because it precludes lesser included offense verdicts.

*Negative*—Alabama's death penalty statute does not violate the cruel and unusual punishment clause of the eighth amendment or the due process clause of the fourteenth amendment because it precludes lesser included offense verdicts.

In contrast, when the sentence contains an argument rather than a conclusion, as in the successful petitioner's brief in *Beck v. Alabama*,<sup>28</sup> juxtaposition produces an illogical statement:

*Original*—Alabama's death penalty statute violates the cruel and unusual punishment clause of the eighth amendment and

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25. *Id.* 183-89.

26. *Id.* 185.

27. *Id.* 185-86.

28. 447 U.S. 625 (1980).

the due process clause of the fourteenth amendment because the preclusion of lesser included offense verdicts substantially increases the risk of error in the factfinding process.<sup>29</sup>

*Negative*—Alabama's death penalty statute does not violate the cruel and unusual punishment clause of the eighth amendment or the due process clause of the fourteenth amendment because the preclusion of lesser included offense verdicts substantially increases the risk of error in the factfinding process.

#### V. A SYSTEM FOR SELF-REVISION: THE PROBLEM OF THE WEAK MAIN VERB

The backbone of Professor Gopen's book is his "System for Self-Revision," which he presents in chapter two. Because revising follows writing, we have saved our discussion of this system for last.

Revising one's own work is as important as it is difficult. Even accomplished lawyers rarely write precise and felicitous first drafts. Self-revision is also a sometimes frustrating and, according to Professor Gopen, ultimately futile exercise. The more we reread our own words, he observes, the more our mind robs us of the ability to view them with objectivity and editorial detachment. To make this depressing point, Professor Gopen describes with uncanny accuracy the mental processes that each of us will recognize:

[The writer] looks at the words; he recalls their individual denotations and connotations; he understands the significance of the syntax; and synthesizing all of this he perceives a meaning for the whole sentence. If that meaning corresponds to his intended meaning (and it usually does), he proceeds to the next sentence. Actually, however, the following happens: he recognizes the words and the order they are in; he remembers what he was thinking when he put those words in that order. Since this has brought to mind for him his intended meaning, he believes it will do the same for his reader and therefore proceeds to the next sentence. Mere association, and not objective perception, has produced the desired self-satisfaction.<sup>30</sup>

One cure for this lack of objectivity is, of course, the disinterested reader. Any experienced lawyer will ask others to read and criticize drafts of an important document or brief. The wise judge, too, makes it a practice to have a law clerk scrutinize and dissect all opinions before they leave the chambers. Yet we all know that the day-to-day pressures of law practice often make scrutiny by a second set of eyes an unaffordable luxury.

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29. *Id.* at 632.

30. G. GOPEN, *supra* note 8, at 18.

Professor Gopen believes he has found a reliable "danger signal" to help the writer objectively edit his work. Of all the characteristics that indicate ineffective writing, he singles out for discussion what he calls the "weak main verb."<sup>31</sup> The stronger a sentence's main verb is, he tells us, the more effective the sentence will be; effective sentences in turn produce effective paragraphs and effective writing.

No verb is intrinsically weak or strong.<sup>32</sup> A "weak main verb" is one whose meaning bears little or no relation to the meaning of the sentence. A "strong verb," on the other hand, is one whose meaning bears a direct relation to the meaning of the sentence. The verb "to be" ("am," "are," "is," and so forth), which is used as a weak verb more often than any other verb, illustrates the difference:<sup>33</sup>

This sentence is a good example of the point I am trying to make.

The main verb—"is"—is weak because it bears no relation to the writer's meaning. "Example" is the most important word in the sentence, so its verb form serves as a strong verb:

This sentence exemplifies my point well.

Stressing the main verb, Professor Gopen presents a system for writers to employ to edit their own writing. He acknowledges that this system for self-revision is "sophisticated and difficult to use . . . [and] require[s] a substantially strenuous effort,"<sup>34</sup> an admission his six-page excursion into algebraic, geometric, and Latin illustrations does nothing to belie. He says, however, that after working through the system in detail only a few times, the writer will begin to construct more rigorous sentences and paragraphs without further need to resort to it. The burdensome nature of this complex six-step system is evident from its mere recitation:

*Step 1*

Circle the main verb(s) in each clause of each sentence, being careful to treat all passive constructions as the verb "to be." If you cannot deduce the general topic of the paragraph from reading only the circled words, then you have too many weak verbs and should continue to Step 2.

*Step 2*

Considering only the first sentence, decide if the main verb(s) communicates the central idea. If it does not, decide what the most important content of the sentence is and find a verb that capsulizes that idea. Then restructure a sentence around the new main verb, being

31. *Id.* 19.

32. *Id.*

33. Professor Cooper's title for chapter one of *WRITING IN LAW PRACTICE—Law is Language*—illustrates a strong use of the verb "to be." Professor Cooper uses "is" to mean "equals," which goes right to the heart of the sentence's meaning. F. COOPER, *WRITING IN LAW PRACTICE 1* (1963).

34. G. GOPEN, *supra* note 8, at 19.

extremely careful to include everything from your original sentence and to add nothing that is new (at this point). [Often in the restructuring of a sentence some element of the original will not fit the new schema. If this happens, note the word or words in the margin so you can return to them later.]

*Step 3*

Repeat Step 2 for each sentence in the paragraph, being careful to treat each one in isolation. The more completely you can disregard all other sentences while working on one, the better your final result will be.

*Step 4*

Now reread your new sentences as a new paragraph and take note of the large number of repetitions that have surfaced. (Your main verbs will repeat, as well as your subjects, in most cases.) Then combine sentences to eliminate as many of the repeats as you can. During this process you should attempt to add in all the words you relegated to the margins earlier. You will find yourself reordering thoughts and articulating connections you had previously omitted, thus filling in the "gap between the period that ends one sentence and the capital letter that begins the next."

*Step 5*

If the process of collapsing redundancies leaves your sentences with seemingly less of your thought than you felt you were trying to express before, search your prose throughout these drafts for patterns that might have been forming. For example, check all the subjects of the sentences. Do they form a pattern or progression? Do the same for the verbs, the objects, and the modifiers. Have you included a large number of abstract nouns, or of any other recognizable category of words? Are they in a pattern? . . .

*Step 6*

Polish the prose so that it fulfills grammatical requirements and proceeds as smoothly, directly, and forcefully as possible.<sup>35</sup>

We are not convinced that Professor Gopen's concededly complex system for self-revision is a panacea for the struggling writer. Although his goal—to help the writer achieve greater clarity and precision—is laudable, it can be achieved more efficiently and more effectively through guidelines that are not so "sophisticated and difficult to use" that they "require a substantially strenuous effort" from the writer.<sup>36</sup> Even if the writer is patient enough to use the time-consuming system, he is likely to use it only once or twice before collapsing from the mental exertion and returning to writing as usual, retaining only the speculative residual benefits that come from making the initial mental sacrifice.<sup>37</sup>

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35. *Id.* 31-34.

36. *Id.* 19.

37. In his review of *HOW TO WRITE PLAIN ENGLISH*, Professor Wydick questions whether Dr. Flesch's controversial "readability formula" (which requires a writer, among other things, to count words, syllables, and sentences and to do long division) is useful "in the day-to-day writing

Less complex rules are available. With considerably less strain, for example, the writer can achieve clarity and precision by adhering to the six principles that Professor Richard C. Wydick sets forth in *Plain English for Lawyers*: (1) omit surplus words; (2) use familiar, concrete words; (3) use short sentences; (4) use base verbs and the active voice; (5) arrange your words with care; and (6) avoid language quirks.<sup>38</sup> The writer is likely to keep Professor Wydick's practical guidelines in mind each time he revises; on the other hand, he is likely to discard Professor Gopen's convoluted system at the first opportunity.

Still, when Professor Gopen's unique system for self-revision is distilled to its essence—sensitivity to the problem of the weak main verb—it makes an original contribution to the literature by providing another useful “danger signal” to the careful writer. Because there is more to good writing than using strong main verbs, however, Professor Gopen's narrowly focused system cannot bear the entire editorial burden.

#### CONCLUSION

Amidst the widespread criticism of legal writing, any book that contributes to improved written expression is likely to receive a warm welcome. This conclusion certainly applies to Professor Gopen's *Writing From a Legal Perspective*, to which we extend a warm, but not uncritical, welcome. The lawyer or law student who studies this volume will emerge a better writer for the effort.

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done by busy practicing lawyers.” Wydick, Book Review, 78 MICH. L. REV. 711, 716 (1980). In his preface to Dr. Flesch's book, however, Michael Pertschuk, former Federal Trade Commission Chairman, attests to the usefulness of Dr. Flesch's formula—a kind of Skinnerian word monitoring for writers—in banishing gobbledygook from legislation, administrative regulations, and consumer contracts. Flesch, HOW TO WRITE PLAIN ENGLISH xi (1979).

38. R. WYDICK, PLAIN ENGLISH FOR LAWYERS 65 (1979).