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## The Lawyer's Guide to Writing Well (Third Edition) (2016)

Tom Goldstein

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THE LAWYER'S GUIDE  
TO WRITING WELL

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Tom Goldstein  
and  
Jethro K. Lieberman

THIRD EDITION

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University of California Press

For Max and Blaze, and Hannah and Zeke

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For more than thirty years, we have been studying, writing about, and talking to people about the problems lawyers have with writing. Our concern led us to write the first edition of this book more than a quarter-century ago. Between October 1987 and June 1988, we asked 650 people familiar with legal writing—practicing lawyers, judges, professors, writing instructors, and journalists who report on legal topics—what bothered them most about the way lawyers write. The answers from three hundred of those respondents inform a portion of this book.

Fifteen years later, we updated the book, and now, after another dozen years, we have revised it again, reflecting on the revolutionary changes in the practice of law. When we first began writing about writing, desktop computers were just beginning to find their way into lawyers' offices, but probably few lawyers used them regularly or proficiently. (Indeed, lawyers at some firms told us then that they were forbidden to touch a computer; managing partners in those days viewed the "word processor" as a tool for secretaries and typists, not professionals.)

For all of the rapid improvement in communications technology since 1988, legal writing has improved little, if at all, since the first edition. Law offices around the country have largely defaulted in training their newcomers. During the 1990s, law firms hired so many new associates that they could no longer provide their customary one-on-one training. Currently, in the more uncertain economic climate for lawyers, training has become a costly extravagance. A natural solution, many supposed, was to look to the law schools to provide more thorough training. For a time, that seemed to be happening. During the 1990s, most American law schools established (or beefed up) their legal writing programs, usually a yearlong course in writing and research. These programs and courses were spurred by the MacCrate Report of the American Bar Association

in 1992.<sup>1</sup> Chaired by New York lawyer Robert MacCrate, for whom the report was nicknamed, the Task Force on Law Schools and the Profession called on law schools to add communication skills to their educational objectives. The cry for greater clarity in communication, however, has not led to serious curricular reform. Most law school classroom instruction remains oral, and full-time professors devote almost no time to critiquing their students' written work. The custom that law school professors grade their own exams, while salutary, also has unintended deleterious effects. Professors typically evaluate students on whether they have spotted the issues, not whether their exams are well written. Thus students can sail through three years of law school with very little critique of their writing. Even in legal writing courses, writing often takes a back seat to legal analysis, research, and the formats for motions, briefs, and other legal documents. For all the talk about legal literacy, writing instructors have the lowest prestige in the law schools in which they work, and the smallest claim on their resources. The consequence is that law schools remain unequipped to deal with increasingly ill-prepared college graduates who clamor for admission.

The increased attention to legal writing, even in more sophisticated courses, was short-lived. It was never clear whether the added writing instruction succeeded in improving students' writing proficiency. And by the early part of the twenty-first century, many of these programs were being folded into broader "lawyering" courses that diluted the writing instruction in favor of other clinical skills. Most lawyers now practicing began their professional lives after the first edition of this book was published, roughly in the period during which law schools presumably beefed up their teaching of writing skills. Despite this increased attention, the quality of legal documents has not demonstrably improved.

But learning does not end in law school. We think lawyers in practice can improve, and we ask those who aim to write more clearly and efficiently—our readers—to heed the lessons, techniques, and tips in the pages that follow. Work at it, and in six months' time compare your old writing with the new. We think you will persuade yourself that the results will have amply repaid the effort.

## PART I

### WHY LAWYERS WRITE POORLY

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## 1 DOES BAD WRITING REALLY MATTER?

---

Most lawyers write poorly.

That's not just our lament. Leading lawyers across the country agree. They think modern legal writing is flabby, prolix, obscure, opaque, ungrammatical, dull, boring, redundant, disorganized, gray, dense, unimaginative, impersonal, foggy, infirm, indistinct, stilted, arcane, confused, heavy-handed, jargon- and cliché-ridden, ponderous, weaseling, overblown, pseudointellectual, hyperbolic, misleading, incivil, labored, bloodless, vacuous, evasive, pretentious, convoluted, rambling, incoherent, choked, archaic, orotund, and fuzzy.

Many critics amplified: Lawyers don't know basic grammar and syntax. They can't say anything simply. They have no judgment and don't know what to include or what to leave out. They do not know how to tell a story—where to begin, when to end, or how to organize it. They get so carried away with their advocacy that they distort and even deceive.

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*The difficult task, after one learns how to think like a lawyer, is relearning how to write like a human being.*

FLOYD ABRAMS, 1998

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So what? Does poor writing matter? It's commonplace to say that it does. But what are its consequences? That's a harder question to answer. Justice Alvin F. Klein of the New York State Supreme Court in Manhattan once embarrassed the opposing lawyers in a divorce case by saying in open court that he could not understand the papers filed by either of them.<sup>1</sup> He ordered them to rewrite their motions and objections.

The judge's impatience represented more than the passing mortification of two practitioners or the wasting of several hours in drafting

indecipherable papers. Judges rarely comment on the style or intelligibility of documents they read, though not for want of opportunity. In recent years, judges have rebuked poor writers enough that a word—*benchslap*—has come to characterize the practice, including even by the U.S. Supreme Court. But most benchslaps are confined to violations of style guides, punctuation errors, and other minor matters.<sup>2</sup> Sometimes judges run the danger of making the same mistakes they lambaste. For example, in admonishing the lawyers, Justice Klein rambled a bit himself: “Upon a careful reading of all the voluminous papers submitted herein, the court is frank to state that it cannot ascertain the basis for the relief sought by the plaintiff on the motion and by the defendant on the cross-motion.”<sup>3</sup> But Justice Klein diagnosed a soreness that afflicts the practice of law throughout the country. Perhaps it is not a fatal disease but a wasting one: a canker if not a cancer.

Many lawyers bristle at the suggestion that they should improve their writing or spend time editing their drafts. In 2013, Bryan A. Garner, a prominent legal writing specialist, wrote a thoughtful *American Bar Association Journal* article called “Why Lawyers Can’t Write.” It elicited nearly two hundred comments, some perceptive and some less so. One common theme is seen in remarks from practicing lawyers who took issue with Garner’s point that lawyers need to clean up their prose, arguing that the cost is unjustifiable. “Excellent writing requires extensive revisions. . . . My clients don’t want to pay for extensive revisions.”<sup>4</sup>

This belief is short-sighted and mistaken. First, resistance to improving their writing skill assumes that lawyers cannot actually learn to do so and thereafter write consistently at a more proficient level. Anyone can learn, and when we learn to write better, we no longer take the time or need to bill the client for fixing what was once done poorly. To excuse their failure to write well, or at least write better, by claiming that their clients won’t pay for the better product, lawyers undersell what they are capable of producing. They are admitting that they are just not that good and hoping that the client will not discover another lawyer who can deliver the better work at the same cost, because that other lawyer has superior skills. If we did not think it possible for any lawyer to improve his or her writing, we would not have written this book.

The belief that muddled writing does not matter is mistaken, second, because the real costs of poor legal writing are often overlooked:

- It wastes the valuable time of judges, clients, and other lawyers, who must constantly reread documents to figure out what is meant.
- It costs law firms a lot of money. They must absorb the time of senior lawyers who are forced to rewrite the work of junior ones.
- It costs society. We all pay for the lost time and the extra work.
- It loses cases. Briefs, memoranda, and letters that do not adequately convey a writer’s point give adversaries who are better writers the opportunity to portray their own positions more persuasively and sympathetically.
- It can lead to disrespect for or indifference to law. The public can’t understand what lawyers are saying because the law itself is almost always obscure and lawyers’ attempts to explain it are rarely clearer.
- It erodes self-respect. Hurried, careless writing weakens the imagination, saps intelligence, and ultimately diminishes self-esteem and professionalism.
- It impoverishes our culture. Writing well in a calling that prides itself on professionalism in pursuit of justice ought to be an end in itself.

Despite these consequences, many lawyers fail to connect good writing to good lawyering, probably because it is rarely possible to quantify the costs of inadequate writing. We doubt that lawyers would offer to reveal, or that accountants would leap at the opportunity to prove, the dollar value that a particular document cost the firm or the client or society because it was poorly written. And who can measure the injustice that obscurity fosters? So lawyers dismiss the consequences of their inability to express themselves well.

“Writing is a waste of time,” said a young associate at a mid-sized New York firm, expressing an attitude we have frequently encountered. “We sell time, not paper.” He could not be more mistaken. Good lawyers may rightly measure the value of the paper they sell by the time it takes to put words onto it, but if a document is unreadable, clients are not impressed—



or should not be—that a lawyer has spent endless hours on their behalf. Good lawyers must devote their time to producing effective prose, but that is time well spent.

The more important a lawyer, judge, or case, the more important clear writing becomes.

---

*One can be a good lawyer or judge and a bad writer,  
but not a great one without being a good writer.*

---

STUART BERG FLEXNER, 1987

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Good lawyers are genuinely interested in words, in their nuances, in the subtle distinctions among them, in the growth of the language. Good lawyers browse through usage books now and again, not out of pedantry but out of fascination with language and the power of writing. Good lawyers revere English—and edit their work one more time to ensure that they have expressed their thoughts with the clarity and felicity that they owe to their clients, to the public, and to themselves.

Those for whom writing is unimportant are doomed to be second-rate lawyers. The connection between good writing and good professional work is not peculiar to lawyers. But because lawyers' work, more than that of most other professionals, consists of writing, a lawyer's disinclination to write well is the more disheartening—and potentially the more disastrous. Bad lawyers scorn the artisans unremunerated for their pains. These lawyers, at best, produce serviceable prose—they know some rules of usage—and settle for the pedestrian. Bad lawyers, neglecting their craft, risk their livelihood—or certainly their clients'.

Lawyers who ignore the art of writing, who leave their prose rough, murky, and unedited, are not simply foolish; they are guilty of malpractice. Unhappily, this form of malpractice is widespread.

George D. Gopen, a lawyer and one-time director of the writing programs at Duke University, offered an elaborate metaphor—the “toll booth syndrome”—to describe how lawyers write. Late on an arctic night, as you drive home from an exhausting day's work, you toss your last quarter at the toll basket—and miss. You can back up and pay the toll

collector in another lane, or you can go through the red light just ahead of you. Your choice depends on what you think the toll is for. If it is to help finance road repairs, then you should back up and pay. But if you suppose the purpose is simply to divest drivers of loose change, you will go through the light. The money is not in the road authority's hands, but it is not in yours, either.

So, said Gopen, lawyers write without thinking about the purpose of doing so:

You cast all of your knowledge on the subject out of your mind onto the paper, not caring if the audience will actually receive your 40¢ worth of wisdom, but caring only that you unburden yourself of it. It's all out there—on the paper, in the gravel—and that is what matters.

Of course, that is *not* what matters. . . . [Lawyers] get all the relevant information down on the paper; they refer to all the possible issues and suggest a number of different approaches and counterapproaches; and all the while they have no perception of how a reader not already knee-deep in the case will be able to wade through it all.<sup>5</sup>

The feeling that good writing does not count is puzzling in a profession that demands its practitioners be well educated. Every state requires prospective practitioners to spend three years at law school, where students learn the substance of law. But the schools largely neglect the skills of practice. Most law schools have added “clinical” courses, especially in the years following the 2008 job market crash. These courses show how to build a client's case and how to guard against an adversary's, but they are costly and sometimes enroll relatively few students. In theory, law schools offer somewhat more in writing instruction: at most law schools, all first-year students take a required “writing” course. But these courses deliver little in the way of a sustained critique of writing. The accrediting rules of the American Bar Association require that law students complete two “rigorous writing experience[s],” a term the accrediting arm has never defined.

When pressed, law schools offer excuses for not providing adequate instruction in writing: Our professors don't want to teach writing. Teaching writing effectively is costly. Or time is limited, and students

come for law, not for a refresher course in what they should have mastered years before. Teaching writing is the responsibility of colleges (or high schools or elementary schools). Students will develop their writing skills on the job.

These excuses are inadequate. The Navy scarcely tolerates a sailor's inability to swim because he should have learned how elsewhere. Nor does it assume that a sailor will discover how to float when his ship is sunk. Worse, these excuses keep students from learning that most lawyers do not know how to write effectively and that good writing really does matter. The message to students is clear: Your writing is good enough for whatever tasks will come your way once you leave school's sanctuary.

In practice, the problem worsens. Most firms offer only a few hours' training to their recruits, even though the best recruits may be mediocre writers. Some large firms invest fair sums of money and large amounts of time in substantive training—a workshop on advocacy, a seminar in the fine points of securities trading, the art of taking depositions—which is a measure of what they think is valuable. Many bosses have been poorly trained themselves and cannot improve upon the inept writing of their juniors, so the prose deteriorates further. The occasional partner outraged at some bit of mangled syntax might circulate a memo on “the five rules of good writing,” as if these idiosyncratic rules (themselves quite likely to be wrong) could solve the problem. Solo practitioners and lawyers at small firms receive little guidance; what they see is the often marginal, convoluted prose of their adversaries and judges.

The lawyer's writing problem is compounded by the different forms that poor writing can assume. When lawyers discuss bad—and good—writing, they mean diverse things. Solving minor difficulties, they may believe they have overcome all. At a prosperous West Coast law firm we visited, a fourth-year associate bragged about how well she and some of her colleagues wrote. Of her boss, she said, “He knows how to write; he knows the difference between *that* and *which*.”

The “that-which” distinction is an occasional issue in English usage, but this knowledge is scarcely the height of the writer's skill. The writer must contend with scores of other usage problems, and usage itself is only one of many elements a skilled writer must master. Yet all too many

lawyers believe that good writing means only mastering a few simple rules.

To prove that they are good writers, or at least that they care about well-ordered sentences, many lawyers, including the West Coast associate, point to a tattered copy of Strunk and White sitting on the bookshelf. *The Elements of Style*, that venerable volume on good usage, was published in 1918 and rediscovered in 1957 when one of William Strunk's students, E. B. White, reminisced about the book in the *New Yorker*. For many lawyers, it epitomizes the craft of writing. For decades, the U.S. Court of Appeals for the Eleventh Circuit in Atlanta has provided a copy to every lawyer admitted to practice.

In 1919, when it was first circulated on the Cornell campus, Strunk said *The Elements of Style* was a good “little book.” As a brief summary of some useful rules, it does belong on a writer's shelf. But *The Elements of Style* is also unsystematic, chaotic, limited, and sometimes unhelpful. Here, for example, is how Strunk and White explained *that* and *which*: “*That* is the defining, or restrictive pronoun, *which* the nondefining, or nonrestrictive.” Accurate, surely, but how does it help?

In a devastating and widely discussed critique of the book, Geoffrey K. Pullum, a professor at the University of Edinburgh, wrote: “*The Elements of Style* does not deserve the enormous esteem in which it is held by American college graduates. Its advice ranges from limp platitudes to inconsistent nonsense. Its enormous influence has not improved American students' grasp of English grammar; it has significantly degraded it.” Pullum called William Strunk and E. B. White “grammatical incompetents” who were unqualified to give the advice that all too many people have been following since 1959, when the book was published in its current form.<sup>6</sup>

Lawyers' misplaced reliance on Strunk and White is emblematic of a limited perspective on writing. Good writing is an elusive concept, but it is certainly more than adherence to elementary rules of usage, punctuation conventions, or idiosyncratic capitalization “rules.” Among its attributes, good writing requires originality, imagination, and clarity; it flows seamlessly from sentence to sentence, paragraph to paragraph, engaging and educating its readers, who view the prose before them not as a chore but as a valuable use of their time.

Everyone can become a better writer, but becoming one requires attention to several ingredients:

- Vocabulary—the choice of appropriate words
- Organization—the effective arrangement of thought
- Topic flow—the appropriate articulation of concepts
- Transitions—the connections between ideas
- Structure—the proper elements of a document
- Audience—the knowledge held by the expected readership
- Tone—the manner or spirit of addressing readers
- Style—the types of sentences and the cadence of prose
- Clarity—the fit between idea and expression
- Accuracy—the fit between expression and reality
- Timing—when to write and when, and how often, to edit

In this book, we write for lawyers who wish to improve their writing—for practitioners who seek to refine their skills and for students who hope to develop them. We look at writing from many perspectives to offer concrete solutions to difficulties of which readers may be unaware. We do not suppose that those who absorb the contents of this book will match Brandeis, Cardozo, or Holmes as stylists. But we do believe that diligent readers will become better writers and that they will be equipped with the means to improve further on their own.

Three more observations about the book's aims:

1. Because writing is an art and a skill, a process and a business, an end in itself and a means to other ends, we do not confine our discussion to rules of usage. We propose that readers consider context and process as well. In chapter 2, we discuss the causes of poor writing and the historical critique of legal writing; in chapters 3 through 6, the way that writers write—individually and in the office; in chapters 7 and 8, the importance of getting to the point; in chapters 9 through 11, the rules and techniques for polishing prose; and in chapter 12, how to make your writing memorable.

2. Because every lawyer composes for many purposes and different audiences, our advice should not be taken to apply equally to every kind of document and under every set of circumstances. We know that lawyers are busy and that they do not have the novelist's luxury of time. The lawyer who must prepare overnight a response to a motion for a preliminary injunction obviously cannot put the draft aside for days before returning to reconsider it. Rules of grammar apply to every brief, memorandum, pleading, letter, and (we argue) even to email, but norms of usage and other stylistic matters vary according to the piece of writing and the intended audience. A brief, for example, should have a level of formality that may be excessive for an email (*whom* is a word that may be absent in emails but should reside in more formal settings).
3. With minor exceptions, we do not consider the art of drafting legislation, contracts, or other legal instruments in "plain English" that is understandable to the lay public. Our premise is that lawyers' thoughts and manner of expression are so disordered that even *other lawyers* cannot understand them. As lawyers learn to write well, inevitably the public will learn to understand them also.

Mindful that we have chided scores of lawyers by using their writing to illustrate problems and solutions, we have sought assiduously to eliminate our own mistakes. But writing about writing errors is always dangerous because the critics invariably commit their own. Sally Powell, the book review editor of *Business Week* for many years, never let her writers attack typographical errors in the books they were reviewing, because as soon as they did, she said, similar mistakes would creep into the magazine.

On occasion, we confess, we have led with our chins. In our original survey of lawyers, for example, we asked the question "Do you have other thoughts on legal writing that you would like to share with us?" David L. Shapiro, then a professor at Harvard Law School, chided us: "Only that the 'sharing of thoughts' should be left to the headmasters of progressive secondary schools."

We hasten to acknowledge that mistakes are sometimes just mistakes and that not every wooden phrase or fuzzy thought means that the writer is thoughtless or poorly trained. We recognize that mistakes inevitably remain in this book, too. We hope that by adhering to the principles we propound, we and you can learn to become more adept at spotting and eliminating the mistakes that slip through.

## 2 DON'T MAKE IT LIKE IT WAS

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Around the country, a select group of court watchers indulges an arcane hobby: collecting lawyers' dreck. A West Coast journalist sent us this specimen:

At 1:00 P.M. while plaintiff was a business invitee and customer, present at that certain real property, a Ralph's Market, located at 1725 Sunset Blvd., Los Angeles, California, and that at said time and place, the defendants, and each of them, carelessly and negligently owned and operated and maintained and controlled the said real property and particularly a shopping cart thereof, and the said cart was at said time and place in a dangerous condition, because there was no "seat flap" in the "upper" basket and a can fell through, breaking plaintiff's foot and it was unsafe for use by persons, including plaintiff, and directly because of such condition, and the negligently and carelessly maintained condition thereof the plaintiff was caused to and did sustain injuries and was proximately injured thereby as hereinafter set forth.

Fred Graham, a one-time Supreme Court reporter for the *New York Times* and CBS-TV, collected examples of particularly ghastly "questions presented," the required statements of the issues in each petition for certiorari, "until," he says, "I got discouraged." Here are two of his favorites:

Whether, consistently with the due process clause and the equal protection clause of the fourteenth amendment, a state court may deprive a party, without compensation of his or its constitutional rights to property by validation of an invalid court determination through the aegis of res judicata, wherein such principle of res judicata was actually a premise for invalidation and nullity rather than the aforementioned validation.

Does it violate the fourteenth amendment of the United States Constitution for the highest court of the state, here the supreme court of