September, 2012

Twenty Opinion-Writing Myths

Gerald Lebovits

Lex and Verum

The National Association of Workers' Compensation Judiciary

Number XXXVII, September 2012

President's Message

By Hon. Ellen Lorenzen, President, NAWCJ

I am back from our annual college and still have not caught my breath but I wanted to pass along a few comments. I particularly want to thank Judge Langham and his committee for putting together the programming and all our judges who cheerfully contributed their time and efforts by appearing on panels or by introducing speakers.

To those of you who were there: I hope you enjoyed yourselves as much as I did. I did not get a chance to meet all of you and I hope you will come back next year so we can talk. If you have not already filled out your evaluation form, I would appreciate it if you could or even just send along an e-mail with your likes/dislikes and high points/low points. One comment of my own: next year we will try our best to provide printed materials. We will also figure out how to let you know the IP address for obtaining the materials on line if you want to bring your I-Pad or notebook. I think we can send you a link ahead of time and you can download the materials to bring with you. If you think that would work, let me know.

To those of you who were not there: I am sorry you could not make it. You missed a lot of really good presentations. For instance, I learned how to rework the opening paragraph of my orders to make it clearer to my readers what the specific legal issues I addressed were, as well as my rulings. Currently I only provide my rulings and I do not think that is a sufficient road map to keep my readers from getting lost as they try to follow the twists and turns of my reasoning. If you are reading this paragraph in bewilderment, give some thought to coming next year.

Continued, Page 2.

NAWCJ President Ellen Lorenzen and President-Elect David Torrey discussing the Judiciary College and the rebroadcast of Dr. McCluskey's presentation by Webex.

Florida Chief Financial Officer and Cabinet member Jeff Atwater opened the College and reminded attendees of their critical role in the workers' compensation systems across the country.

Twenty Opinion-Writing Myths

By: Judge Gerry Lebovits

ED. NOTE. The New York Court system s publishes a book on judicial writing, The following is an excerpt from the 2004 edition. This is a compendium providing an unbelievably detailed focus on legal writing. The table of contents alone is thirty-four pages. The original work is available here: http://ssrn.com/abstract=1406709

1. Only geeks with thick glasses can write good opinions. That is fine; literary style is not very important in opinion writing.

Reality: Judges must be good writers. As professional writers, judges should dedicate themselves to a lifelong study of writing. You cannot be a great lawyer, law clerk, or judge, whatever your other qualities, unless you write well. Here is the reverse: No shoddy lawyers, law clerks, or judges are good writers. As Fordham Law School's former dean, John Feerick, explained, "Without good legal writing, good lawyering is wasted, if not impossible." (John D. Feerick, *Writing Likea Lawyer,* 21 Fordham Urb LJ 381, 381 [1994].)

Legal educators agree on little. But they all agree that legal writing is the most important skill future lawyers and judges must acquire. *(See e.g.* American Bar Association, *Legal Education and Professional Development-An Educational Report of the Task Force* on *Law Schools and the Profession: Narrowing the Gap* 264 [1992] [MacCrate Reportj.) Legal ethicists have their debates. But they all agree that legal writing must be competent. *(See e.g.* Debra R. Cohen,
Competent Legal Writing - A Lawyer's Professional Responsibility, 67 U Cinn L Rev 491 [1999].) American opinion writing must be especially competent "because no judicial system in the common law world has featured the judicial opinion to the extent that the American system has." (William Domnarski, In the Opinion of the.Court xi [1996].)

The following goes in the "My Inferiority Complex is not as Good as Yours" Department. Those who assume that only geeks write well see writing as a series of complicated do's and don'ts. That is not surprising. There *are* many rules, although the most difficult ones are rules of usage, not rules of grammar. Anyone who can speak English, though, can write English. To compose effectively, you need not know every style rule, which can be learned one by one anyway. Nevertheless, the sooner you learn the rules, the better. As the Chinese proverb goes, "The best time to plant a tree is 10 years ago; the second best time is now."

Judges and law clerks know that they must periodically undergo continuing legal education to study substantive law and procedure. *(See* Robert A. Leflar, *The Quality ofJudges,* 35 Indiana LJ 289, 304 [1960] ["It is a rare judge who does not appreciate the need for further self-education, and strive for it constantly."].) All appellate judges and their law clerks know the value of studying writing in addition to substance and procedure. But some trial judges and their law clerks do not. Perhaps they do not know that resources are available to help them. Perhaps they believe that the magic of appointment elevated them above pedestrian activities like writing. Perhaps their egos are too large to acknowledge that their writing-that everyone's writing-can improve. Perhaps they believe that they can get by on boilerplate, or oral opinions, or, in the case of judges, good law clerks. Perhaps they believe that they are too old to learn writing. Perhaps they believe that style is unimportant. Perhaps they suffered so greatly studying legal writing in law school that they do not care to repeat the experience.

You do not get experience until after you need it. But just as you can drive a car without knowing how an engine works, to write effectively you need not know the difference between syntax-the order of words in a sentence-and the parts of speech. With study, practice, an editor, and the right attitude, you can write as comfortably as you drive. Experienced motorists drive without thinking about every shift in gear. Experienced writers compose without thinking about every usage rule. To think constantly about gears is never to arrive at the destination, or never to be happy about the trip. To think constantly about usage is never to finish a document, or never to be happy about the product.

And literary style *is* important. If good opinion writing is critical to the good administration of justice, literary style is critical to good opinion writing:

> "Some judges argue that literary style has little or nothing to do with the quality of opinions, that style is 'dressing' merely, and that the functions of opinions are served by their substantive content.

Continued, Page 4.

NAWCJ
National Association of Worker's Compensation Judiciary
P.O. Box 200, Tallahassee, FL 32302; 850.425.8156 Fax 850.521-0222

"*Writing Myths*" from Page 3.

> "Some judges argue that literary style has little or nothing to do with the quality of opinions, that style is 'dressing' merely, and that the functions of opinions are served by their substantive content. This simply does not make sense. For one thing, every judge has a writing style, whether he knows it or not. Whatever it is, it determines how effectively the substantive content of the opinion is conveyed." (Robert A. Leflar, *Some Observations Concerning Judicial Opinions,* 61 Colum L Rev 810,816 [1961].)

An opinion that "presents a sound statement of the law will hold its own regardless of its literary style. But, the fact that substance comes before style does not warrant the conclusion that literary style is not important." (American Bar Association, Section on Judicial Administration, Committee Report, *Internal Operating Procedures of Appellate Courts* 31 [1961].) Although literary style is important, a satisfactory "objective is not a literary gem but a useful precedent, and the opinion should be *constructed* with good words, not plastered with them." (Bernard E. Witkin, Manual on Appellate Court Opinions § 103, at 204-205 [1977] [emphasis in the original].)

2. Legal writing is subjective. Opinion writers see so much bad writing that they have little incentive to improve their own writing.

Reality: Objective standards determine whether legal writing is good. People disagree only about the less important aspects of legal writing. And precisely because so much legal writing is poor, opinion writers should strive to write well. Poor writing goes unread or is misunderstood. Good writing is appreciated. Great writing is rewarded lavishly. As Professor Fuller said:

> "The great judges of the past are not celebrated because they displayed in their judicial 'votes' dispositions congenial to later generations. Rather their fame rests on their ability to devise apt, just, and understandable rules of law; they are held up as models because they were able to bring to clear expression thoughts that in lesser minds would have remained too vague and confused to serve as adequate guideposts for human conduct." (Lon L. Fuller, *An Afterward: Science and theJudicial Process,* 79 Harv L Rev 1604, 1619 [1966].)

Continued, Page 6.

Did you know?

The National Association of Workers' Compensation Judiciary has undertaken a study of procedural distinctions among the various jurisdictions. Under the leadership of President-Elect David Torrey of Pennsylvania's Department of Labor and Industry, a survey has been prepared and published. This will be the initial step in gathering comparative data regarding the processes in the various jurisdictions. It is hoped that the results from this survey will provide a foundation from which the NAWCJ can build and publish a database comparing various jurisdictions. The survey was provided to attendees at the 2012 Judiciary College in Orlando, and is reprinted on pages 19-22 of this edition. Please take a few moments to complete the survey and then send it to us by email, facsimile or mail. The NAWCJ thanks you for your support and participation.

"*Writing Myths"* from Page 4.

Perfection in writing is impossible. But perfection should be the goal, so long as perfection does not interfere with a deadline. Poor opinion writing signals mediocrity or worse, and that is unhealthy for the administration of justice: "A judge need not be vicious, corrupt, or witless to be a menace in office. Mediocrity can be in the long run as bad a pollutant as venality, for it dampens opposition and is more likely to be tolerated." (Maurice Rosenberg, *The Qualities of Justice - Are They Strainable?*, 44 Tex L Rev 1064,1066 [1966].)

3. Write in a comfortable setting. Then finish a section before taking a break.

Reality: These are matters of personal preference. But most people find writing difficult. The work will be finished faster and more concisely if the writer writes in an uncomfortable setting. Moreover, many writers who take a break between sections become complacent. They find it hard to resume quickly. A writer who takes a break in the middle of a sentence has an unenjoyable break but returns to work quickly. However you do write, though, write at a time and place with few distractions.

4. Reread your opinion soon after you submit it.

Reality: The time to edit your writing is before you submit your final product. Rereading what you have written months after you have written it is helpful to measure progress. But rereading something too quickly after you submit it leads to frustration. Most writers' egos are still wrapped up in their writing, and nothing can be improved after it is submitted.

5. Creativity is the essence of good opinion writing.

Reality: Except in hard cases, the law does not reward creativity. It rewards logic and experience. As Justice Holmes observed, "The law is not the place for the artist or poet. The law is the caning of thinkers." (Oliver Wendell Holmes, quoted in Case & Comment 16 [Mar./Apr. 1979].) A good argument weighs little if, before you consider it, no one, not even a secondary authority, raised it, suggested it, or at least laid the foundation for it, regardless how logical and wise it seems. That is the system of precedent, well explained by New York's Chief Judge John T. Loughran in *Some Reflections* on *the Role of Judicial Precedent,* 22 Fordham L Rev 1 (1953). Thus is it said that "a page of history is worth a volume of logic." *(New York Trust Co. v. Eisner,* 256 US 345,349 [1921, Holmes, J.].) Legal writers gain nothing "reinventing the wheel. And trial judges may not disregard binding appellate precedent. The most they can do is urge a change in the law that only legal authority itself can justify.

6. Good opinion writers write for themselves.

Reality: Good opinion writers write for their readers. Unfortunately, "[t]oo often ... judges write as if only the writer counted. Too often they write as if to themselves and as if their only purpose were to provide a documentary history of having made a judgment. Instead, they must realize that the purpose of an opinion is to make a judgment credible to a diverse audience of readers." (Dwight W. Stevenson, *Writing Effective Opinions,* 59 Judicature 134, 134 [1975].)

An honest, effective judicial opinion for a varied audience must be simple. The goal is to write an opinion "that will contribute to clear understanding of court opinions by laymen and the public in general; perhaps by lawyers, too." (Boyd F. Carroll, *The Problems of a Legal Reporter: Views* on *Simplifying Appellate Opinions*, 35 ABAJ 280, 281 [Apr. 1949].)

7. Organizing increases the workload. It is just one more thing to do.

Reality: Organizing by outlining is a great timesaver if the case is complicated. Those who hate to outline should adopt a flexible approach, but outline they should. Not outlining often means spending more time overall. If you outline you will have a vision before you start, you will know what goes where, and you will not forget or repeat things.

8. Writing a lengthy opinion is harder and takes more time than writing a brief one.

Reality: Writing something short, concise, and to the point is harder than writing something lengthy or rambling. Pascal noted this phenomenon in the seventeenth century: "I have made this letter longer than usual because I lack the time to make it shorter." (Blaise Pascal, Provential Letters xvi, quoted in *Hayes v. Solomon,* 597 F2d 958,986 n 22 [5th Cir 1979, Hill, J.]' *cert denied* 444 US 1078 [1980].)

9. If you have little to say about something, even something important, do not use much space writing it.

Reality: If you have nothing to say, or nothing good to say, do not say it. The same applies to writing. Consider James

Continued, Page 7.

"Writing Myths" from P.6

Russell Lowell's comment about the loquacious: "In general those who have nothing to say Contrive to spend the longest time in doing it." But something that must be communicated will get lost if little space is devoted to it. Expand your important point to give it the stress it deserves.

10. Real opinion writers never compose on word processors. They write longhand.

Reality: The best writers under 40 are computer literate. They make their final edits on a hard copy but compose on the screen. They rarely write in longhand. They never dictate anything longer than a page or two, for "[d]ictating an opinion invites amendment and re-writing to shorten and strengthen its structure." (James D. Hopkins, *Notes* on *Style in Judicial Opinions, 8* Trial Judges J 49 [1969], reprinted in Robert A. Leflar, *Quality in Judicial Opinions*, 3 Pace L Rev 579,585 [1983].) Beware, though: Word processing lets writers write more than readers care to read. Judge Matthew J. Jason explained the problem:

> "[I]n recent years we have witnessed great technological advances in the methods of reproduction of the written word. Too often this process is merely viewed as a license to substitute volume for logic in an apparent attempt to overwhelm the courts, as though quantity, and not quality, was the virtue to be extolled." *(Slater v. Gallman,* 38 NY2d 1,5 [1975].)

11. Know everything about your topic before you begin to write.

Reality: Some argue that "[a]n effective brief is fully thought through before a word is set to paper." (Judith S. Kaye, Callaghan's Appellate Advocacy Manual [John W. Cooley, ed], quoted in Albert M. Rosenblatt, *Brief Writing and Oral Argument in Appellate Practice,* 24 Trial Lawyers Q 22, 22 [1994].) On the other hand, you will never start to write, or you will start to write only the night before your opinion is due, if you insist on knowing everything before you begin. The key is to know everything by the time you finish. You can always change focus in midstream, especially if you compose on a computer. Outlining in advance and constant editing will control your writing.

12. Do not start to write an opinion until inspiration hits you.

Reality: Reflection and deliberation assure fair and accurate decisions. But your opinion will be late if you wait until inspiration strikes. Waiting to become inspired will turn you into a procrastinator, if you ever get around to procrastinating. Waiting for sudden bursts of insight or energy is an excuse to delay writing. These excuses are symptoms of writer's block-which, because the law rewards logic over creativity, except in hard cases-should not afflict the opinion writer. *(See* Stewart G. Pollock, *The Art of Judging*, 71 NYU L Rev 591, 593 [1996] ["To deny the similarities between artistic and judicial endeavors, however, would ignore the reality that judging, particularly in hard cases, is unavoidably creative."].) Legal writing requires more sweat than inspiration. Writers often begin sentences not knowing how they will end. Inspiration comes as you write and edit.

Continued, Page 9.

"Second Fridays," Free Educational Programs from the NAWCJ

September 7, 2012

Mark Popolizio, Esq., will present "Medicare Compliance" an overview of the challenges posed by requirements to take Medicare's Interests into account when settling a workers' compensation case. Mark is an expert in MSA and compliance.

October 12, 2012

Sanford Silverman, M.D. is a pain management physician. He will present perspectives on pain management with focus on the challenges of the growing evidence regarding opiod medications.

November 9, 2012

Alex Cuello, Esq. will present his perspective on guardianships and the challenges to workers' compensation professionals when working with injured workers who are unable to attend to their own best interest.

Make plans today to tune-in

All Second Fridays presentations are free. To join at 12:00 Eastern time, email judgelangham@yahoo.com for details.

Your 2012 NAWCJ Board of Directors

Hon. Ellen Lorenzen, President
Tampa, Florida
Florida Office of Judges of Compensation Claims

Hon. David Torrey, President-Elect
Pittsburgh, Pennsylvania
Pennsylvania Department of Labor and Industry

Hon. Melodie Belcher, Secretary
Atlanta, Georgia
Georgia State Board of Workers' Compensation

Hon. Robert S. Cohen, Treasurer
Tallahassee, Florida
Florida Division of Administrative Hearings

Hon. John J. Lazzara, Past-President
Tallahassee, Florida
Florida Office of Judges of Compensation Claims

Hon. Michael Alvey
Owensboro, Kentucky
Kentucky Workers' Compensation Board

Hon. R. Karl Aumann
Baltimore, Maryland
Maryland Workers' Compensation Commission

Hon Paul M. Hawkes
Tallahassee, Florida
Florida First District Court of Appeal

Hon. Jennifer Hopens
Austin, Texas
Texas Department of Insurance, Division of Workers' Compensation

Hon. David Imahara
Atlanta, Georgia
Georgia State Board of Workers' Compensation

Hon. David Langham
Pensacola, Florida
Florida Office of Judges of Compensation Claims

"*Writing Myths" from P.7*

It is hard to write judicial opinions. Together with emotional strain and the requirements of research and technical accuracy, "as a writer, a]n appellate] judge is under a pressure to produce and publish more severe than that felt by any college professor or journalist." (Johnson, *What Do Law Clerks Do*?, 22 Tex BJ 229, 230 [1959].) If your strength ebbs, you, the trial or appellate opinion writer, are an important public servant who "does not have the luxury of setting aside the case and coming back to it in a month because you have writer's block; you wade through to the end, no matter how paralyzed your pen." (Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings,* 62 U Chi L Rev 1371, 1385 [1995].)

All cases must be decided, even when the equities appear balanced and law and fact seem unclear. After all, "[a]ppellate judges, indeed all judges, have one overriding responsibility: to decide cases." (Eugene A. Wright, *Observations of an Appellate Judge: Use of Law Clerks, 26* Vand L Rev 1179, 1179 [1973] .) Do not worry if you cannot decide a case immediately. A few days' thought and study will resolve doubts, lead to an epiphany, and allow the opinion-writing process to begin. Judge Cardozo beautifully described an experience through which every opinion writer lives from time to time:

> "I have gone through periods of uncertainty so great, that I have sometimes said to myself, 'I shall never be able to vote in this case one way or the other.' Then, suddenly, the fog has lifted. I have reached a stage of mental peace .. . , [T]he judgment reached with so much pain has become the only possible conviction, the antecedent doubts merged, and finally extinguished, in the calmness of conviction." (Benjamin N. Cardozo, *The Paradoxes of Legal Science* in Selected Writings of Benjamin Nathan Cardozo: The Choice of Tycho Brahe 80-81 [Margaret E. Hall ed 1947] .)

13. Finish your opinion early.

Reality: Start early, as soon as reason overcomes emotion and you have the feeling of decision, who should win and, roughly, why. Your labor will be more efficient if you start to draft before the case gets cold in your mind. Starting early lets you start over after a false start and still submit your opinion on time. False starts happen from time to time: "A judge .. . often discovers that his tentative views will not jell in the writing." (Roger J. Traynor, *Some Open Questions* on *the Work of State Appellate Judges,* 24 U Chi L Rev 211,218 [1957] .) But take the time and make the effort to edit until the project is due. You will have fewer regrets afterward. If you write in haste you will repent in court. As Chief Justice Marshall wrote, "The past cannot be recalled by the most absolute power." *(Fletcher v. Peck,* 10 US [6 Cranch] 87, 135 [1810].)

14. Obsessive-compulsives and the omniscient make great opinion writers.

Reality: I wish I had written this 16 times by now: Do not obsess over what you write. Never sweat the small stuff. It will paralyze you. Become obsessive, if at all, only at the very end, during your final edit, when attention to detail is important. Then submit your work and be done with it. Opinions are like children. At some point you must let them go and hope for the best.

Continued, Page 10

"Writing Myths" from P.9

Doing your best and trying your hardest also means not worrying about being reversed. Obsessing over the possibility of reversal might lead to a timid opinion or indecision. The most experienced and learned trial judges sometimes suffer reversal. Just as appellate judges must be open to the possibility of error below, so must trial judges be grateful for appellate review if they make mistakes, or even if others see things differently. The potential for appellate correction should relieve anxiety, not create it.

The omniscient are even worse opinion writers than the obsessed. According to Ninth Circuit Judge Merrill, the omniscient do not recognize an occupational hazard of judging:

> "There is both prospective and retrospective danger to the judge who demands of himself nothing less than omniscience. In the first place he will find it difficult ever to let loose of an opinion, feeling that further study may expose some lurking error in his reasoning. He simply will not get his work out. In the second place, having reached a decision, he may have rendered himself immune to all further enlightenment on the subject." (Charles M. Merrill, *Some Reflections* on *the Business of Judging,* 40 J State B Cal 811,812 [1965].)

15. Good opinion writers rarely need time to edit between drafts. And good opinion writers do not need editors.
Reality: Put your project aside, however briefly, a few times while you write and edit. You will catch mistakes you did not see earlier and make improvements you might not have thought of earlier. Self-editing requires objectivity. You cannot be objective if you do not distance yourself from your work. Thus, start early, but edit late. If you have an editor, take advantage. Welcome suggestions gratefully, and think about them, even if you ultimately reject them. Editors, unlike writers, always consider the only one who counts: the reader.

16. No one cares how you cite, so long as your citations can be found.
Reality: Just as a few dents greatly diminish the value of a fine car, so does improper citation mar legal writing . Just as a gourmet can tell whether the main course in a restaurant will be good by how good the bread is, so can legal readers tell from the quality of the citation format whether the writing and analysis will be good. If the writer is sloppy about citations, the writer might be sloppy about other, more important things. Readers know that writers who care about citations care even more about getting the law right.

Some judges and law clerks insist that they care not at all how lawyers cite, so long as lawyers give the correct volume and section numbers so that citations can be found. Judges and law clerks who insist that they could not care less about lawyers' citing do so for one or more false reasons: as code to suggest that they are so fair and smart that they can see through the chaff to let only the merits affect their decision making; because they themselves do not do not know the difference between good citing and bad; or to communicate their low expectations of the lawyers who appear before them. Judge and law clerks should tolerate lawyers' imperfect citations but must cite proficiently.

17. Only perfectionists care about occasional typographical errors.
Reality: What applies to imperfect citation format applies even more to typographical errors. Spell-check every time you exit your file. Proofread carefully on a hard copy. Proofreading reflects pride of authorship. Arkansas Supreme Court Justice and later NYU Law Professor Leflar explained why pride of authorship is important: "An opinion in which the author takes no pride is not likely to be much good." (Robert A. Leflar, *Some Observations Concerning Judicial Opinions,* 61 Colum L Rev 810,813 [1961].)

Readers find proofreading mistakes easily, more easily than writers can. These are the same readers who pay little attention to what you write until you make a mistake. Proofreading mistakes adversely affect the opinion to a degree vastly out of proportion to their significance.

If your final drafts regularly drop words and contain typographical, citation, formatting, and quotation errors, you might be learning disabled (LD) to one degree or another and in one form or another. In the United States, "15% of the population is affected to varying degrees" by dyslexia. (Unmesh Kehr, "Medicine-Deconstructing Dyslexia: Blame it on the Written Word," *Time Magazine,* Mar. 26, 2001, at 56,56.) It is not a matter of intelligence. Dyslexics have difficulty breaking down the written word, especially the notoriously variable and complex written English word. English has 1120 ways to spell its 40 phonemes, sounds needed to pronounce words. Italian, by contrast, needs only 33 letter combinations to spell its 25 phonemes. (Id.) Those who speak Italian are as dyslexic as those who speak English, but dyslexia affects readers and writers of English, not readers and writers of Italian.

A learning disability is a gift. The learning disabled have talents the differently-abled will never know. Some of the best writers have been learning disabled.

Continued, Page 11.

"Writing Myths" from Page 10.

Think of Albert Einstein, whose penetrating writing proves that he was not merely a physicist. Think of Sir Winston S. Churchill, whose History of the English Speaking People won him the 1953 Nobel Prize for Literature and proved that he was not merely a politician with a gift for gab. LD writers must compensate by proofreading with special care and a second set of eyes. With that extra care, LD writers can often be better writers than non-LD) writers.

For an inspirational, autobiographical piece about an LD opinion writer, see Jeffrey Gallet, *The Judge Who Could Not Tell His Right from His Left and Other Tales of Learning Disabilities, 37* Buff L Rev 739,740 (1989)("I am a kind of talking frog-a learning disabled judge."). The late Judge Gallet, then a Family Court judge for the State of New York in the City of New York and later a U.S. Bankruptcy judge for the Southern District of New York, discovered at 34 that he was dyslexic (reading), dysgraphic ('riting), and dyscalculiac ('rithmetic). Yet he wrote more articles, books, and opinions than many people have read.

18. Prose in opinion writing is best directed to the highest common denominator.

Reality: Legal writing is best directed to smart high-school students. If they understand, you, so will a more educated readership. Keep your words, sentence structure, paragraphs and organization simple. Complex prose is weak prose. The erudite explain difficult concepts in easy-to-read language. From Harvard Law Professor Warren: "[T] he deepest learning is the learning that conceals learning." (Edward H. Warren, Spartan Education 31 [1942].)

19. Legal writing has little to do with reading nonlegal subjects. It is enough to read judicial opinions to learn good legal writing.

Reality: Writing has everything to do with reading, from finding good models, to assessing the merits of a written argument, to learning to think clearly. The goal is to read widely and critically.

Reading cases is not the best way to learn opinion writing. Frankly, some judges write poorly. *(See e.g.* Steven Stark, *Why Judges Have Nothing to Tell Lawyers About Writing,* 1 Scribes J. Legal Writing 25 [1990].) Some law-school teachers select cases to make their students feel inadequate: "Not many readers can defend the prose of judicial opinions selected for case books, a style students instinctively assume is 'the way law looks.'" (Terri LeClerq, Guide to Legal Writing Style xvi [2d ed 2000].)

Opinion writing sets the standard by which many lawyers write. If imitation is thought to flatter, it is not flattering that writing gurus like Temple Law Professor Lindsey consider opinion writing a poor legal-writing model: "Unfortunately, court opinions influence the writing styles of students, lawyers, judges and even law professors. That [is] a distressing, or at least sobering, thought for all of us. If you are what you eat, you write what you read. Garbage in, garbage out." (John M. Lindsey, *Some Thoughts about Legal Writing,* NYLJ, Oct. 27, 1992, at 2, col 2.)

Professor Lindsey overstated his case. Lawyers' and judges' writings have different functions. *(See* William Domnarski, *The Opinion as Essay, the Judge as Essayist: Some Observations* on *Legal Writing,* 10 J Legal Profess 139 [1985] [arguing that judges' and lawyers' writings cannot be analyzed together]; Judith S. Kaye, *One Judge's View of Academic* Law *Review Writing,* 39 J Legal Educ 313, 320 [1989] [arguing that law professors "are writing for each other"].) But many, including many opinion writers, share Professor Lindsey's opinion about opinion writing.

If reading opinions will not teach you how to write a good opinion, how can you learn good opinion writing? Not on a wing and a prayer. It is not enough to recognize good writing when you see it. *(Cf. Jacobellis v. Ohio,* 378 US 184, 197 [1964, Stewart, J., concurring] ["I know [obscenity] when I see it ...."].) Nor is it enough to choose one grammatical construct over another just because the chosen option looks good.

Professor Lindgren suggests returning to school, but" [i]f school is not the answer for most of us, what is? A few people may learn to write from their supervisors on the job, but most will have to learn the same way I am trying to, by reading style books." Games Lindgren, *Style Matters:* A *Review Essay* on *Legal Writing,* 92 Yale LJ 161, 168-169 [1982] [book review].)

Only reading broadly and critically will lead a writer to study the vocabulary and rules of writing. Most great legal writers stress that reading nonlegal subjects is a prerequisite to good lawyering. This was Justice Frankfurter's advice to a 12-year-old boy who wanted to prepare for a career in the law:

> "My dear Paul:
> No one can be a truly competent lawyer unless he is a cultivated man. If I were you, I would forget about any technical preparation for the law. The best way to prepare for the law is to come to the study of law as a well-read person. Thus alone can one

Continued, Page 12.

"Writing Myths" from Page 11.

acquire the capacity to use the English language on paper and in speech and with the habits of clear thinking which only a truly liberal education can bring ....

With good wishes,
Sincerely yours,
Felix Frankfurter"

(Felix Frankfurter, *Advice to a Young Man Interested into Going into Law,* in The Law as Literature 725 [Ephraim London ed 1960].)

20. Law clerks should trust their judges when they are told, "Just give me a draft."
Reality: Many new attorneys believe that a supervisory attorney's most common fib is to instruct the new attorney to submit "only a draft." The problem here is communication, not dishonest supervisors. A seasoned attorney's draft is a less-seasoned attorney's final product. A less-seasoned attorney's draft provides little help to a seasoned attorney, and especially a judge, who might have forgotten that it takes years to write well. The solution: New attorneys should hand in their best work even when told to submit only a draft.

_____

Gerry Lebovits holds advanced law degrees (M.C.I. and LL.M.) and serves as an adjunct professor (teaching "Drafting Judicial Opinions" and other courses) at New York Law School. A Housing Court Judge in New York City, he was principal court attorney in the New York State Court system for almost 16 years. He has published on a broad range of legal subjects and authors a column on legal writing for the New York State Bar Journal. For a number of years, he has conducted judicial training seminars on opinion writing under the auspices of the New York State Office of Court Administration, Jude Lebovits' Handbook, now in its seventh edition was developed for those seminars and has been distributed widely to the New York bench.

Judge Lebovits' Perspective on his work:

"I would be honored if this work in progress helps law clerks and their judges render justice. I would be content if it makes them think about writing."

Gerry Lebovits
GLebovits@aol.com
November 2004

NAWCJ Judiciary College 2013

With the 2012 Judiciary College behind us, we are refocusing our efforts. We will be evaluating the program in coming weeks as we begin the process of planning for next year. Mark your calendars now for these future Judiciary College dates.

Judiciary College 2013 * August 18-21, 2013

Judiciary College 2014 * August 17-20, 2014

Judiciary College 2015 * August 23-26, 2015

Judiciary College 2015 * August 21-24, 2016

If you have suggestions for topics generally or specific speakers, please contact judgelangham@yahoo.com