Book Notices

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Advanced Legal Writing: Theories and Strategies in Persuasive Writing. By Michael R. Smith. New York, N.Y.: Aspen Law & Business, 2002. Pp. 360. $41.00.

This book is designed to build on the basics of persuasive writing taught in most first-year legal-writing courses. It teaches techniques based on research from other disciplines such as cognitive psychology, literary theory, and classical rhetoric theory.

The book is both novel and fascinating. While Smith, like other writing experts, notes that credibility is crucial to an advocate's persuasive power, he goes far beyond that concept, explaining exactly how to project credibility. For example, he identifies five traits that demonstrate good moral character — truthfulness, candor, zeal, respect, and professionalism — and then describes characteristics of writing that evince each trait. He uses the same approach for the eleven traits that demonstrate intelligence. While interesting from a social-science perspective, this technique will seem manipulative to many readers. Here, Smith turns on its head the principle, long recognized by writing experts, that good writing flows naturally from good character and intelligence.[1]

While the book covers unusual topics not commonly discussed elsewhere, few readers — whether students or lawyers — will have

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[1] *See, e.g.*, BRYAN A. GARNER, THE WINNING BRIEF: 100 TIPS FOR PERSUASIVE BRIEFING IN TRIAL AND APPELLATE COURTS 459 (2d ed. 2004) ("[W]hatever you write reflects who you are and how your mind operates."); WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE 67 (4th ed. 2000) ("Every writer, by the way he uses language, reveals something of his spirit, his habits, his capacities, his bias.").

much patience for its use of specialized terms such as "non-thematic hyperbole" and "intertextuality." And only literary scholars are likely to appreciate Smith's discussion of obscure figures of speech like autonomasia, anadiplosis, and antimetibole.

Although generally well written, the book exposes a few bad habits of its author, such as starting sentences with *however* and overusing nominalizations, passive voice, and quotation marks. Particularly offputting — in style, format, and tone — are many of the book's chapter and section headings, including these three:

> *The Cognitive Dimensions of Illustrative Narratives in the Communication of Rule-Based Analysis*
>
> *"Role Differentiated Morality" Insulates Professional Advocates from Criticism for Acting in Ways Consistent with Their Social Role*
>
> *Lawyers, as Advocates, Maintain and Improve a "Culture of Argument" that Makes Available to Society Tools of Argumentation and Persuasion that Can Be Mobilized in the Pursuit of Justice*

Some readers will appreciate Smith's innovative approach to persuasive writing. But several other books on this topic are more comprehensive — and more comprehensible — than this one.

The Art of Oral Advocacy. By David C. Frederick. Foreword by Ruth Bader Ginsburg. St. Paul, Minnesota: West Group, 2003. Pp. 265. $31.00.

This softcover book is an abridged version of Frederick's *Supreme Court and Appellate Advocacy*, a splendid hardback guide to oral argument in the Supreme Court. In her foreword to that earlier guide, Justice Ruth Bader Ginsburg comments: "Frederick's step-by-step analysis, his account of the components of oral argument, can arm an attorney to perform to best effect before any of our nation's multi-judge courts." This edition, which focuses more broadly on oral advocacy before any court or adjudicative body, shares those same strengths.

Frederick, a veteran U.S. Supreme Court advocate who served with the Office of the Solicitor General, draws on his own experiences in this practical guide. While designed to be useful to law students, this well-written, readable gem would be a valuable resource for any lawyer preparing for oral argument.

What sets the book apart from other guides is its many concrete examples of effective and ineffective techniques. Especially insightful is Frederick's chapter on common mistakes in oral argument, in which he catalogues and, using excerpts from Supreme Court transcripts, gives examples of errors in speaking style, in substance, in citing materials, in interacting with judges, and in decorum.

Frederick also identifies the attributes of the best advocates, providing excerpts from arguments by luminaries such as Charles Alan Wright. Frederick could improve the next edition, however, by expanding the group of effective advocates that he quotes.

The book addresses subjects that are not extensively covered in the existing literature on appellate advocacy. For example,

Frederick discusses the pros and cons of conducting moot courts and shows how to use analogies effectively, again giving specific examples from Supreme Court arguments.

The book provides a systematic guide to preparing for oral argument, including how to create an "argument podium binder." And it identifies the types of questions typically asked by appellate panels. Finally, in five appendixes, Frederick provides helpful checklists as well as samples — both good and bad — of openings, midargument advocacy techniques, and rebuttals.

This book is highly recommended for anyone who seeks to become a better advocate.

A Grammar Book for You and I . . . Oops, Me!: All the Grammar You Need to Succeed in Life. By C. Edward Good. Herndon, Virginia: Capital Books, 2002. Pp. 430. $17.95.

As unlikely as it seems, this book is a lively, accessible grammar guide by the author of *Mightier than the Sword: Powerful Writing in the Legal Profession.* In this book, Good, who is of counsel and writer in residence at a large intellectual-property firm, teaches grammar from the very beginning. Yet his tone is neither condescending nor didactic. Instead, Good's clear, step-by-step approach is laced with the humorous tales of Miss Hamrick, his stern seventh-grade English teacher, and of Billy Womble and his pals, the 13-year-olds who struggle to get grammar right. This combination of clarity and levity should enable even the most apprehensive readers to overcome their fear of grammar.

Good begins and ends the book by discussing the erosion of grammar and explaining why correct grammar matters. The main

text starts with detailed chapters on the eight parts of speech. Next, in a section called "Wars of the Words," Good explains why effective writers prefer verbs over nouns, minimize their use of the verb *to be*, choose the active over the passive, and use *that* and *which* carefully. Good also addresses style, including subordination, noun substitutes, and parallel structure.

In another section, Good covers common grammatical blunders, using clever subtitles like these:

- When writing, your participle might dangle.
- Their mixing up they're "theres."
- Your leaving out the word "are."

The book ends with an easily understood section on punctuation.

The book's format is excellent, including effective charts, plenty of white space, and shaded windows that synthesize key points. For authority, Good relies largely on eight well-recognized sources, which he identifies at the beginning, giving each a short form such as *Fowler* or *Strunk & White*. And while some of the chapters have a few endnotes, Good uses the short forms to identify his sources in the text. Thus, readers don't have to consult the endnotes unless they need specific page references.

Good's clear, well-written grammar guide is highly recommended.

Hereof, Thereof, and Everywhereof: A Contrarian Guide to Legal Drafting. By Howard Darmstadter. Chicago, Illinois: American Bar Association, 2002. Pp. 179. $39.95.

This book is a lively collection of musings, tips, and anecdotes on legal drafting by Howard Darmstadter, an experienced New York business lawyer and former philosophy professor. Most of the book is adapted from "Legal-Ease," Darmstadter's award-winning column in *Business Law Today*, the magazine of the ABA's Section of Business Law. Although written for business lawyers, it's a book that almost any lawyer would enjoy.

Indeed, Darmstadter has accomplished a near-miracle here. He's written a page-turner about legal drafting — which is "surely one of life's drier subjects," as he notes in the preface. But the book brims with humor, with thoughtful observations about lawyers' foibles, and with fascinating insights about writers, readers, language, and life in general. Darmstadter is that rare author who, in addition to knowledge, has a fluent writing style, a self-deprecating tone, a sharp wit, and a colorful vocabulary. Take, for example, these excerpts:

- Legal documents require a certain amount of legal language, but the document should still be as close to colloquial English as practicable. Writing colloquial English is not easy. If I were better at it, I'd be writing novels rather than documents (p. 3).

- There's no particular reason to center headings nowadays, and centering tends to lose the strong verticals that designers — and readers — like. For myself, I find that centered text is somewhat lifeless. I tend to use it only for regulatory legends, for which embalming is appropriate (p. 65).

As a legal-drafting guide, the book is neither comprehensive nor scholarly. But as Darmstadter explains, he didn't aim for such a guide: "Much of this book is devoted to explaining the reason for the suggestions I make. I lack the facilities and the temperament for sustained historical research. Rather, it is a form of speculative anthropology" (p. x). Still, Darmstadter offers sound, practical advice on the topics he considers.

The book begins with good chapters on word choice and sentence structure. Next, in a chapter titled "The Look of the Document," Darmstadter provides sensible tips on typeface, font size, margins, line length, and other formatting issues that affect readability. Here, he explains that legal documents often look archaic because lawyers have resisted technological change, clinging to the typewriter's outmoded effects. Later chapters cover specific document types, including securities prospectuses, promissory notes, and guarantees. In these chapters, Darmstadter addresses key drafting issues such as headings, numbering, formulas, boilerplate, definitions, counterpart documents, and exhibits.

But Darmstadter includes a few topics that seem peculiar. For instance, in a transactional-drafting book, it's strange to find sections on (1) the use of footnotes, endnotes, or parentheticals for citations; and (2) the substantive law of guaranty and suretyship. And there's a similarly odd discussion of how to choose fictional names for characters in examples.

Overall, however, *Hereof, Thereof, and Everywhereof* is recommended. It offers a humorous, yet critical, look at legal drafting that surpasses the typical scorn for legalese.

Just Writing: Grammar, Punctuation, and Style for the Legal Writer. By Anne Enquist and Laurel Currie Oates. New York, N.Y.: Aspen Law & Business, 2001. Pp. 315. $39.95.

This student guide has already gained wide acceptance among legal-writing instructors nationwide. Its chapters are excerpted, renumbered, and condensed from the 1998 second edition of *The Legal Writing Handbook* by Oates, Enquist, and Kelly Kunsch. As the authors explain, *Just Writing* includes "just the writing" portions of the earlier book, omitting the sections on research and legal analysis.

The book is divided into three main parts. Part I focuses on general principles of good writing. Unlike many other authors, Enquist and Oates discuss the writing process, including psychological barriers to good writing. This part also includes excellent advice on effective paragraphs, sentences, and words. And the authors emphasize the need for smooth transitions. Part I also offers sound advice on some topics often omitted from student texts, including gender-neutral language, bias-free language, and eloquence.

Part II covers grammar and punctuation. But as the authors acknowledge, this part is merely a review. On these topics, law students would be better served by using a more comprehensive guide, such as Bryan Garner's *Redbook: A Manual on Legal Style* or William Sabin's *Gregg Reference Manual.*

Part III, however, fills a gap in the legal literature by addressing legal writing for law students for whom English is a second language. Here, Enquist and Oates devote over 40 pages to the aspects of English that nonnative speakers find most difficult and to the "rhetorical preferences" of native speakers, including

assumptions about the writer–reader relationship and other fascinating assumptions that underlie U.S. legal culture.

While the book ends with a glossary of usage and an index, both sections are too brief to be of much use.

Just Writing contains a few peccadilloes. For example, the authors oddly imply that dashes should be avoided in legal writing because they supposedly suggest informality. And in listing ways to avoid the generic masculine pronoun, they include the confusing approach of alternating masculine and feminine pronouns. But overall, *Just Writing* is a well-written, thoughtful, and sound guide that will help law students improve their writing.

Legal Usage in Drafting Corporate Agreements. By Kenneth A. Adams. Westport, Connecticut: Quorum Books, 2001. Pp. 207. $99.95.

This book covers virtually every aspect of drafting corporate agreements between sophisticated parties represented by counsel. Adams, a corporate lawyer in private practice, discusses the conventions of language and structure in corporate agreements, including grammar, document design, and word usage.

In eight chapters, Adams first moves from the beginning to the end of a corporate agreement and then considers general drafting issues:

- Chapter 1 discusses a contract's preliminary parts — the title, introductory clause, recitals, cover sheet, table of contents, and index of defined terms.

- Chapter 2 analyzes the body of a contract, including the language of performance, obligation, discretion, prohibition, policy, and representation.

- Chapter 3 addresses the structure and format used for the body of a contract.

- Chapter 4 considers the concluding clause, the signature blocks, and any attachments.

- Chapter 5 examines general drafting issues, including defined terms, numbers, time references, cross-references, typography, and common drafting problems.

- Chapter 6 suggests specific provisions that are intended to aid in contract interpretation, explaining why each is useful, not useful, or possibly useful.

- Chapter 7 discusses general writing principles that Adams finds most relevant to contract-drafting.

- Chapter 8 considers certain aspects of the drafting process that most affect the quality of the drafting.

At the end, you'll find a before-and-after version of a sample contract and a short index.

Adams offers generally good advice and detailed explanations, particularly on linguistic matters such as tense, usage, and word choice. He also makes some helpful suggestions on defined terms, formatting, and forms. But for reasons that are somewhat unclear, Adams disagrees with most legal-writing experts on using *shall* and

must in contract drafting. And troublingly, he quotes an article from this *Journal* by one such expert, Joseph Kimble, out of context, wrongly implying that Professor Kimble agrees with his position.

The book contains a few other flaws as well. For example, the writing sometimes suffers from awkward, overlong, and even grammatically incorrect sentences like this one:

> Of those contracts that have occasion to refer to the introductory clause, many refer to it as a "recital," however recitals are found after the introductory clause, and others refer to it as the "preamble," a term best understood as the legislative equivalent of recitals (p. 2).

Other occasional lapses include omitting necessary commas and overusing prepositional phrases beginning with *of*. These flaws sometimes create ambiguities within the text — like the one caused by omitting commas before and after the phrase "whenever possible" in this sentence:

> If you make the effort to ensure that whenever possible duties are imposed on the subject of a sentence, you will draft more clearly and will, in the process, limit your need to alternate between *shall* and *must* (p. 32).

Although the book is well researched, all citations appear in endnotes after the last chapter. To make matters worse, Adams often fails to include in the text any indication about the source of the quoted material. Many readers will resent either having to constantly flip to the endnotes or having to guess about the sources.

While a thorough edit would improve the book significantly, Adams has provided generally sound, comprehensive guidance on drafting corporate agreements.

Legal Writing: Form and Function. By Jane N. Richmond. Notre Dame, Indiana: National Institute for Trial Advocacy, 2001. Pp. 277. $41.75.

Richmond, who has a Ph.D. in English, has for many years taught legal writing at a large law firm. Despite her experience in the legal field, her book focuses primarily on pure grammar and mechanics. And on those topics, she provides more detail than most practicing lawyers will find useful, or even tolerable. Only lawyers who are grammar zealots will want to learn about reflexive pronouns, dangling participles, and conjunctive adverbs. Meanwhile, Richmond omits important legal-writing topics such as analysis, citation, and use of authority.

In seven chapters, Richmond addresses style, persuasion, writing with flair, grammar, punctuation, the writing process, and paragraph structure. While she advises readers to avoid monotonous sentence structure, she sometimes ignores her own advice, as in this series of short sentences with subject–verb constructions:

> Writing is an integral part of a lawyer's professional competence. Writing lies at the heart of a practice, and most attorneys write every day. Associates prepare legal memoranda. Litigators write to convince judges. Other documents record transactions (p. xix).

Also, Richmond's tone is consistently serious, sometimes bordering on the pedantic. All but the stuffiest readers will yearn for a touch of levity, especially since the mechanical aspects of writing are not intrinsically lively.

More important, some of Richmond's writing advice is dangerously misguided. For example, she comments that even if the "rule" against starting a sentence with *and* "has changed," *and* "creates a flabby, indirect beginning for a sentence" (p. 72). But as

Bryan Garner has observed, it's "rank superstition that this coordinating conjunction cannot properly begin a sentence."[2] For centuries, the very best legal writers — from Alexander Hamilton to Lawrence Friedman — have occasionally used *and* to begin a sentence. And contrary to Richmond's unusual view, the initial *and* creates a swift, graceful transition to the next thought.

Throughout the book, Richmond cites no authorities, although from time to time she claims that "most grammarians agree" with whatever "rule" she's espousing. This lack of authority probably explains why her advice to readers sometimes goes awry.

While the book includes numerous exercises, most of them seem designed to improve grammar skills, not legal writing. For example, it's hard to imagine how an exercise like this one could possibly help a lawyer: "Identify each prepositional phrase, its type, and the modified term in these sentences: . . ." (p. 155). The book may be of interest to the rare lawyer who's a grammar aficionado, but it is not generally recommended.

[2] BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 55 (2d ed. 1995).