

Gopen Litigation Article #30

Understanding How Our Concept of the Writing Task Got Arrested at the Student Level and What to Do about It

How often do you, after reading a legal document, want to run into colleagues' offices to share the document with them because it was so clearly and engagingly written? Not often enough. Probably not often at all.

Why is this the case? Is it because legal thinking is so hard that legal reading must be equally hard? That is a misconception.

Is it because lawyers tend to imitate the writing they are constantly forced to read? In part.

It is worse than you think. I was married to a state appellate court judge for ten years. I watched her work. I watched her have to do the work the lawyers should have done for her. Many a time I have heard her say that 95% of the briefs submitted for her cases were of little use – sometimes no use at all -- in her decision-making process.

I think the problem started when we were students, from the very first grade in which we were assigned writing. If we are lawyers, we were probably pretty good students. We learned how to succeed at the writing task we were given: (1) Gather information and ideas; (2) arrange them on the page in some kind of orderly manner; (3) choose the best words you know to fill the sentences; and (4) be sure the whole thing is error-free. If you fill the right number of pages on the topic assigned, you cannot fail. If you do

it with energy, you will do well. And if you have improved since last time, your grade will continue to climb.

No one told us that when we graduate for the last time, our rhetorical task of writing changes. In school, we were writing for an audience that had nothing to learn from us. We assumed teacher was the expert, knowing 100% about anything we were assigned to write. We were performing; teacher would judge the performance. Our rhetorical task was *demonstration*. We needed to *demonstrate* to teacher that we were worthy of a high grade. Depositing stuff on the pages usually did the trick.

That task often seemed to us burdensome, perhaps even odious – with good reason. The whole process was artificial. We were writing for an audience that already knew everything we could say. We were writing for a fake audience.

When we become lawyers, the rhetorical task changes dramatically. Now we are the experts, the ones who know everything about what we want to say. Our readers read us in order to find out what we have to say. Our success does not depend on filled pages nor on energy expended and certainly not on whether we have improved since last time. The judgment of the quality of a piece of writing in the professional world is based on this simple question: Did the reader receive what the writer was trying to send? If the answer is “yes,” the writing was good enough; if “no,” it wasn’t.

So our writing task as lawyers is not the student’s task of *demonstration*; ours we can call *communication*.

How do many, perhaps most, lawyers think about the writing process? I fear most look upon writing as what is left to be done

once all the interviewing and researching and thinking has been completed. Now it just has to be “reduced to words.” Wrong from the start. Writing is part and parcel of the thinking process. You think in order to write; you read what you have written to judge what it is you have thought; and that leads you back to thinking. “How do I know what I mean ‘till I see what I say?”

If the final judgment of a piece of writing is based on what the reader made of it, then the best way to get greater control over writing is to understand how readers go about reading. That has been my work for more than four decades.

This is the 30th essay I have written in *Litigation*'s series called “On the Papers.” Taken together, they are a handbook for understanding how readers go about making sense out of the words in a sentence and the sentences in a paragraph. The new, underlying principle is this: Readers of contemporary legal prose take the great majority of their clues for the interpretive process not from word choice nor from word meanings, but rather from the structural location of words in a sentence. *Where* a word appears will control most of *the use* to which it will be put by the reader.

I am repeating myself from former essays: But this concept is so important, it bears repeating. There are four questions to which we as readers have to have the right answers at the end of reading every sentence if we are to perceive what the writer intended by it: (1) What is going on?; (2) Whose story is it?; (3) how does this sentence connect backwards and forwards to its nearest neighbors; and – the most important one --(4) what words should I be reading with extra emphasis because they are the stars of the show?

My Reader Expectation Approach to the language claims that as

readers we know *where* in the sentence to look to find the answers to all four of these questions. As readers, we know these things intuitively. “All” we have to do as writers is to make that intuitive knowledge conscious in us as we go about fashioning our sentences.

This is neither mechanical nor cosmetic. In order (e.g.) to place the most important thing in the sentence into an appropriate stress position, we first have to know what that important thing is. In order to start a sentence with a linkage backwards to the previous sentence, we have to be able to articulate what that connection is. We have a word for this process: It is called “thinking.” Thinking is hard. Writing is hard, too; but we can do a much better job of it than we currently do.

You write a brief for a judge. The judge is not your high school teacher, who will approve of you if you download all the facts, identify the issues, summon precedents, and conclude that your side is in the right. The judge is not in the business of giving you an A for effort: The judge actually needs to understand *how* you are thinking about the case and *why* your client should prevail. She cannot understand these things unless your writing guides her thinking, from one end of a sentence to the other, from sentence to sentence, and throughout the entire paragraph.

Understanding reader expectations will make an enormous difference. If, on a regular basis, you announce clearly (here are those 4 questions again) what is going on, whose story this sentence is, how it connects backwards and forwards to its neighbors, and – most important of all – which word or words in the sentence should be read with extra emphasis because they are the stars of the show, then you will have successfully completed the rhetorical task of communication.

In a legal case there usually is a winner – even when both sides do an inadequate job of writing. In scientific research, this is not the case. Of all the grant applications submitted to an institute of the National Institutes of Health (our major funding organization in the USA), on average only about 10% will be funded. The other 90% of applicants all have PhDs, all have worked hard, and all have submitted data and arguments; but they will have failed. There is simply not enough money to go around.

I have been working with these scientists for more than 20 years now. Every couple of months I receive an email from some scientist I do not know, who says in effect the following: “I never could get my grants before you explained how the English language works for readers. I worked hard to incorporate all that into my writing. Since then, I have received funding every time I have applied for it.”

What the scientists have done, you can do, too. If you want to learn or revisit all the answers to those four crucial questions, you can review all my previous 29 Litigation articles. They are available on the Publications page of my website: www.GeorgeGopen.com. 27 of them are precisely as short/long as this one is. The other 2 will cost you an extra page of attention. Putting all that information to work is hard, because thinking is hard. But your eventual products will prove far more effective. Communication will happen.

I will close with a bold statement: There is no other single thing you can do that will make as profound a difference in your career as gaining control of your writing by understanding how readers go about reading.

Have questions? You can reach me at ggopen@duke.edu.
Happy reading.