

“I CAN [READ] CLEARLY NOW”

*LEGAL WRITING: A JUDGE’S PERSPECTIVE ON THE
SCIENCE AND RHETORIC OF THE WRITTEN WORD*

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Audience. Comprehension. Recall. Those three words sum up Judge Robert E. Bacharach’s recent book, *Legal Writing: A Judge’s Perspective on the Science and Rhetoric of the Written Word*.¹ Published in 2020 by the American Bar Association’s Tort Trial and Insurance Practice Section, Judge Bacharach’s book looks at how readers are “affected by others’ language.”² And while the book does offer substantive tips on sections of legal documents—such as introductions, point headings, conclusions, and fact sections—the meat of the book concerns word choice, sentence structure, grammar, and punctuation.

In offering his writing tips, Judge Bacharach draws from the work of well-known jurists and advocates, including Paul Clement, Neal Katyal, Judge Frank Easterbrook, and Chief Justice John Roberts, who was a successful Supreme Court advocate before becoming a judge.³ Judge Bacharach doesn’t limit himself to the works of lawyers and judges; he also examines memorable speeches by politicians, like Winston Churchill

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1. ROBERT E. BACHARACH, *LEGAL WRITING: A JUDGE’S PERSPECTIVE ON THE SCIENCE AND RHETORIC OF THE WRITTEN WORD* (2020).

2. *Id.* at ix.

3. Before becoming Chief Justice, John Roberts argued thirty-nine cases before the Supreme Court. White House Archive of President George W. Bush’s Nomination of Chief Justice John G. Roberts, Jr., WHITE HOUSE, <https://georgewbush-whitehouse.archives.gov/infocus/judicialnominees/roberts.html> (last visited Sept. 29, 2021).

and Franklin D. Roosevelt. Judge Bacharach effectively uses these sources to provide concrete examples of the points he is making, whether it be how to craft a point heading or how to properly use vivid verbs for emphasis.

While other books on legal writing have looked to jurists, advocates, and politicians for examples,⁴ Judge Bacharach adds a twist—he supplements these examples with research from psycholinguists.⁵ For those unfamiliar with psycholinguistics, it involves the study of “language use and the cognitive processes that accompany it.”⁶ As Judge Bacharach explains, psycholinguistics can help us understand “[w]hy . . . certain word combinations command our attention” and “[h]ow . . . word choice, punctuation, and the layout of a page affect the pace of our reading.”⁷ For those who want their audience to understand and remember what they write, these are important questions to answer. We might reflexively know why a piece of writing sticks with us but understanding the science behind that feeling can help our writing improve.

Although only 158 pages long, Judge Bacharach’s book is replete with insights into effective writing. As I dug into the book, I kept returning to the notions of audience, comprehension, and recall. This review centers on those three concepts.

I. AUDIENCE

When I teach appellate brief writing, I always remind my students that they are writing to persuade judges and law clerks—not the partners at their firm, other attorneys, or their clients.⁸

4. *See, e.g.*, ROSS GUBERMAN, *POINT MADE*, at xxxi (2d ed. 2014).

5. BACHARACH, *supra* note 1, at ix.

6. Chris Kelaher, *What is Psycholinguistics?*, APA BOOKS BLOG (July 6, 2016), <https://blog.apabooks.org/2016/07/06/what-is-psycholinguistics/>.

7. BACHARACH, *supra* note 1, at ix.

8. *See* TESSA L. DYSART ET AL., *WINNING ON APPEAL 15* (3d ed. 2017).

When I ordered Judge Bacharach's book, I assumed that it would focus on that perspective—writing to persuade a judge. And while the book does discuss that audience, it also focuses on the writing of judges and their audience—the litigants and attorneys who will read judicial opinions and “whose lives are affected by the language” the judge selects.⁹ Thus, this book isn't just for attorneys who write to judges; it also provides some excellent writing suggestions for judges. In fact, Judge Bacharach's discussion of “vivid verbs” for emphasis uses examples almost exclusively from judicial opinions rather than briefs.¹⁰ This dual audience focus becomes even more important when we look at the importance of comprehension.

II. COMPREHENSION

As I dug into the book, I was surprised at the emphasis on grammar and sentence structure.¹¹ For example, over one-third of the book is devoted to sentence structure, with another twenty-plus pages to grammar.¹² Judge Bacharach devotes such a substantial portion of the book to these topics because they are so critical to comprehension. Take, for example, his discussion of transitions.¹³ As he notes, transitional words don't simply signify that “the writer is going to say something else.” Instead, they “inform the reader, showing how the

9. BACHARACH, *supra* note 1, at ix.

10. *Id.* at 73–89.

11. *See, e.g., id.* at 37–99 (sentence structure), 123–45 (grammar).

12. *Id.* In his discussion of grammar, Judge Bacharach comes to the right conclusion concerning the singular possessive when a noun ends in “s.” He suggests adding an apostrophe s, so the possessive of James would be James's. *Id.* at 143. *But see* Ryan C. Black & Timothy R. Johnson, *Obsessive Over the Possessive on the Supreme Court of the United States: Exploring SCOTUS' /SCOTUS'S Use of Possessive Apostrophes*, 21 J. APP. PRAC. & PROCESS 13 (2021) (analyzing the use of possessive nouns in the United States Supreme Court).

13. *See* Diana Simon, *The Power of Connectivity: The Science and Art of Transitions*, 18 LEGAL COMM'N & RHETORIC (forthcoming 2021), for another discussion on the use of effective transitions.

new sentence will relate to the prior one.”¹⁴ Likewise, the discussion of sentence structure,¹⁵ concrete nouns,¹⁶ and modifiers¹⁷ is designed to promote reader comprehension. As Judge Bacharach notes, “no one should need to reread anything that you write” to understand it.¹⁸ And while some might think that these topics should be mastered far before one begins writing appellate briefs or judicial opinions, a simple Google search for “bad legal writing examples” shows that bad legal writing is a real problem.

But, writing to promote comprehension involves more than just proper grammar, especially for judges who are writing for non-legal readers. Writing for comprehension requires using simple language,¹⁹ avoiding unnecessary legalese and Latin phrases,²⁰ avoiding unfamiliar acronyms,²¹ and using parties’ names rather than their litigation status.²² This last piece of advice mirrors the requirement of Federal Rule of Appellate Procedure 28(d),²³ which is perhaps one of the most frequently ignored federal appellate practice rules.

Finally, writing for comprehension requires using words correctly. Judge Bacharach provides an extensive list of words that are often misused.²⁴ While I was surprised that the list did not include “compliment” versus “complement,” he does give a great summary of how to use “principle” versus “principal.”²⁵

14. BACHARACH, *supra* note 1, at 37.

15. *Id.* at 46–49.

16. *Id.* at 69–70.

17. *Id.* at 132–35.

18. *Id.* at 46.

19. *Id.* at 109–10.

20. *Id.* at 113–14.

21. *Id.* at 115–16.

22. *Id.* at 116.

23. Fed. R. App. P. 28(d) (“In briefs and at oral argument, counsel should minimize use of the terms ‘appellant’ and ‘appellee.’ To make briefs clear, counsel should use the parties’ actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as ‘the employee,’ ‘the injured person,’ ‘the taxpayer,’ ‘the ship,’ ‘the stevedore.’”).

24. BACHARACH, *supra* note 1, at 116–21.

25. *Id.* at 120.

III. RECALL

The final overall theme of the book is recall. Recall is critical for appellate briefs, as judges often must juggle large caseloads. And recall often goes hand in hand with comprehension. It is hard to recall something that you don't understand.

Judge Bacharach's lengthy chapter on sentences offers some excellent strategies for promoting recall. He devotes twenty pages to the topic of emphasis,²⁶ discussing rhetorical devices like anaphora,²⁷ epistrophe,²⁸ alliteration,²⁹ simile,³⁰ and metaphor.³¹ He also discusses punctuation,³² sentence and paragraph placement,³³ and the use of "vivid verbs."³⁴

Although Judge Bacharach spends a significant number of pages discussing emphasis, he rightly cautions writers to not overuse it, warning that overuse can dilute the value of emphasis.³⁵ I think that is especially true for brief writers who may try to overuse emphasis rather than focusing on strong reasoning.

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Legal Writing: A Judge's Perspective on the Science and Rhetoric of the Written Word is an excellent resource for attorneys and judges who want to improve their writing, especially those who want to improve the details of writing, like grammar and sentence structure.

26. *Id.* at 49–69.

27. Anaphora is "the repetition of a word or phrase to begin successive clauses." *Id.* at 50–52.

28. Epistrophe is the "repetition of phrases at the end of a sentence." *Id.* at 52–56.

29. *Id.* at 53–56.

30. *Id.* at 64–65.

31. *Id.*

32. *Id.* at 123–26.

33. *Id.* at 59–60 (discussing sentence placement in the paragraph), 101–08 (discussing effective paragraph formulation).

34. *Id.* at 73–89.

35. *Id.* at 88.

While, as a teacher of novice writers, I would have enjoyed a little more fulsome discussion of structural aspects of the brief, like the introduction and issues presented, such a discussion would perhaps not fit what seems to be his intended audience—judges and experienced attorneys.

I learned a lot from Judge Bacharach's discussion of emphasis, diction, and grammar. I view this book as one that will sit on my shelf with other resources books, like *The Elements of Style*³⁶ and *Plain English for Lawyers*.³⁷ And, it is a book that I will suggest to our readers—judge and attorney alike—who want to up their writing game.

36. WILLIAM STRUNK, JR. & E. B. WHITE, *THE ELEMENTS OF STYLE* (4th ed. 1999).

37. RICHARD C. WYDICK & AMY E. SLOAN, *PLAIN ENGLISH FOR LAWYERS* (6th ed. 2019).