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Steve Leben

*n the Kansas Court of Appeals*

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# Writing Like the Best Judges

Steve Leben

ROSS GUBERMAN, *POINT TAKEN: HOW TO WRITE LIKE THE WORLD'S BEST JUDGES*, Oxford University Press, 2014. 376 pp. \$24.95.

**W**ith more than 30,000 judges in the United States alone, you'd expect to find an impressive array of judicial-training materials. And there are some good ones—the American Judges Association's video training series for handling domestic-violence cases ([education.amjudges.org](http://education.amjudges.org)) stands out as one recent example. But there's not much out there specifically on judicial writing, and what's out there is generally limited in scope (reflecting the idiosyncratic views of a single author or even of a committee), outdated, or . . . well, boring.

Legal-writing consultant Ross Guberman has entered the market with a new book on judicial writing. Any judge who writes opinions should read it.

Guberman organized his book, *Point Taken: How to Write Like the World's Best Judges*, around opinion excerpts taken from 34 judges well known for their writing abilities. The chosen judges are mostly appellate judges (six are trial judges); mostly from the United States (six are from Canada, the United Kingdom, or Australia); and mostly still on the bench (13 are no longer active). The current judges include John G. Roberts, Jr., Antonin Scalia, Ruth Bader Ginsburg, and Elena Kagan from the United States Supreme Court; United States appellate judges Marsha Berzon, Edward Carnes, Frank Easterbrook, Brett Kavanaugh, Alex Kozinski, Richard Posner, O. Rogeriee Thompson, and Diane Wood; and Canadian Chief Justice Beverley McLachlin. The former judges include Benjamin Cardozo, Lord Denning, Learned Hand, Robert Jackson, John Paul Stevens, Roger Traynor, and Patricia Wald.

With that lineup and Guberman's review of hundreds of their opinions, it's no surprise that *Point Taken* is filled with example after example not just of great writing, but also great judging.

This book follows the format of Guberman's book on writing for lawyers, *Point Made: How to Write Like the Nation's Top Advocates*, now in its second edition (2014). In both books, Guberman covers key points—micro and macro—in brief writing and opinion writing, using examples from top lawyers and judges to demonstrate the goals and techniques he urges readers to adopt.

At the macro level, *Point Taken* covers crafting opinion openers, reporting the facts, and constructing an effective legal analysis. The micro level focuses on words and phrases to use or avoid, elements of style (like the effective use of em dashes, semicolons, and colons), and what Guberman calls stylistic “nice-to-haves”: metaphors, similes, analogies, literary references, and rhetorical devices.

Guberman's goal is to “[g]o bold on judicial opinions,” providing a “guide that will transform the work of some of the world's best judges into a concrete step-by-step method acces-

sible to judges at all levels and across jurisdictions.” A lofty goal, and Guberman largely succeeds.

My favorite part of the book is his section on openers. Those of us who write a large number of opinions under time pressure may opt for a standard format we can use to turn out opinions quickly. Or your court may have a preferred (or at least standard) method of writing opinions. Guberman has identified four basic styles for the opener, and he provides examples and suggestions for each style. Just reading through these took me out of the rut I had been in and got me to try something different for the next opinion on my plate. Guberman provides useful suggestions about when each opener may be most appropriate and about how best to approach each style.

The four types of openers break down along two variables—length and whether they answer the case's main question. Guberman calls a short opener that answers the main question a “sound bite” and a longer one an “op-ed.” If the opener leaves the result unresolved, a succinct one is a “teaser” and a detailed one is a “trailer.”

In the section on openers alone, Guberman provides 28 examples from great writers (as well as a clunker from Justice Anthony Kennedy for contrast). You immediately see that a great opinion can start with any of these methods.

Since the value of the book comes through its examples, let's look at some of the openers he included. We'll start with a teaser from Alex Kozinski—only four sentences, but you know what the issue is, and you're ready to read more:

Long after the public spotlight has moved on in search of fresh intrigue, the lawyers remain. And so we find ourselves adjudicating a decade-old dispute between Jennifer Flowers and what she affectionately refers to as the “Clinton smear machine”: James Carville, George Stephanopolous and Hillary Clinton. Flowers charges that said machine destroyed her reputation by painting her as a fraud and a liar after she disclosed her affair with Bill Clinton. We decide whether Flowers's claims are timely and, if so, whether they survive a motion to dismiss.

You might respond that it's easy to make a case between Flowers and the “Clinton smear machine” into a good read. But Guberman offers a three-sentence teaser from Antonin Scalia that quite effectively sets up a much more mundane issue:

Upon joining a criminal conspiracy, a defendant's membership in the ongoing unlawful scheme continues until he withdraws. A defendant who withdraws outside the relevant statute-of-limitations period has a complete defense to prosecution. We consider whether, when the defendant produces some evidence supporting such a defense, the Government must prove beyond a reason-

able doubt that he did not withdraw outside the statute-of-limitations period.

And Guberman offers a teaser from Lord Denning that's hard to beat for sheer fun: "This is the case of the barmaid who was badly bitten by a big dog."

For an example of a trailer opener, Guberman breaks down in detail one that Richard Posner used to start an immigration appeal:

Questor Cecaj, who together with his wife is seeking asylum in the United States, was active in the Democratic Party of Albania at a time when the country was ruled by the Socialist Party. Persecution of Democratic Party activists during this period has been found in a number of cases. In 1998, Cecaj—whom the immigration judge found wholly credible—was arrested following a political protest in which he had participated. He was detained for six days and during that period was beaten by masked police with rubber truncheons and also kicked, suffering injuries that required his hospitalization. A few days after his release from the hospital a member of the Socialist Party accosted Cecaj on the street and fired a gun near his head, an act that Cecaj sensibly interpreted as a threat. He fled to Greece but returned in 2000 and resumed his political activity with the New Democratic Party, which is related to the Democratic Party, though the precise relationship is obscure. The following year, after an unsuccessful run for mayor of his hometown, he stood for the Albanian parliament on the New Democratic Party ticket in his hometown, which was dominated by the Socialist Party. Although he was a well-known local figure and candidate for public office, he was arrested during the campaign and beaten by the police, ostensibly for not having identification papers on him. He also received threatening phone calls, which he believed came from the police. The last straw was the kidnapping of his 10-year-old brother by unknown persons who told the child that he was being kidnapped because of Cecaj's political activity and that the child "would end up dead" if Cecaj "didn't do what they say." The child was released unharmed after a few hours but Cecaj received a call in which they "said that [the kidnapping] was the last warning." Cecaj prudently abandoned his candidacy and left Albania with his wife.

The immigration judge ruled that Cecaj's testimony did not establish that he had been persecuted.

Guberman spends more than a page analyzing this Posner opener. He points out that it shows "how skilled writers use the passive voice on purpose": "The passive voice improves the flow of the first two sentences: the construction 'was ruled by' helps keep 'country' closer to Albania, and the 'has been found in a number of cases' keeps 'activists' closer to the previous sentence, which is about politics, not case law." He continues to analyze the additional uses of passive voice that kept the focus on Cecaj and his story, notes the strong, vivid verbs (fled, fired, ruled, accosted, kicked, dominated, stood for, abandoned, left), and the use of em dashes to slow down the reader

when Posner reported a key fact—that the immigration judge found Cecaj "wholly credible."

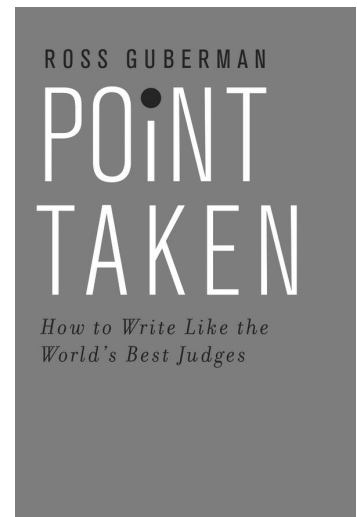
But Guberman also points to reasons Posner's style "is not always to everyone's liking"—using a tone that "is so cocksure and so one-sided that the immigration judge is made to sound like a fool" (Guberman assumes that "there must be some counterargument") and including expressions of opinion ("Cecaj sensibly interpreted," "Cecaj prudently abandoned") when the facts were quite strong enough on their own.

Examples and discussions like this are what make the book so strong. We see some of the very best judicial writers at their very best. Guberman identifies what works about their approaches as well as what doesn't. He raises questions judges must consider that go beyond craft to how they see their role as a judge. And judges reading the book get to decide what makes sense for their own work.

After covering how to write clear, engaging openers, Guberman moves on to address the other main tasks of an opinion—telling the facts and providing the legal analysis. Here too, Guberman fills each chapter with examples of great writing and explains why some methods work better than others, especially in certain types of cases. For example, in presenting the facts, he urges taking out all details that play no part in the analysis, while providing detailed treatment of the facts that are the most important to your reasoning. In legal analysis, when citing or distinguishing cases, he again urges homing in on only the key facts that link—or distinguish—two cases.

Guberman provides advice on grammar and writing style both in footnotes to the opinion excerpts found throughout the book and in separate sections on style and punctuation. The footnotes are easy to skip for readers who want to stick to the main topic but are rich in useful comments about writing style. In addition to pointing out Posner's skilled use of passive voice, for example, Guberman uses footnotes to compliment John Roberts for purposefully splitting infinitives to keep his message clear. (Roberts, by the way, is clearly a Guberman favorite. Not only does Guberman include a great many Roberts opinions with gushing praise ["[t]he magic of Roberts's writing"], Guberman also spares Roberts from criticism he gives to others. When Roberts uses "the fact that" [p. 90], nary a word is said. When Patricia Wald uses it [p. 129], Guberman inserts a tsk-tsk footnote citing to Strunk and White.)

Guberman also devotes a chapter to dissents. Here, he takes a position that may not be applicable to all multi-member courts: "The best dissents aren't written like majority opinions that just so happen to reach a different conclusion. They use the majority opinion as a springboard instead, poking holes in



the majority's reasoning and highlighting points of disagreement, all the while tipping a hat to the court's authority and dignity."

Someone I respected—and I'm sorry that I can't recall who—once told me the opposite. He suggested writing at least the first draft of the dissent as if it were a majority opinion, crafting responses to the majority only after you first have a coherent opinion going the other way. At least some of the time, that may be a better way both to maintain the collegiality of a court and, if further review is still possible, to convince a higher court to take and reverse the decision. Doing so keeps the main point—the issue before the court—as the main point, avoiding potential focus on what may seem an altogether non-collegial attack, especially to one's colleagues.<sup>1</sup> For example, Guberman suggests that in some cases a dissent can point to the majority as elitists with no concern for their limits, in other cases as populists pandering to popular will. No doubt that can be done, and Guberman's advice aptly reflects several dissents from the United States Supreme Court that he includes as examples. On most courts, though, I would think that biting dissents should be used sparingly.<sup>2</sup>

The book offers more for appellate judges than trial judges, but there's enough to satisfy both audiences. For example, trial judges often set out facts (or even conclusions of law) in separately numbered paragraphs; some appellate courts now do this too as an aid to public-domain citations. In either case, Guberman explains why good headings can still help the reader process facts or legal analysis.

If Guberman decides to do a second edition of the book (as he's already done for *Point Made*), he could do a bit more for trial judges on how they might make factual findings that are readable yet effective in allowing appellate review. He also could add some current state-court judges, presently unrepre-

sented in his sample. And he should provide some advice on the important question he introduces at the front of his book: Just whom should the judge regard as the audience for the opinion? An opinion written for a lay audience would surely differ from one written for lawyers. In today's environment, with respect for public institutions, including the judiciary, at historically low levels, and with much greater Internet access to judicial opinions, we might all benefit from making judicial opinions more accessible to the lay reader.

But my suggestions and occasional criticisms should not be overstated. Guberman's *Point Taken* is—by far—the best book I've seen on judicial writing.

Guberman has compiled excellent examples of judicial writing (as well as a few examples of poor writing). He explains the craftsmanship these exemplary judges use. And he provides solid guidance for how you could at least attempt to do similar work.

Any judge who studies the book will become a better writer. And an already talented writer who reads the book will also become a better judge.



Steve Leben is a judge on the Kansas Court of Appeals and the coeditor of *Court Review*. The National Center for State Courts awarded him the William H. Rehnquist Award for Judicial Excellence in 2014 in recognition of his recent efforts promoting procedural fairness in America's courts and his long-time commitment to judicial-system improvements.

## Footnotes

1. One case I handled with this approach was *State v. Morlock*, 190 P.3d 1001, 1016-33 (Kan. Ct. App. 2008) (Leben, J., dissenting), *rev'd* 218 P.3d 801 (Kan. 2009).
2. I do not suggest that I am above such a dissent. See *Fischer v. State*, 206 P.3d 13, 16-22 (Kan. Ct. App. 2008) (Leben, J., dissenting) (criticizing majority opinion requiring that convicted murderer be brought to rural courthouse 287 miles from his

prison for brief hearing rather than participating by phone; concluding, "The court's opinion in this case will undoubtedly become one of the most widely read decisions in every prison and jail library in Kansas. It didn't need to be."), *rev'd* 295 P.3d 560 (Kan. 2013). I have admittedly omitted reference to my dissenting opinions that have gathered only dust, not further review by my state's supreme court.

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