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BOOK REVIEW: BRYAN A. GARNER, THE WINNING BRIEF (OXFORD UNIVERSITY PRESS 1999)

Reviewed by Peter Friedman*

"I hate quotations. Tell me what you know."[1]

Bryan Garner is our quintessential contemporary Sophist, the most financially successful teacher of legal writing in the United States today. Just as his precursors in fifth-century Athens made their money by teaching their students the arts of persuasion necessary to commercial and political success, Mr. Garner makes his. He tours the country conducting continuing legal education seminars. As the guiding force behind LawProse, Inc., he provides consulting services on individual writing projects and writing workshops for lawyers and judges. In addition, Mr. Garner makes his expertise available to the public at large as a prolific author and editor of a variety of books relating to legal writing, including, most prominently, the most recent edition of *Black's Law Dictionary*.[2]

Mr. Garner's personal presence and teaching abilities are by all accounts remarkable. One of his clients declares that he has a "gift for teaching [that] opens the eyes of skeptics, the minds of cynics, and the thought processes of both recent graduates and senior partners."[3] This testimonial, discounting

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1. 2 RALPH WALDO EMERSON, JOURNALS AND MISCELLANEOUS NOTEBOOKS, May 1849 entry.

2. BLACK'S LAW DICTIONARY (7th ed. 1999) (Bryan A. Garner, editor-in-chief). In addition, Mr. Garner is the author of THE ELEMENTS OF LEGAL STYLE (1991), A DICTIONARY OF MODERN LEGAL USAGE (1987 & 2d ed. 1995), A DICTIONARY OF MODERN AMERICAN USAGE (1998), A HANDBOOK OF BUSINESS LAW TERMS (1999), and SECURITIES DISCLOSURE IN PLAIN ENGLISH (1999).

3. Terence G. Connor, Morgan, Lewis & Bockius, *quoted in* the promotional materials

for the customary excesses of promotion, is consistent with the reports of my colleagues who have had the good fortune to attend his writing workshops.

Moreover, Mr. Garner claims to have more than the usual insight into the minds of the audience for whom brief writers write: judges. Rhetoric, of course, is the art of using discourse to inform, persuade, or motivate an audience.[4] Inasmuch as brief writing is a form of rhetoric addressed exclusively to an audience of judges, Mr. Garner appears ideally situated to address the subject. In fact, he finds the existing literature and practice of brief writing dissatisfying and locates the source of those inadequacies precisely in the literature's failure to focus on the brief-writer's audience.[5] Thus, he describes as one of the "proximate causes" of *The Winning Brief* his ability to "relate the brief-writer's special concern—persuading judges—to the larger field of rhetoric."[6]

Another impetus for his current book was the urging of a friend that he develop a CLE course devoted exclusively to brief writing.[7] Mr. Garner admits that his previous teaching has diluted lessons specifically aimed at writing briefs with lessons devoted to other genres of legal writing, including letters and memoranda.[8] This defect, of course, is one Mr. Garner's past courses shared with most legal writing courses. Fifty-nine percent of the law schools surveyed in 1994 awarded only three or four credits for their first-year legal writing courses, and nineteen percent awarded two credits or fewer,[9] a situation that has not changed in any significant way since the date of the survey. Such bare-bones courses barely provide the opportunity to assign more than a couple of memos and an appellate brief.[10] Nonetheless, these courses also often attempt to introduce law students to client letters, demand letters, contracts, and trial

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for LawProse, Inc.'s 1999 CLE workshops.

4. *See, e.g.*, EDWARD P.J. CORBETT, CLASSICAL RHETORIC FOR THE MODERN STUDENT 3 (3d ed. 1990).

5. BRYAN A. GARNER, THE WINNING BRIEF x (1999).

6. *Id.*

7. *Id.*

8. *Id.*

9. RALPH L. BRILL ET AL., SOURCEBOOK ON LEGAL WRITING PROGRAMS 56 (1997).

10. *Id.*

briefs, among other examples of legal writing.[11] Clearly, Mr. Garner's identification of brief writing as a subject that requires special treatment is appropriate.

In short, Mr. Garner's knowledge of brief writing and his sensitivity to the unfulfilled need for better instruction in the subject make him a natural to write a book entitled *The Winning Brief*. In fact, a reader well versed in the art of brief writing will recognize in the book's pages that Mr. Garner's knowledge of the topic is vast and that his reputation as a teaching presence is probably well deserved. Again and again in its pages I found myself nodding my head in agreement with various points and, in a few places, with pleasure at Mr. Garner's effective defiance of empty convention.

Mr. Garner's book, however, suffers from the primary defect present in even the best contemporary legal writing texts: While they do a terrific job of *describing* well-written legal documents, they are ineffective at *teaching* the skill of legal writing to someone who has not already gained considerable control over it. It is as if one were to teach painting by describing the best paintings. While the description of the characteristics inherent in the best brief writing is no doubt one of the things necessary to teaching the art, such a description is far better at refining the skills of people who have already gained control over it than at teaching beginners.

Indeed, it seems that Mr. Garner never decided on the precise audience for *The Winning Brief*, a serious problem with a book of rhetoric. As hinted at above, the people who would benefit most from Mr. Garner's genuine learning and insight are experienced brief writers looking to refine their skills. The book consists of one hundred chapters representing the "100 tips [Mr. Garner] most commonly give[s] to brief-writers."[12] These one hundred chapters are organized into ten sections addressing the process of preparing to write, effective approaches to the introductory portion of the brief, stylistic matters, common

11. *Id.* at 12. Of course the *writing* instruction these courses provide (in whatever specific genres they address) is further diluted by the fact they are intended to address as well at least some, if not, all of the following subjects: legal analysis, factual analysis, legal research, and oral advocacy. *Id.* at 16-19.

12. GARNER, *supra* note 5, at x. Mr. Garner makes clear that his "chief difficulty was in narrowing the list down to 100; [he] could easily have made it 150." *Id.*

mistakes, and a variety of specific rhetorical techniques useful in brief writing.

My own favorite section of the book is the one entitled "Conveying the Big Picture,"[13] comprised of the tips numbered eight through fifteen, which addresses the necessity of writing the brief so that it makes its primary point right at the outset by framing the issues well.[14] On this subject Mr. Garner is at his best. He acknowledges the existence of the almost universal practice that is still the principal way students are taught to introduce a brief: a one-sentence question. He then is frank in characterizing the convention and effective in describing its inadequacy:

> The one-sentence version of an issue doesn't seem to be required anywhere, but it's a widely followed convention. And it's ghastly in its usual form because it leads to unreadable issues that are deservedly neglected. Either they're surface issues, or else they're meandering, nonchronological statements that can't be understood on fewer than three close readings.[15]

In place of the one-sentence "Question Presented," Mr. Garner prescribes what he calls the "deep issue."[16] His formula for this introductory section is as follows: The writer should set forth her version of the issues the court must decide in no more than 75 words.[17] In doing so, she should use short sentences that follow a major premise-minor premise-question syllogism; these sentences should be written in such a way that there is only one possible answer to that question.[18] In addition, the sentences must include enough facts "so that the reader can truly understand the problem."[19] The seven chapters Mr. Garner devotes to the deep issue explore in some depth the reasons for each of these guidelines, set forth examples of the effective use of the device, and provide useful exercises for developing one's mastery of it. While I myself try, whenever possible, to depart

13. *Id.* at 45-89.
14. *Id.* at 48.
15. *Id.* at 68.
16. *Id.* at 49.
17. *Id.* at 71.
18. *Id.* at 74.
19. *Id.* at 48.

even further from the "Question Presented" convention,[20] I applaud Mr. Garner's independence of thought and effective presentation. Unsurprisingly, every colleague who has reported to me his or her appreciation of Mr. Garner's teaching has experienced it in seminars in which the deep issue has been the principal focus. He quite obviously has given the subject a lot of thought and has refined the technique through years of practice. Thus, when he writes, for example, that "the 75-word limit is the result of experimentation and informal testing,"[21] I am perfectly willing to take him at his word.

Unfortunately, while Mr. Garner is at his best in *The Winning Brief* in both describing the deep issue and in providing useful instruction in achieving mastery over it, even this portion of the book betrays the weaknesses that dominate its other sections. First, far too much of the book consists of the repetition of unarguably correct but pedagogically useless formulations. Thus, for example, in the space of the four pages that make up the substance of Chapter 8 (the remaining pages being made up of bad and good examples), the reader is told the following:

> The best argument on a question of law is to state the question clearly.[22]
>
> In law the right answer usually depends on putting the right question.[23]

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20. In any brief in which a "Question Presented" or its equivalent is not required by rule, I make a point of opening with a brief statement of (1) the identity of the party on behalf of whom the brief is submitted; (2) a precise description of the relief being asked for in the brief; and (3) a concise statement—in affirmative form dispensing entirely with any pretense of framing a "question"—of the factual and legal reasons justifying the requested relief. In essence, I explain (1) who the client is; (2) what the client is asking for; and (3) why the client is entitled to it. Mr. Garner believes that retaining the form of a question in at least a part of the introductory portion maintains at least the appearance of objectivity: "[A] bona fide question looks and sounds objective even when it's gently slanted. Rather than pushing your answer, you're putting a question on the table." GARNER, *supra* note 5, at 74. In contrast, I believe that in writing a brief your role as an advocate is undeniable and that, rather than trying to convey an objectivity that will not be taken seriously, the convention of posing a question in the introductory portion of a brief simply detracts from the clarity and force of your argument.

21. GARNER, *supra* note 5, at 71 (quoting BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 473 (2d ed. 1995)).

22. *Id.* at 47 (quoting Rufus Choate, 1799-1859, *as quoted in* Harley N. Crosby, *Mistakes Commonly Made in the Presentation of Appeals*, *in* 3 SYDNEY C. SCHWEITZER, TRIAL GUIDE 1546 (1945)).

> A lawyer who has never held a judicial office does not, I think, fully appreciate the importance of getting the principal facts and the main contention between the parties firmly fixed at the outset in the mind of the court. When he has done this, his labor is half over.[24]
>
> [I]n most cases, and certainly in most brief essays, a failure to isolate the most important idea is usually an indication of sloppy thinking, not profundity.[25]
>
> [I]t is unwise to allow the court to read a factual statement without first having presented the issues involved. The court should not be forced to guess, even for a moment, what questions it is asked to decide.[26]
>
> Issues are the most important information attorneys give an appellate court.[27]
>
> Start in the very first sentence with the problem in this case.[28]
>
> I like to see the most important issues framed up front.[29]
>
> Every brief should make its primary point within 90 seconds. But probably only 1% of American briefs actually succeed on this score. The ones that do are spectacular to read: within 90 seconds, the judge understands the basic question, the answer, and the reasons for that answer.[30]
>
> Only one thing matters to the judge: what question he or she is supposed to answer.[31]

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23. *Id.* (quoting Estate of Rogers v. Commissioner, 320 U.S. 410, 413 (1943) (Frankfurter, J.)).

24. *Id.* (quoting Alfred C. Coxe, *Is Brief-Making a Lost Art?*, *in* ADVOCACY AND THE KING'S ENGLISH 338, 341 (George Rossman ed., 1960)).

25. *Id.* (quoting STEWARD LA CASCE & TERRY BELANGER, THE ART OF PERSUASION: HOW TO WRITE EFFECTIVELY ABOUT ALMOST ANYTHING 13 (1972)).

26. *Id.* (quoting EDWARD D. RE, BRIEF WRITING AND ORAL ARGUMENT 117 (4th ed. 1974)).

27. *Id.* at 48 (quoting THOMAS B. MARVELL, APPELLATE COURTS AND LAWYERS 119 (1978)).

28. *Id.* (quoting Nathan L. Hecht, *as quoted in* Bryan A. Garner, *Judges on Effective Writing: The Importance of Plain Language*, 73 MICH. B.J. 326, 326 (1994)).

29. *Id.* (quoting FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 120 (1994)).

30. *Id.*

31. *Id.* at 49.

> Essentially, a deep issue is the ultimate, concrete question that a court needs to answer to decide a point your way.[32]

This dogmatic tone is endemic to the book and seems to be the product of an unfortunate decision made at the outset to preface each of the 100 chapters with five to ten quotations from a veritable potpourri of writers. These so-called "Quotable Quotes" make it seem that Mr. Garner's effort to put the most common brief writing tips he knows into "black-letter form"[33] consisted primarily of turning over his vast files to a research assistant with the instruction to get them organized. Indeed, in many of the chapters the Quotable Quotes constitute the majority of the text. While I cannot help but be impressed by the breadth of sources Mr. Garner draws upon, his reliance on everyone from Felix Frankfurter to Gerry Spence to Schopenhauer to Flaubert to lesser writers of style manuals dilutes the effectiveness of his own advice. While I am certain this was not Mr. Garner's intent, even unintentionally doing so is unforgivable in a book devoted to the teaching of rhetoric.

Additionally, Mr. Garner's failure to sufficiently refine his expertise into written form leads to seeming incoherence that can only be resolved by experienced writing teachers. I am certain that experienced writing teachers are not the audience he intended to reach with *The Winning Brief*. Rather, in addition to writing for experienced brief writers needing to brush up on and refine their existing skills, he seems to be writing for novice legal writers. Much of the book is devoted to matters of style that are dealt with far better in *The Elements of Style*[34] and *Simple & Direct*.[35] Garner displays far more originality and utility in the beginning portion of his book, "Composing in an Orderly Way,"[36] which is a primer in the *process* of writing. Relying in his Quotable Quotes on the leading composition theorists of our day and expressly attributing his approach to two English professors at the University of Texas (who also happen

32. *Id.*

33. *Id.* at x.

34. WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE (Allyn & Bacon 4th ed. 2000).

35. JACQUES BARZUN, SIMPLE & DIRECT: A RHETORIC FOR WRITERS (Univ. of Chicago Press rev. ed. 1994).

36. GARNER, *supra* note 5, at 1-44.

to be his colleagues in LawProse, Inc.), Dr. Betty S. Flowers and Dr. John R. Trimble,[37] Mr. Garner describes a model to be followed in approaching any writing process, the "Flowers Paradigm."[38] Succinctly stated, the Flowers Paradigm suggests that the writer proceed on any writing project in four successive and overlapping stages, from "madman" to "architect" to "carpenter" to "judge."[39]

The extension of contemporary process theory into legal writing through the use of the Flowers Paradigm is an admirable goal.[40] It makes clear that for every writer, effective writing proceeds in stages bearing radically different styles, including the "madman's" creative openness to ideas, the "architect's" passion for organization, the "carpenter's" focus on craft, and the "judge's" critical eye.[41] Mr. Garner's ready adoption of process theory makes clear again that he is as *knowledgeable* a writer on writing as we have.

Mr. Garner unfortunately does not write about how to put process theory into practice in any but the most superficial ways. Consequently, while he leaves hints of good ideas, they are conveyed in ambiguous and confusing terms. In Chapter 3, for example, he states, "If you're serious about writing good briefs, you shouldn't compose sentences and paragraphs until you have a good working statement of the issues."[42] The implication that the writer should not even think of putting words down on paper until she has a firm understanding of what the brief is going to say is reinforced by the Quotable Quotes:

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37. *Id.* at xi.

38. *Id.* at 4.

39. *Id.* at 4-7.

40. Mr. Garner is by no means unique in introducing process theory into legal writing. Process-oriented legal writing texts have been used in the law schools for more than a decade. *See, e.g.*, VEDA R. CHARROW & MYRA K. ERHARDT, CLEAR AND EFFECTIVE LEGAL WRITING (1986); LINDA HOLDEMAN EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION (1996) (now in its second edition); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE (1990) (now in its third edition); LAUREL C. OATES ET AL., THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING (1993) (now in its second edition); DIANA V. PRATT, LEGAL WRITING: A SYSTEMATIC APPROACH (1989) (now in its third edition); HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW (1989) (now in its fourth edition).

41. GARNER, *supra* note 5, at 5-6.

42. *Id.* at 22.

> Concentrate on your problem, turn it over in your mind, think about it in tub or shower, try out your hypotheses on associates, live with the case in every spare waking moment—*but don't start to write until the sequence and direction of your points have fallen clearly into place in your mind.*[43]

Mr. Garner cannot possibly mean that a writer should not write before she knows the fundamental sequence and direction of what she plans to write. Central to process theory is the idea that *writing itself is a means of thinking through a problem.* Thus, the best way to *reach* the point at which you know the fundamental sequence and direction of your final product is to write your way to that point. You write during the "madman" stage, and you write at every single other stage as well.

Quite clearly, Mr. Garner knows that you write at every stage. Just as clearly, however, he has not taken the critical approach to the final product that he, correctly, prescribes for the "judge" stage of writing. While in one place he seems to forbid writing before achieving an understanding of the basic architecture of the piece, elsewhere he acknowledges it is useful at the "madman" stage to "jot down ideas as they come . . ., even developing ideas in their entirety."[44] He even acknowledges in the caption to Chapter 3 that all he really means to forbid is excessive *attachment* to writing done early on; you must "be willing to discard everything you've written up to the threshold of discovery."[45] Nevertheless, this message remains cloaked in ambiguity, so that the student unfamiliar with process theory will not know whether to put words on paper before he has a clear idea of his ultimate argument. This ambiguity is so thorough that Mr. Garner declares "the legal writer doesn't really 'write' at all during [the madman stage], but instead takes copious notes, jotting down ideas and possible approaches to a problem."[46] Making the student struggle to distinguish between "writing" and "jotting down ideas" is not

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43. *Id.* at 21 (quoting FREDERICK B. WIENER, BRIEFING AND ARGUING FEDERAL APPEALS 136 (1967) (emphasis added)).

44. *Id.* at 8 (quoting Jean Appleman, *The Writer's Argument on Appeal,* 41 NOTRE DAME L. REV. 40, 41 (1965)).

45. GARNER, *supra* note 5, at 21.

46. *Id.* at 5.

only unhelpful, it is certain to turn the student away from genuinely useful ideas.

Finally, the fundamental strengths of *The Winning Brief* and the undercutting of those strengths through inadequate refinement are exemplified in its chapter on outlining. I have heard from several people that one of the most useful things they have learned from Mr. Garner in his workshops is his unconventional, "nonlinear" approach to outlining. Rather than providing a thorough description of this approach, Chapter 5 begins with a quotation from Arthur Schopenhauer criticizing most people for writing without a plan,[47] then proceeds for over a page with further quotations simply declaring the importance of outlining and criticizing conventional means of doing so.[48] In less than a page Mr. Garner reiterates that conventional outlining does not work well, that a "nonlinear outline" is far more useful, and that he himself "routinely create[s] 'whirlybirds,'"[49] whatever those might be. The whirlybirds are described only as "a whorl of ideas resulting from the madman-architect collaboration";[50] the thinking that connects their ideas is never explicated. Rather, after he provides us with another half page of testimonials to the effect that such nonlinear outlining is a really terrific thing, we are given a single example, a one-page diagram representing one of Mr. Garner's whirlybirds.[51]

I believe the testimonials. I have no doubt that if I could decipher Mr. Garner's whirlybird I would benefit as a writer and a thinker. Without Mr. Garner's explanation of its design and function, however, I have been unable to do so. What works in his lectures seems not to translate well to text. I expect more from a book on writing.

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47. *Id.* at 26 (quoting Arthur Schopenhauer, *On Style* (1851), *in* THEORIES OF STYLE IN LITERATURE 251, 269 (Lane Cooper ed., 1923)).

48. *See id.*

49. *Id.* at 26-27.

50. *Id.* at 27.

51. *Id.* at 28-29.