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THE
GREEN BAG

ALMANAC

OF USEFUL AND ENTERTAINING TIDBITS
FOR LAWYERS

&

READER

OF GOOD LEGAL WRITING FROM THE PAST YEAR

SELECTED BY
THE LUMINARIES AND SAGES
ON OUR BOARD OF ADVISERS

2007

EDITED BY ROSS E. DAVIES



GREEN BAG PRESS
WASHINGTON, DC
2006

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PREFACE

This is the second *Green Bag Almanac of Useful and Entertaining Tidbits for Lawyers and Reader of Good Legal Writing from the Past Year Selected by the Luminaries and Sages on Our Board of Advisers*. To learn why the world needs our almanac, please read the “Preface” to last year’s (2006) edition.

SAME OYSTER, DIFFERENT PEARLS

This year’s (2007) edition looks pretty much the same as last year’s, but with different contents. Most appealingly and importantly, the 2007 *Almanac* contains a new collection of exemplary legal writing published during the past year or so, showing again that good reasoning, rhetoric, and reporting are alive and well in the law. There were, again, many first-rate works nominated by one or more of our advisers, but not selected by the advisers speaking as a body of voters for publication in the *Almanac*. All those fine nominees are listed in our “Recommended Reading” list, on pages 11 to 16.

Our selection process for “Exemplary Legal Writing of 2006” was, like last year’s, not your typical invitation to competitive self-promotion by authors and their publishers and friends. We did not solicit (or accept) entries from contestants, charge them entry fees, or hand out blue, red, and white ribbons. Rather, we merely sought to:

- (a) organize a moderately vigilant watch for good legal writing, conducted by people (our Board of Advisers) who would know it when they saw it and bring it to our attention;
- (b) coordinate the winnowing of advisers’ favorites over the course of the selection season, with an eye to harvesting a crop of good legal writing consisting of those works for which there was the most substantial support (our “Recommended Reading” list);
- (c) ballot our advisers to identify the cream of that already creamy crop; and then
- (d) present the results to you in a useful and entertaining format — this book.

We did make two significant changes.

First, we enlisted several new advisers, applying the three theories we used when organizing the Board for last year’s *Almanac*: (1) “it takes one to know one” — people who are good writers will recognize their peers; (2) “birds of a feather flock together” — people who associate them-

selves, by collaboration, by citation, by recommendation, with their fellow good writers have already demonstrated the good taste sought under the first theory; (3) "good stylists have substance" — people have to know the law (that is, be good lawyers or good observers of the law) in order to know whether they are looking at a good expression of it.¹

Given the caliber of our advisers old and new, it should come as no surprise that several of them, including one or two of our distinguished new colleagues, are also authors of exemplars appearing in this volume or included in our list of "Recommended Reading." Perhaps it should also come as no surprise — in a group that consists almost entirely of people who either work under the authority of, or engage from time to time in the contemplation of, 28 U.S.C. § 455(a)² or its state-law equivalents — that none of the advisers whose works are published in this volume voted for themselves.

Second, we refined our definitions of three of our categories of exemplary legal writing. "Short Articles" are now works that are fewer than 5,000 words long. "Long Articles" are at least 5,000 but no more than 25,000 words long. "Books" are now not only books in the conventional sense of the word, but also those creatures nearly unique to the world of modern American legal scholarship: things that are as long as books but are called "articles" — specifically, "law review articles" that are more than 25,000 words long. The last of these definitional changes inspired a few comments from our advisers, of which this one is a good example, capturing nicely the ambivalence in modern legal culture about the hypertrophic law review article:

May I suggest that the 25,000-word cutoff is too low for "articles masquerading as books." My impression is that most, or at least a significant plurality of "lead articles" exceed 25,000 words, often by a lot. So you really dilute the book category by including so many articles. Of course, it is (and I think we agree on this) unlikely that a 30,000+ word article would be any good, so perhaps it doesn't really matter.

¹ We are proud of our outlook on advisers, especially when we compare ourselves to some other, more prominent bodies devoted to the recognition of excellence. *See, e.g.*, Frank Deford, *Voting Rites: Polling power turns sports scribes into gatekeepers*, SI.com, http://sportsillustrated.cnn.com/2006/writers/frank_deford/12/13/heisman.voting/in dex.html (visited Dec. 13, 2006) (describing the author's selection and short tenure as a Heisman Trophy elector).

² "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

PREFACE

In other words, reasonable minds can meet on the value of brevity and clarity, but there is room for reasonable dispute over where to draw the line between something that is plausibly an “article” and something that is called an “article” but is so big or otherwise so non-article-like that to classify it as one does violence to the language. Like calling an amputation a “flesh wound.”

Then there is the related and equally reasonable typological problem raised by another adviser:

“Short Articles” ... and “Long Articles” include both scholarly articles and more journalistic pieces. That seem[s] to mix apples and oranges, & to be a bit unfair to the apples! The challenge of making a serious and original scholarly argument in lucid and engaging prose seems very different (if not greater) than what many of the journalistic pieces attempt to do (and do very well). I don’t mean to suggest that you or we should be attempting to evaluate scholarly as well as expository merit, but only that there perhaps ought to be a separate category for “legal scholarship” as opposed to journalism & such.

And consider this message from yet another adviser, raising similar concerns about variety in the nature and production of various courtroom inputs and outputs:

I now offer a couple of thoughts on opinion and brief writing: My thought is that trial court work is fundamentally different from appellate work. By this I mean it’s much harder to write stylish stuff at the trial level, either as an advocate or as a judge. The reason goes to the fundamental differences between the ways the different levels do their work.

At the trial level, the lawyers have to brief each element of what are usually multiple theories and multiple counts. This frequently makes for “messy” work. Lots of things must be repeated or restated in various ways, as an example. The trial court must respond to, and deal with, every assertion, every theory, and every permutation submitted, else the appellate courts remand for determinations regarding the undiscussed claims or issues. More messy writing.

At the appellate level, things are clearer. First, of course, the lawyers pick and choose the issues they wish to appeal, frequently jettisoning the uglier ones — but still ones the trial judge had to consider. Second, the appellate judges can pick and choose the most interesting of the issues appealed, and write whatever they wish on the subjects they have cho-

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sen to construe. They then have the magisterial power to write that famous line — denied to trial judges — “we have considered the remaining issues raised on appeal and find them insubstantial,” or one of its countless permutations.

This means the appellate opinions can be more focused and “artistic.”

These observations apply with even more force to amicus briefs, concurrences, and dissents. In those cases, there is no need to deal with messy statements of facts, or even full explications of law. The authors can simply pick their favorite subjects and have at it. It’s a whole different kind of writing, persuasive, bombastic, polemic, or hysteric.

And way more fun.

But it’s different writing and it’s difficult to rate one kind against another when they are all grouped together.

Anyway, it was fun.

Our advisers makes some good points, but what are we to do? Any system of classification we might choose is going to be plagued with this sort of difficulty. Creating new problems, substantive and procedural, even as it solves old ones. So, we will have to content ourselves with muddling along to the best of our ability, while remaining open to improvements as they occur to us, or to you. Which means the question asked above is sincere, and your answers will be welcomed.

Back to the business of this year. Our process for selecting our exemplars is simple but burdensome for our advisers:

Step 1: Our advisers read legal writing as they always have, keeping an eye out for short works and excerpts of longer works that belong in a collection of good legal writing. When they find worthy morsels, they send them to the *Green Bag*. “Good legal writing” is read broadly for our purposes. “Good” means whatever the advisers and the volume editor think it does. As one experienced scholar and public servant on our board put it, “there is good writing in the sense of what is being said and also in the sense of how it is being said.” Our advisers are looking for works that have something of each. “Legal” means anything written about law — opinions, briefs, articles, orders, statutes, books, motions, letters, emails, contracts, regulations, reports, speeches, and so on. “Writing” means ink-on-paper or characters-on-screen.

Step 2: The *Green Bag* organizes all of the advisers’ favorites into categories, and then sends a complete set to every adviser. Advisers’ names are not attached to the works they nominate. In other words, everything is anonymized. Advisers vote without knowing who nominated a piece.

PREFACE

Similarly, their rankings are secret. No one but the volume editor ever sees individual advisers' rankings or knows who voted in which categories. And the editor destroys all individualized records once the *Almanac* is in print.

Advisers are free to vote in as many categories — or as few — as they desire. That is, although there may be one hundred or more nominated works in total, they are free to select the types of writing they want to evaluate. Almost all — but invariably not all — advisers vote in each category.

Step 3: The volume editor tallies the rankings and compiles the book based on the results, reserving, as editors tend to do, the right to add, subtract, and reorganize within reason. Nominated works not published in the book are listed in the “Recommended Reading” section. Thus, everyone gets at least their 2¢ in.

Step 4: The advisers and the editor start all over again for next year's edition — a process which has been underway since last Halloween (recall that our annual cycle for selection of exemplary legal writing begins and ends on October 31), with dozens of nominees already in the hopper for the 2008 *Almanac*.

Despite the substantial work involved in this business, most of our advisers seem to enjoy participating. Their correspondence is peppered with friendly remarks — “It was a pleasure, by the way, to spend an evening with the entries, which were mostly terrific and generally as interesting for their subject matter and reasoning as for their style.” “Thank you for the chance to read some good, and some fun stuff.” “Thanks again for including me in this process. It's always fun to read the nominations, especially the judicial opinions.” — and plans to participate again. Justice Ronald Nehring's letter on pages 9 and 10 is an especially enjoyable example. But these are people with day jobs, other substantial commitments, and minimum sleep requirements. So not everyone can pitch in every year. Being listed as an adviser implies that a body has done some advising, however, and it just doesn't seem right to burden someone with some small slice of the collective responsibility (or credit, if there is any) for a project in which they did not participate, at least this time around. So the list of board members published on the inside and the outside of this *Almanac* has changed since last year and will, we expect, continue to change from year to year. The fact that people come and go from the board does not necessarily indicate anything about their involvement in the *Almanac*, other than when they have had the time and inclination to participate. Of course, we hope they always will.

IN OTHER BUSINESS ...

Our goals remain the same: to present a useful and entertaining, perhaps even inspiring, monthly dose of our stock in trade — good legal reasoning and reporting, well-written — with moderate doses of the traditional almanac potpourri of useful and distracting information thrown in. With any luck we'll deliver some reading pleasure, a few role models, and some reassurance that the nasty things some people say about legal writing are not entirely accurate. To those ends we have made a few other, smaller changes to the *Almanac*. We welcome suggestions for future additions and subtractions.

Prognostication postponed: We are giving up on prognostication for the time being. The tea leaves have been telling us almost exactly the same stories in 2006 about 2007 as the ones they told us in 2005 about 2006. So, if you want to know what you ought to be doing on a day-to-day basis, we suggest that you consult your *2006 Almanac & Reader*. Do not forget to make the appropriate adjustments for lunar and planetary cycles and cosmic alignments. Our product development specialists will continue their promising work in this area, still with an eye to customizing it for use on questions of law. We expect to have a reliable, user-friendly product available at about the same time that Microsoft releases a comparably companionable version of Windows.

Calendars cleared: Freed from the clutter of prognostications, this year's monthly calendars are blank. Use them to record appointments or deadlines or billable hours. Or perhaps you could use them as templates for your own cartoon strips. (See "The Story of Money," beginning on page 243.) If you come up with any good ones, please send them to the *Green Bag*.

Information increased: Like most almanacs, this one is growing partly through the addition of new features, and partly through the accretion of updates and supplements to old categories. As the days go by this year (and as the years go by over the long haul) you will stumble on bits and pieces of the new and the renewed, scattered across these pages. We have a satisfying jumble of other treasures to share with you as well. Finding them is half the fun. Browse at will.

Edification and Entertainment extended: This remains the meat of the matter, as described above. We still buy the words of Bryan Garner, a leading writer and speaker about law and language, who tirelessly encourages lawyers to read well in order to write better. "I suggest two kinds of texts," he says, "those that illustrate good writing and those that explain how to do it." The *Almanac* fits in the first category.

PREFACE

HOMER NODDED ...

... so often he looked like a bobblehead. It is difficult to produce a big fat book in a hurry without making some mistakes. We can't, but then again, neither can our betters. Consider, for example, the 2006 edition of the *New York Times Almanac*, which bills itself as "The World's Most Comprehensive and Authoritative Almanac" and "the almanac of record."³ In an effort to be both timely (that is, to appear in print at or before the beginning of 2006) and authoritative (that is, to cover the entire preceding year), the *Times Almanac* authoritatively deletes October. It opens with a "Chronology of the Year Nov. 1, 2004–Sept. 30, 2005." The *Green Bag Almanac* might not be authoritative, but at least its years feature 12 months, running from Halloween to Halloween. And then there is the inevitable scramble to account for late developments, with the associated and equally inevitable multiplication of mistakes. Thus, the "Late Breaking News" section of the *Times Almanac* includes a report on the nomination of Harriet Miers to replace Sandra Day O'Connor on the Supreme Court that notes, "Ms. Miers, 60, has never [sic] been a judge" (p. iv), while the "Judicial Branch" section reports, "At press time, Pres. Bush had not yet nominated a justice to replace Sandra Day O'Connor, who announced her retirement in 2005" (p. 134). Yes, yes, we make our own share of errors. They are catalogued below. It is that very cataloguing that sets us apart from the *Times* and, as best we can tell, all of the others: we publish corrections at least as prominently as the original errors.⁴ Here is what we know went wrong in our 2006 *Almanac*, with apologies for the mangled names:

Page 2: "however needs" should be "however, needs."

Page 7: The author of *Clines v. State* is Raoul G. Cantero, III, not "J. Pariente Cantero."

Page 8: Bob Berring extolled the wisdom of Mary Willson, not "Mary Wilson."

Page 15: Priscilla Owen, not "Priscilla Owens," was confirmed by the Senate.

Page 76: George Vest became a Senator of the United States, not the "Untied States."

³ For an appropriately inflated treatment of puffery, see David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395 (2006).

⁴ A tradition of long standing at the *Green Bag*. See, e.g., 2 GREEN BAG 361 (1890).

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Page 484: Harlan Fiske Stone was Chief Justice of the United States, not “Chief Justice of the Supreme Court.”

Changing times make liars of us, too. In the 2006 *Almanac* we said, “Sudoku is not established in America. Unlike Jessica Simpson (2 hits) and Yu-Gi-Oh (4 hits), for instance, it hasn’t appeared in a case in Lexis’s ‘Federal & States Cases, Combined.’” That is no longer true:

[The plaintiff] also contends that because her home computer was logged onto [the employer’s] network for an average of six hours a day while she was telecommuting, [the employer] should have been satisfied. Yet that’s like saying that as long as an employee shows up at the office, the employer can’t complain when she puts her feet up on the desk and does sudoku puzzles all day. . . . [The plaintiff] was being paid to do programming, and if she didn’t accomplish assigned projects it made no difference how many hours per day her computer was a node on the firm’s network.⁵

• • • •

Finally, the *Green Bag* nods — nay, bows — gratefully to you, our readers. Your kind comments about the 2006 edition of the *Almanac* were an inspiration as we worked on this year’s version. Especially useful were your constructive criticisms, including the numerous missives bringing typographical errors and graphical uglinesses to our attention, the several suggestions to put footnotes in type not quite so fine, and the lone but nonetheless compelling demand that we put the authors of our featured works on the marquee, rather than the back cover.

The *Green Bag* also thanks the Board of Advisers for nominating and selecting the works recognized here; the George Mason University School of Law and the George Mason Law & Economics Center for their support of the *Green Bag*; Susan Davies, whose influence is present in both the form and [the] content of this book; Leiv Blad, Bennett Boskey, Sandi Bowen, Femi Cadmus, Rob James, David G. Leitch, Mary Whisner, and Adam White; and especially Green Bag Fellows Christine Kymn and Kathy Smith.

Ross E. Davies
December 25, 2006

⁵ *Yindee v. CCH Inc.*, 458 F.3d 599, 603 (7th Cir. 2006) (Easterbrook, J.)

RECOMMENDED READING

We have tallied the ballots and printed the top vote-getters in this book. They are the ones listed in the Table of Contents above and marked on the list below by a little ★. There were plenty of other good works on the ballot. We list them here. Congratulations to all.

• • • •

OPINIONS

- Danny Boggs, *Violette v. P.A. Days, Inc.*, 427 F.3d 1015 (6th Cir. 2005)
- Stephen G. Breyer, *Labcorp v. Metabolite Lab., Inc.*, 126 S. Ct. 2921 (2006)
- ★ Jay S. Bybee, *Amalgamated Transit Union v. Laidlaw Transit Servs.*, 448 F.3d 1092 (9th Cir. 2006)
- Edward E. Carnes, *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905 (11th Cir. 2006)
- Frank H. Easterbrook, *Schor v. Abbott Lab.*, 457 F.3d 608 (7th Cir. 2006)
- Ruth Bader Ginsburg, *Lincoln Property Co. v. Roche*, 546 U.S. 81 (2005)
- ★ Alex Kozinski, *Jespersen v. Harrah's*, 444 F.3d 1104 (9th Cir. 2006)
- Boyce F. Martin, *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006)
- Dominic R. Massaro, *People v. Ochoa*, 809 N.Y.S.2d 483 (Sup. Ct. 2005)
- Sandra Day O'Connor, *Ayotte v. Planned Parenthood*, 126 S. Ct. 961 (2006)
- Mark P. Painter, *Hilltop Basic Resources, Inc. v. City of Cincinnati*, 2006 Ohio 3348 (Ohio Ct. App.)
- Rosemary S. Pooler, *U.S. v. Martin*, 430 F.3d 73 (2d Cir. 2005)
- ★ Richard Posner, *Cecaj v. Gonzales*, 440 F.3d 897 (7th Cir. 2006)
- Richard Posner, *Freeman v. Berge*, 441 F.3d 543 (7th Cir. 2006)
- Stephen Reinhardt, *U.S. v. Hungerford*, 465 F.3d 1113 (9th Cir. 2006)
- Jane A. Restani, *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006)
- John G. Roberts, Jr., *Georgia v. Randolph*, 126 S. Ct. 1515 (2006)
- John G. Roberts, Jr., *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 126 S. Ct. 1211 (2006)
- John G. Roberts, Jr., *House v. Bell*, 126 S. Ct. 2064 (2006)
- ★ John G. Roberts, Jr., *Rumsfeld v. FAIR*, 126 S. Ct. 1297 (2006)

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- John M. Rogers, *OfficeMax, Inc. v. U.S.*, 428 F.3d 583 (6th Cir. 2005)
- R.S. Smith, *Hernandez v. Robles*, 7 N.Y.3d 338 (2006)
- Jeffrey S. Sutton, *OfficeMax, Inc. v. U.S.*, 428 F.3d 583 (6th Cir. 2005)
- Clarence Thomas, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006)
- ★ Ronald A. White, *Green v. Bd. of Comm'rs*, 450 F.Supp.2d 1273 (E.D. Okla. 2006)
- ★ William G. Young, *U.S. v. Kandirakis*, 441 F.Supp.2d 282 (D. Mass. 2006)

BOOKS

- ★ Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* (Belknap 2005)
- Gregory S. Alexander, *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (Chicago 2006)
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