



SOME ADVICE ON HOW NOT TO WRITE A BRIEF IN THE SEVENTH CIRCUIT – UNLESS...

You're My Adversary

*By Brian Paul **

There is a lot of talk these days about how uncivil the legal profession has become. I too am concerned about this development, so in the spirit of collegiality that brings us here today, I thought I would offer some advice on legal writing, and in particular to those of you who may find yourself opposite me in a case. Litigation is an adversarial process, but we are all engaged in a common endeavor, and so I believe it is only right that I do whatever I can to assist my brothers and sisters in the law.

The first bit of advice I have is to start every motion with a formulaic introduction. Here's the one I suggest: "Comes now [insert name of your client, parentheses, short name in quotes — preferably something obvious], by counsel, and submits [insert the full title of your motion, parentheses, short title in quotes — again, preferably something obvious]." So, for example: "Comes now Defendant, Fred Klutz ('Klutz'), by counsel, and submits his Motion to Dismiss ('Motion')." Never mind that the title of the motion is the first thing after the caption. Never mind that the title indicates that your client — Fred Klutz — is the one that filed the motion. Never mind the fact that Fred Klutz is the only "Klutz" in the case. And above all, never mind that you signed the motion, indicating that, yes indeed, your client is represented "by counsel." Because, you see, the first thing any judge wants to know is not the relief your client is seeking, or why your client should win, or anything boring like that. No, it is: (a) the full and complete name of your client (dba preferably included if it's a company); (b) the fact that your client is represented by a lawyer and not, say, a nail technician or a long haul truck driver; and (c) the gem of a title you came up with to describe your routine motion. Judges often overlook these juicy details, so it is always a good idea to restate them right off the bat. And just for good measure, stick them in the conclusion too.

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While we're on the subject, remember that it will never do simply to say in your conclusion "the Court should reverse" or "the Court should dismiss the complaint." Be sure to preface your conclusion with these four words: "For the foregoing reasons": "for the foregoing reasons, the Court should reverse"; "for the foregoing reasons, the Court should dismiss the complaint"; etc. Invariably, courts get confused about why it is lawyers think their clients should prevail. The phrase "for the foregoing reasons" clues them in. It's like saying, "hey dummy, I just told you why my client is entitled to relief — remember my argument I started 53 pages back? — so rule in our favor, okay, for the reasons I just mentioned, you dolt." And then for good measure, end your conclusion by asking "for all other just and proper relief." This shows that you have carefully thought through the precise relief you desire. It says, "I know we're not entitled to attorney's fees, but if you want to throw 'em in, that'd be cool."

Enough about openings and closings. Let's get to the meat of a brief.

Not long ago the Seventh Circuit decided a case that had to do with reinsurance—basically insurance for insurance companies. *Ind. Lumbermens Mut. Ins. Co. v. Reinsurance Results, Inc.*, 513 F.3d 652 (7th Cir. 2008). If you know anything about reinsurance, you know it's a complex subject. Go to any article on reinsurance and you will run into terms such as "cedant," "retrocessionaire," "facultative," "top and drop cover," "corridor deductible," and "extraction factor." You get the idea. It's esoteric stuff. So in this reinsurance case the court had to decide, Judge Posner took a paragraph at the end of his opinion to remind lawyers that specialized vocabulary is fine—for specialists, that is, but not when you're writing for federal judges. He noted that federal judges are by in large generalists;

they may have heard very few cases involving your niche in the law, and so you can't expect them to know the lingo. "Lawyers should understand the judges' limited knowledge of specialized fields, and choose their vocabulary accordingly," Judge Posner wrote. "Every esoteric term used by the reinsurance industry has a counterpart in ordinary English . . ." *Id.* at 658.

Nonsense! You must demonstrate to the court that you are a learned counselor—a scholar, no less. And the best way to do that is to speak in a specialist's native tongue. Academics usually do, and we all know how influential most law review articles are.



This reinsurance opinion illustrates another chink in Judge Posner's writing style that I want to mention. Mid way into his analysis, he cited the well worn rule that one who voluntary confers a benefit on another ordinarily has no legal claim to compensation. He didn't stop with a simple recitation of the rule, however. He illustrated the rule with a concrete example: "If while

you are sitting on your porch sipping Margaritas a trio of itinerant musicians serenades you with mandolin, lute, and hautboy, you have no obligation, in the absence of a contract, to pay them for their performance no matter how much you enjoyed it . . ." *Id.* at 656. Memorable, yes; amusing, yes; effective at making the point, I suppose. But something you, my opponents, should emulate in your writing? Absolutely not.

It is better by far to write in breezy generalizations than to drive your point home with a creative illustration. That way you don't get bogged down in things like thought and imagination. They only force you to confront the difficulties of your case and deal with them. Just tell the court that this or that rule "clearly" decides the case and that ought to suffice. Many lawyers believe that use of the word "clearly" imbues their briefs with Svengali-like powers to control and sway their readers.

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I too share this belief and encourage the adverb's liberal use, particularly in cases that present difficult, undecided questions of law.

It is also helpful to cite a lot of cases for obvious propositions. One of the best places to do this in an appellate brief is in your discussion of the standard of review. The court is always favorably impressed if you burn a page or two discussing the finer points of, say, the summary judgment standard. Have you ever noticed in reading an Easterbrook opinion that he rarely takes the time to say anything on that score? I can only surmise that after nearly 25 years on the bench he still must not be familiar with Rule 56. As members of the practicing bar, it's our obligation to educate the court. Block quote the entire rule. Cite the Supreme Court's summary judgment trilogy. And work in a few of those Seventh Circuit zingers. Judge Wood has written that summary judgment is "the 'put up or shut up' moment in a lawsuit . . ." *Schacht v. Wis. Dep't of Corrections*, 175 F.3d 497, 504 (7th Cir. 1999). I like that one. Don't do as Judge Cudahy did in a recent opinion, though, and integrate a pithy quote like that into your analysis. *AA Sales & Assocs., Inc. v. Coni-Seal, Inc.*, 550 F.3d 605, 612 (7th Cir. 2008). Put it all up front, in your discussion of the standard of review, where it's most likely to be read and remembered.

On the topic of pithy quotes, let me just say that they are fine now and then, but the name of the game in legal writing is not the well-turned phrase. Readability is one thing, but you didn't go law school to write briefs that are readable. You went to law school to learn how to think like a lawyer. So *write* like a lawyer.

Better than the pithy quote, use ponderous block quotes. This demonstrates to the court that you have mastered the cut and paste function of your word processing program. Also, start as many sentences as possible with one-word transitions followed by a comma: "However," comma; "therefore," comma; "thus," comma; "hence," comma; "accordingly," comma; repeat, comma. This kind of writing kills your momentum. So does refusing to use a contraction here and there. But narrative is overrated. Judges just aren't interested in reading briefs that are straightforward and conversational in tone.

Similarly, if it's a motion you're writing, start each numbered paragraph with the word "that":

Plaintiff states:

1. *that* on February 12, 2008, X Corp. hired Plaintiff;
2. *that* on March 2, 2009, X Corp. fired Plaintiff . . .

And so forth. This isn't the most natural construction, but stilted prose is perfectly acceptable, indeed it is critical because it serves as conclusive evidence that you took legal writing at a major American law school.

Winston Churchill is said to have chided one author for her awkward sentence structure. He reportedly wrote in the margin of the author's work, "This is the sort of English up with which I will not put." This just illustrates that even great writers get it wrong now and then. What Churchill should have written is: "This is the sort of English up with I *shall* not put." The rules of grammar must be strictly adhered to. Bust a gut if you must, but never end a sentence in a preposition, which I think was Churchill's point. Never start a sentence with "and" or "but." And above all, never ever split an infinitive. I recently saw the new Star Trek movie, and I was aghast that this point had been overlooked. The mission of the Starship Enterprise is not "*to boldly go* where no man has gone before." It is "*to go boldly* where no man has gone before." You must slavishly submit to the rules of grammar if your writing is to have any kind of shelf life.

One final point. Good reading breeds good writing. Don't read Judge Easterbrook's or Judge Posner's opinions. Don't read Bryan Garner. Don't read Mayer Brown's new book on federal appellate practice. I suggest the classics, and in particular the Romantic poets: Byron, Shelley, Keats, Coleridge, etc. The flowerier, the better. Judges never tire of purple prose.

Mark Twain said that "[i]f you pick up a starving dog and make him prosperous, he will not bite you. This is the principal difference between a dog and a man." I am not so cynical. In fact, I am positive that should we have the occasion to litigate against each other, and you follow the advice I have offered here today, you will most assuredly not come back to bite me.