TO IMPROVE YOUR BRIEF-WRITING, STUDY HOW JUDGES WRITE OPINIONS

By Lisa Solomon

Legal brief-writing and judicial opinion-writing have much in common. Clarity and concision are overarching goals for both lawyers and judges alike. And, while everyone understands that the primary purpose of a brief is to persuade, few recognize that opinions, too, must be persuasive.¹ This article suggests two fruitful ways lawyers can improve their brief-writing skills by studying how judges write opinions.

**Read Judicial Writing Guides**

It’s customary for lawyers who care about the quality of their writing to read books about how to write better briefs. It’s unusual—but no less enlightening—to look to judicial writing guides for advice. Two such guides—Advanced Judicial Opinion Writing: A Handbook for New York State Trial and Appellate Courts (the “Handbook”) and the Judicial Writing Manual: A Pocket Guide for Judges—should be on every lawyer’s bookshelf.

**The Handbook**

Despite the title, most of the lessons in the exhaustive (491-page) Handbook are valuable for lawyers practicing anywhere, not only in New York. And, again despite the title, the Handbook covers both basic and advanced legal writing topics.

Readers who want to brush up on the fundamentals can turn directly to chapters on grammar, punctuation and mechanics (Chapters XVI, XVIII and XVI, respectively). A comprehensive discourse about problem words and pairs runs alphabetically from “a lot” through “flaunt, flout” and “sensuous, sensual” to “zeal, zest.”

More advanced readers will appreciate Chapter XIV’s discussion of literary style, which touches on well-known literary devices such as metaphors, similes and rhetorical questions as well as obscure ones such as polysyndeton (repeating conjunctions in close succession) and chiasmus (repeating words in successive clauses in reverse grammatical order).

All readers will appreciate introductory chapters on the top ten rules of opinion writing; twenty opinion-writing myths; what readers of judicial opinions hate (the top 30 vices); and what readers of judicial opinions love (the top 30 virtues) (Chapters I, III, IV and V, respectively).

Handbook author Gerald Lebovits loves alliteration. Discussing concision techniques in Chapter XII, for example, Lebovits directs writers to trash tautologies, vitiate verbosity and rebut redundancies. In Chapter XV, he encourages writers to use ordinary English, eschew archaic expressions and flay foreign words.


**The Judicial Writing Manual**

Looking for a shorter resource? The Federal Judicial Center's Judicial Writing Manual: A Pocket Guide for Judges is only 43 pages long, including appendices. The most helpful chapters—IV. Writing the Opinion and V. Editing the Opinion—together cover 13 pages. In those few pages, the FJC addresses such issues as citations; problems in judicial writing; guidelines for good writing; and editing.


(Continued on the Next Page)
Examine Judges’ Increasing Use of Images in Opinions

**Seventh Circuit Judge Richard Posner, an Early Adopter, Gets it Wrong**

Seventh Circuit Judge Richard Posner was one of the first judges to include images in the text of his opinions. While Judge Posner is to be applauded for showing that innovation is possible even in the staid world of judicial opinion-writing, his attempts at innovation fall flat because his inclusion of images in the opinions discussed below serves no rhetorical purpose.

In *Cavel International, Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007), which concerns the slaughtering of horses for human consumption, Judge Posner reproduced from a news article a photograph of a lion at a Texas zoo celebrating its birthday with a cake made from 10 pounds of horsemeat topped with whipped cream and a carrot. Posner included the picture to underscore the fact that zoos feed their animals a considerable amount of horsemeat.

In *Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931 (7th Cir. 2011), Judge Posner included photos of an ostrich and a lawyer, both with their heads in the sand, to illustrate his point that appellate lawyers cannot simply ignore relevant cases that undermine their positions:
Finally, *Grayson v. Schuler*, 666 F.3d 450 (7th Cir. 2011) addressed whether prison officials may allow Rastafarians (but not members of other religions) to wear their hair in dreadlocks. In his opinion, Judge Posner used a photo of Bob Marley to underscore his statement that “dreadlocks can attain a formidable length and density,” a fact that was not in dispute.

While making opinions more accessible—both to lawyers and to the general public—is a worthy goal, none of these pictures help the reader better understand the facts or legal concepts involved in the cases. Additionally, the images included in these opinions did not come from the appellate records before the Seventh Circuit. While a *dehors*-the-record image in an opinion may serve a rhetorical purpose if used correctly, the fact that an image is not contained in the record is one indicator that the image is a distraction from the opinion’s content, not an integral part of it.
To Improve Your Brief-Writing, Study How Judges Write Opinions
(Cont'd from Page 4)

Ninth Circuit Judge Barry Silverman and C.D. Cal. Judge Otis Wright Get it Right

By contrast, Ninth Circuit Judge Barry Silverman and Central District of California Judge Otis Wright properly used images in two more recent opinions.

In *Multi Time Machine, Inc. v. Amazon.com, Inc.*, No. 13-55575 (9th Cir. July 6, 2015), the plaintiff (“MTM”) argued that Amazon infringed its trademark by responding to a search request for “MTM Special Ops” with a page showing “MTM Special Ops” three times above a search result displaying similar watches manufactured by MTM’s competitors. Although the Ninth Circuit majority agreed with MTM Judge Barry Silverman dissented, arguing that, because Amazon’s search result clearly labeled the name and manufacturer of each product offered for sale and even included photographs of the items, no reasonably prudent shopper accustomed to shopping online would likely be confused as to the source of the products. To illustrate his point, Judge Silverman included in his opinion an image of the search results page at issue:

The image (which was reproduced as a full page in the dissent) was the first page of an exhibit that Amazon had submitted in support of its summary judgment motion in the district court.

*Ingenuity 13 LLC v. Doe*, No. 2:12-CV-833-ODW(JCx), 2013 WL 1898633 (C.D. Cal. May 6, 2013) was a Central District of California copyright troll case. In his decision sanctioning the plaintiff’s lawyers for their role in the copyright trolling scheme, Judge Otis Wright included two images that the defendant’s lawyer had submitted in support of the judge’s order requiring the plaintiff’s lawyers to show cause why they should not be sanctioned.

The first image is a Google Maps combined satellite and street view image:

(Continued on the Next Page)
The defendant’s lawyer had submitted this image showing a gateless small house in a closely-packed residential neighborhood to demonstrate that the plaintiff’s characterization of one defendant’s home as “a very large estate consisting of a gate for entry and multiple separate houses/structures on the property” was a “blatant lie.”

The second image is an infographic the defendants’ lawyer had prepared to show the complicated relationships among the defendants and their attorneys:

While it’s not the most sophisticated or artistically-composed chart, it was obviously effective.

This nascent trend is important for lawyers for two reasons. First, it demonstrates that images can often make information more easily understandable than a textual description. From these courts’ use of images to make their opinions more accessible to the reader, we can infer that the courts themselves found the images helpful in understanding the facts. This is the case with the MTM image of the Amazon search page and especially with the Ingenuity 13 infographic.

Second, an image can be used to bring a point home more powerfully than mere words. This is the case with the Ingenuity 13 Google Maps image. While it’s not difficult to understand the difference between “a very large estate consisting of a gate for entry and multiple separate houses/structures on the property” and “Denton’s property is not a large estate; it is a small house in a closely packed residential neighborhood. There are also no gates visible,” the Google Maps image helps remove any
To Improve Your Brief-Writing, Study How Judges Write Opinions
(Cont'd from Page 6)

shred of doubt the reader might have about whether the conduct of the plaintiffs’ lawyers merited the sanctions the court meted out.

Conclusion

Both the explicit lessons contained in judicial writing guides—a conventional source of time-honored advice—and the implicit lessons that can be drawn from current opinions—an unorthodox source that reveals modern trends—can help lawyers write more polished and persuasive briefs.

Lisa Solomon was one of the first lawyers to recognize and take advantage of the technological advances that make outsourcing legal research and writing services practical and profitable for law firms of all sizes. Through Lisa Solomon, Esq. Legal Research & Writing (www.QuestionOfLaw.net), she assists attorneys with all their legal research and writing needs, including preparing and arguing appeals and drafting substantive motions and trial memoranda. Through Legal Research & Writing Pro (www.LegalResearchandWritingPro.com), she shows other lawyers how to start and run successful practices as contract (freelance) attorneys and teaches lawyers in all practice areas how to write more persuasive briefs.

1Gerald Lebovits et al., Ethical Judicial Opinion Writing, 21 Geo. J. Legal Ethics 237, 248 (Spring 2008).

RECOMMENDED READING FOR APPELLATE LAWYERS

1. Guberman, Ross, Point Made: How to Write Like the Nation’s Top Advocate
2. Armstrong , Stephen V. and Timothy P. Terrell, Thinking Like a Writer
3. Coffin, Frank M. and Ruggero, J. Aldisert, Winning on Appeal
4. Re, Edward D., Brief Writing and Oral Argument