

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 XVII, 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 *Handbook* is available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1406709.

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.

The *Judicial Writing Manual* is available online at <http://www2.fjc.gov/sites/default/files/2014/Judicial-Writing-Manual-2D-FJC-2013.pdf>.

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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.



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ted to balance its interest in horses' welfare against the other interests of the (human) population, and it is also permitted to take one step at a time on a road toward the humane treatment of our fellow animals. E.g., *Center Chicago Cashier & Center, Inc. v. City of Chicago*, supra, 431 F.3d at 1077; cf. *Ames v. Ames*, 476 U.S. 340, 346-47 (1986); *Williamson v. Lor Optical of Oklahoma, Inc.*, 348 U.S. 483, 488-89 (1955); *Milner v. Appl.*, 148 F.3d 812, 818-19 (7th Cir. 1998); *Jansson v. Dudge*, 334 F.3d 582, 596 (7th Cir. 2007).

There is a wrinkle in this analysis, however, though unremarked by the parties. Zoos feed a considerable amount of horse meat to their charges. Brad Haynes, "Zoo in a Pickle Over Horse Meat," *South Times*, Aug. 14, 2007, http://southtimes.newssource.com/Detail/Accessories/20070814227_horsemeatfor.html (visited Sept. 18, 2007). For living proof, see reproduce a photograph from Haynes's article, with its caption:



"Kwanza, a young South African lion at Cameron Park Zoo in Waco, Texas, celebrates his birthday with a cake made from 10 pounds of horse meat, plus whipped cream and a carrot."

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:

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the cases that established the precedents. Whatever the reason, such advocacy is unacceptable.

The ostrich is a noble animal, but not a proper model for an appellate advocate. (Not that ostriches really bury their heads in the sand when threatened; don't be fooled by the picture below.) The "ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is an unprofessional as it is dishonest." *Madden v. Fluid, Inc. v. County of Cook*, 854 F.2d 1843, 1847 (7th Cir. 1999), quoting *Hill v. Netherland & Western Ry.*, 834 F.2d 1192, 1196 (7th Cir. 1987).



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risk, though he did not explain why. The plaintiff complained to the prison chaplain, who informed him that only inmates who are Rastafarians are permitted to wear dreadlocks. The plaintiff is not a Rastafarian, but a member of the African Hebrew Israelites of Jerusalem; and according to the chaplain the members of that sect are not required by their faith to wear dreadlocks (this appears to be correct), and therefore, he concluded, the plaintiff was not entitled to wear them. (It's the "therefore" that's the issue in this appeal.) The plaintiff filed an internal prison grievance, but it was denied on the basis of the chaplain's theological opinion.

Dreadlocks can attain a formidable length and density, as shown in this photograph of the late Jamaican musician Bob Marley (a Rastafarian):



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The attorney in the vehicular accident case, David S. "Mac" McKeand, is especially culpable, because he filed his opening brief as well as his reply brief after the *Ahad* decision yet questioned it in neither brief despite the heavy reliance that opposing counsel placed on it in their response brief. In contrast, counsel in the blood-products appeal could not have referred to either *Ahad* or *Chang* in their opening brief, did try to distinguish *Ahad* (if unpersuasively) in their reply brief, and may have thought that *Chang* added nothing to *Ahad*. Their advocacy left much to be desired, but McKeand's left more.

AFFIRMED.

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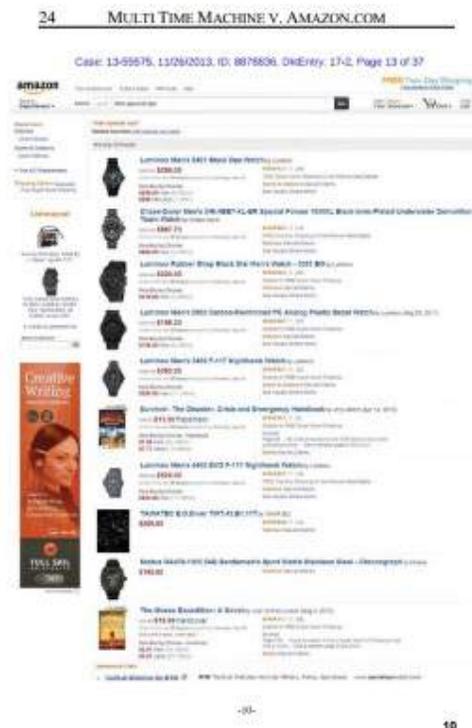
While making opinions more accessible—both to lawyers and to the general public—is a worthy goal, none of these pictures help the reader better understand the facts or legal concepts involved in the cases. Additionally, the images included in these opinions did not come from the appellate records before 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.

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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:

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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

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

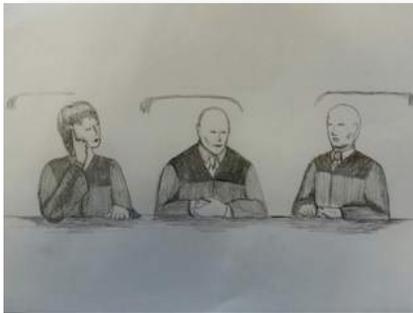
Conclusion

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*