

## BRIEFS FOR THE BRIEF WRITER: Posner on prose: Oft-cited federal judge dispenses writing advice

By: DIANE SLOMOWITZ May 3, 2016 11:08 am

Formidable 7th Circuit Judge Richard Posner recently published in the winter edition of the legal journal "Green Bag" the delightfully readable first installment of a two-part article: What is Obviously Wrong With the Federal Judiciary, Yet Eminently Curable.

The article's second half describes what Judge Posner views as formal and substantive deficiencies in federal appellate decisions.

Some of Judge Posner's criticisms concerning judicial procedures or decision-making apply only to the judiciary. Four of his criticisms, however, can be analogized to brief writing.

1. On citations, Judge Posner states, "At the level of form, the first thing to do is burn all copies of the Bluebook, in its latest edition 560 pages of rubbish. ... Yet no serious reader pays attention to citation format; all the reader cares about is that the citation enable him or her to find the cited material."

I would not burn the Bluebook, but Judge Posner's basic sentiment is true. Attorneys should spend less time on cross-citing and more on shepardizing or keyciting their citations to ensure that their cited cases are still good law.

2. On conciseness, Judge Posner states: "One might think that even if the Bluebook has to remain untouchable — that is to the legal profession what the Rules of Golf are to golfers — judges and their clerks would endeavor to eliminate from their judicial opinions superfluous verbiage, which is experiencing a weed-like growth and tenacity."

One of this column's hallmarks is the persuasiveness of well-made arguments, using only the necessary language and without overblown adjectives. A brief's 50-page limit does require 50 pages of words.

3. On avoiding redundancy, Judge Posner states: "Redundancy is a common form of superfluity in judicial opinions, as when the opinion states that 'a question of fact (is) to be determined from the totality of all the circumstances. ...'

"Apart from being crowded with superfluous flourishes, of which I've given just a few examples, appellate opinions tend to be overlong, crammed with irrelevant facts and repulsive legal jargon ('subjective prong' is one of my favorite examples of judicial illiteracy. ...)"

Brief writers would be well-served to apply this criticism to their briefs. Wordiness often occurs when a brief writer does not have time, or does not bill out the time, to write and revise a series of brief drafts. However, the time spent in transforming an unwieldy document into a lean, persuasive and grammatically correct brief can come back to the client with an appellate victory.

Similarly, emphasis is one thing; brow-beating another. A properly organized, concisely written brief does not need to make the same statement or point again and again. Overkill may even work against the writer, turning off the court before it has read all of your arguments.

4. On eloquence, Judge Posner states: "My complaint is not that modern appellate opinions lack eloquence. They certainly do lack it. But eloquence is no longer a property of legal writing. ... Clarity, not eloquence, is the only attainable, though not attained, literary goal of modern judicial writing, cultural changes having largely killed off the humanities."

Well, fellow lawyers, Judge Posner has never been called "timid."



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Even so, Judge Posner has a point, which applies as readily to appellate briefs as to appellate decisions. Good briefs, by definition, are eloquent. Eloquence means “fluent or persuasive speaking or writing,” according to the Oxford American Dictionary.

Attorneys, like judges, are busy. Unlike judges, who don’t fill out time slips, attorneys can’t justify spending inordinate billable hours on one brief.

But eloquence — persuasiveness — doesn’t take days and days. It just takes a little thought of the story to be told; of the wrong to be averted or the right to be vindicated; and of the law, which can bring justice to your client.



Seventh U.S. Circuit Court of Appeals Judge Richard Posner writes recently in his office at the Dirksen Federal Building in Chicago. (File photo by Kevin Harnack)

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