

OUT of ORDER

Opinion • Commentary • Humor

Get Creative in Filings With Dialogue, Photos, Cartoons

by MARTIN J. SIEGEL

Brief writing is so hemmed in with picayune rules, it's no wonder lawyers want to bust loose now and then. Required sections, word limits, margin width and font size — not much is left to the imagination.

APPELLATE LAW

Perhaps fed up with all the rules, some lawyers have gotten creative. In 2011, appellate lawyer David Holman of the Holman Law Firm filed a motion asking the Texas Supreme Court to rehear its denial of a petition for review in *Mabon Ltd. v. Afri-Carib Enterprises Inc.* Confronting the problem facing all such movants — the first effort at persuasion fell flat — Holman devised a novel solution.

Ditching the usual, dry recapitulation of legal arguments, Holman created a fictional dialogue between an editor and reporter at the invented *Corporate Counsel Quarterly*.

"So you tell me that you have a story brewing in Texas?" the editor asked.

"I think so. It could be really bad for defendants in civil litigation," the reporter replied.

They go back and forth like this as the fake-but-dogged reporter lays out what's wrong with the lower court decision. The Supreme Court granted the petition and reversed in 2012.

This recent ingenuity isn't limited to the written word. In litigation between ownership groups of the Dallas Mavericks, Tom Melsheimer of Fish & Richardson drafted a summary judgment motion disputing the plaintiffs' claim that Mark Cuban had mismanaged the team. Filed days after the Mavericks won the 2011 NBA Championship, the brief ran only 10 sentences but featured an enlarged photo of players jubilantly hoisting the championship trophy.

"Under Cuban's stewardship the Mavericks have become one of the league's most successful teams and are now NBA champions," Melsheimer wrote.

The court ruled for Cuban, and legal journal *The Green Bag* named the brief one of the best examples of legal writing in 2011.

One more recent example is "the illustrated amicus brief." According to a Sept. 5, 2012, article on the legal website *abovethelaw.com*, a district court limited Bob Kohn, appearing as amicus in a major price-fixing case, to five pages for his objection to the parties' settlement. What to do?

Like Holman, he settled on a fictional dialogue, in this case between himself and a companion who wanders in and asks, "Watcha workin' on?" But Kohn went farther and set the discussion in a comic strip drawn by his daughter and her classmate, according to "Why Write an Amicus Brief - When You Can Draw One Instead?" Like Melsheimer, Kohn won a *Green Bag* award.

It takes guts to throw convention out the window and file something "completely different," as Monty

Python would say. I haven't yet mustered the courage. But as these examples show, the tactic can be effective if used wisely. Here are some things to consider before deciding whether to climb boldly outside the box.

First and foremost, make sure it really works. The poem, play or drawing may seem brilliant when first written, but do others agree? Vetting themes or even whole drafts with colleagues or spouses is a great idea for any brief, but it is essential when dispensing with the standard form. It's probably best to return to the tried and true if more than one reader responds with a puzzled look or asks, "Are you really sure that's a smart idea?"

5th U.S. Circuit Court of Appeals Judge Jacques Wiener gave some advice about humor in briefs and oral argument in an article he wrote in the November 1995 issue of the *Tulane Law Review*. It applies equally here: Do not "attempt humor unless you are sure that you can pull it off; it can backfire if you are not careful."

Second, carefully consider the specific nature of the task at hand. Desperate times call for desperate measures, and desperate legal challenges are better candidates for novelty than run-of-the-mill matters.

In *Mabon*, the goal was rehearing; securing that always amounts to rough sailing. The clever dialogue helped the case stand out from the scads of other briefs clamoring for the court's attention.

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In Kohn's case, the comic strip was an effective way to persuade within the limited space allowed by the district court. On the other hand, the more ordinary the case or assignment, the less need there is for inventiveness.

Third, flouting custom works best when simplicity can do the job. Opening appellate briefs require questions presented, statements of fact, summaries of argument and so on. There is no way to condense one into a single photo or cartoon, and such devices will inevitably grate on the court if a lawyer takes them too far. On the other hand, a short brief that will make one or two simple points may be more susceptible to innovation.

Fourth, no lawyer should wander off the reservation without the client's wholehearted endorsement. Counsel should explain beforehand why an



out-of-the-box approach can work in this case and make sure the client fully understands and agrees. If things go south, charm and novelty may look strange and ill-conceived.

Flair on the Bench

If casting off the old constraints is becoming more popular, maybe lawyers are only now catching up to judges. Writing opinions in verse has held a less than desirable attraction for some. Back in 1986 in *United States v. Batson*, 5th Circuit Judge Irving Goldberg opened, "Some farmers from Gaines had a plan./ It amounted to quite a big scam./ But the payments for cotton/ began to smell rotten./ 'Twas a mugging of poor Uncle Sam."

Other courts have written whole opinions in rhyme. Judge Nicholas Politan of the U.S. District Court for the District of New Jersey wrote in *Joe Hand Promotions Inc. v. Sports Page Cafe Inc.* (1996), "The Court, however, must now be objective/ Because sanctions imposed are always elective."

In 1984, Judge Harris Wangelin of the U.S. District Court for the District of Missouri wrote in *United States v. One 1976 Ford F-150 Pick-Up VIN F14YUB03797*, "The defendant herein is a truck./ The vehicle type is a pick-up./ Alleged by a fed./ To be found in a bed/ Of marijuana, caught in the muck".

Pictures are also compelling. Echoing Melsheimer's approach, Judge Richard Posner of the 7th U.S. Circuit Court of Appeals recently chided attorneys for ignoring important precedent. He illustrated his point in *Gonzalez-Servin v. Ford Motor Co.* (2011) with color photos of an ostrich and a man in a suit burying their heads in the sand.

Then again, judges don't have clients. **CTE**



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