

# Judges Speaking Softly

## What They Long for When They Read

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Do you ever stay up nights wondering what judges want? At least in briefs and motions?

I recently surveyed more than a thousand state and federal judges, both trial and appellate. Respondents ranged from state trial-court judges to U.S. Supreme Court justices.

The good news: Judges agree on much more than many litigators might think, and I found no major differences based on region or type of court. More good news: When judges are surveyed anonymously, they're blunt and sometimes even funny.

The bad news: Other than the briefs by the brightest lights of the appellate bar, almost every filing I see violates the wish lists of the judges I surveyed.

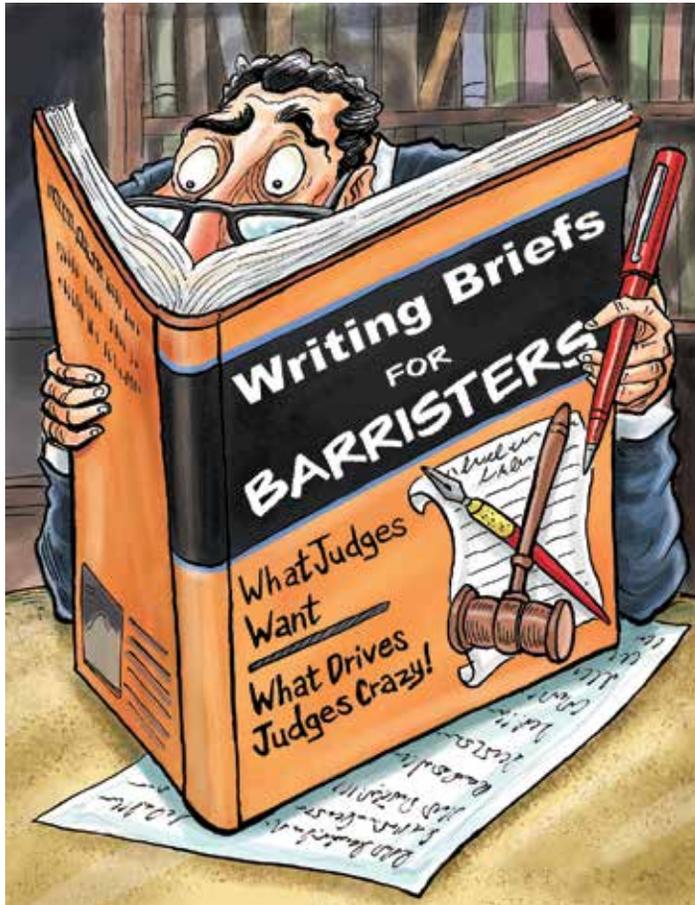
Here is some guidance, along with some choice anonymous quotations about what judges want but too often don't get.

For starters, watch how you name names. Use the parties' names rather than their procedural affiliation. Prefer words to unfamiliar acronyms, even if the word or phrase is longer. Avoid defining obvious terms like "FBI" and "Ford Motor Company." And for the terms you do define, put the defined term in quotation marks and then get out of Dodge.

All four of these techniques make "legal writing" feel more like "writing."

- "I absolutely detest party labels (plaintiff, debtor, creditor, etc.). Name names, for God's sake!"
- "Don't use 'plaintiff,' 'defendant,' 'appellant,' or 'appellee' in the brief because we may forget who's who. Instead, use names for individuals and business titles for companies."
- "Avoid defining obvious terms. If a party is Apple Computer Corp., why include the parenthetical ('Apple')? If the plaintiff's name is Henry Jackson and he's the only Jackson in the case, why the need to identify him as Henry Jackson ('Jackson')? If the case is about one and only one contract, when first identifying it, why the need for (the 'Contract')?"
- "I truly dislike acronyms. I would much rather have 'North River Insurance Cooperative' referred to as 'the insurer' or 'the cooperative' or 'North River' than as 'NRIC.'"
- "'Hereinafter defined as' (or anything like it) is pretty awful."
- "Avoid defined terms ("terms") altogether."

Keep your language choices classy. As if on cue, almost all litigators and appellate lawyers are happy to endorse a ban on emotional or hyperbolic rhetoric. The problem is that those same lawyers often grant themselves an exemption, as if their opponents are so singularly awful or imbecilic that even the snarkest



tone is warranted. In fact, lawyers often tell me that they absolutely must point out how disingenuous their opponent is, because otherwise the court won't see it. Solution: Show, don't tell.

- “‘Disingenuous’ is a perfectly fine word that the legal profession has turned into the wild card disparagement of the other side’s argument.”
- “Don’t use ‘specious.’”
- “Avoid phrases and sentences that reflect a lack of civility. Don’t belittle the other side’s arguments but rather focus on your own strengths.”
- “I hate ‘speciously,’ ‘frivolously,’ ‘disingenuously,’ and other shots at counsel or the other party.”
- “Don’t write ‘ridiculous.’”
- “I hate ‘laughable.’”
- “Words such as ‘clearly,’ ‘plainly,’ ‘obviously,’ ‘absurd,’ ‘ridiculous,’ ‘ludicrous,’ ‘baseless,’ and ‘blatant’ are crutches intended to prop up arguments that lack logical force. They can never make a weak argument credible or a strong argument even stronger. So why bother with them?”

Oliver Wendell Holmes Jr. once said that you should strike at the jugular and let the rest go. If you write motions and briefs for a living, you can manifest Holmes’s maxim many times a

day. Start by cutting stuffy introductory formulas beset with such archaic language as “by and through undersigned counsel.” Reduce well-trodden standards and tests to their essence. Hack away at needless procedural detail. And then, at the sentence level, slash windups and throat-clearing.

- “Avoid long introductions such as ‘Plaintiff, by and through undersigned counsel, hereby submits its Reply Memorandum in response to \_\_\_\_\_. This Reply is accompanied by the following Memorandum of Points and Authorities.’ I know that counsel is filing the brief on behalf of his or her client. I can see in the caption that the filing is a reply, and I can also see that there is a memorandum of points and authorities.”
- “Avoid grammatical expletives (‘there is,’ ‘it is’).”
- “‘It should be noted that,’ ‘it is beyond doubt that,’ and the like waste space.”
- “Writing numbers out twice seems particularly useless.”
- “Is it really necessary to devote a page or more or even half a page to discussing the standard of review for summary judgment or a motion to dismiss for failure to state a claim?”
- “The procedural history does not need to go back to the Creation. Just summarize what is relevant to the issue specifically before the court.”
- “Most sentences are dramatically improved by omitting testimony references: ‘Smith [testified that he] went to the scene the following day.’ While some discussion of trial testimony is necessary when you are talking about hearsay or impeachment, those discussions are best left to highlight after you’ve told the story the reader needs to understand.”
- “There’s a real danger in stuffing factual sections with crud.”

With judges becoming ever more impatient readers, looks do matter. Out: long, uninterrupted blocks of text. In: timelines, maps, graphs, diagrams, tables, headings and subheadings, and generous margins.

- “Sometimes a timeline is clearer than an essay format.”
- “I ALWAYS appreciate a clear timeline of events and I am happy to have that in the text of the fact section or as an exhibit. I want one place where I can see when everything happened in the case if it’s not a singular event.”
- “Just as I don’t like scrolling down to find authority in a footnote, I don’t like flipping through clerks’ papers or exhibits to find a key piece of documentary evidence that is discussed in a brief. The use of pictures, maps, and diagrams not only breaks up what can be dry legal analysis; it also helps us better understand the case as it was presented to the trier of fact (who undoubtedly was permitted to see an exhibit while it was discussed).”

Illustration by Chad Crowe

- “When a case involves analysis of a map, graph, or picture, I would like to see attorneys include a copy of the picture within the analysis section of the brief.”
- “I like fact sections broken down with headings and even subheadings. Define chapters in the facts or the ‘next’ relevant event.”

I was surprised that the judges I surveyed were more open to bolding and italics than judges used to be. Perhaps this evolution stems from their desire not to wade through paragraphs that look and feel the same. Or maybe the internet has accustomed all of us to formatting bells and whistles. That said, even judges who don’t mind emphasis want it in small doses. And although the judiciary may be split on emphasis, every judge in the country appears to hate all caps, and few are fans of underlining.

- “Party names should not be in all caps.”
- “Headings in all caps are difficult to read.”
- “All caps are completely beyond the pale.”
- “If a lawyer feels that emphasis is needed, I always prefer italics to boldface type. Boldface signals to me ‘Just in case you’re too stupid to recognize what’s important.’”

Let’s move on to specific language choices. One question on my survey simply asked judges to list words and phrases they dislike. Few responses surprised me, but it was amusing to see how easily many judges could rattle off language choices that drive them crazy. They must have lots of exposure!

As the list below suggests, many lawyers are unaware of how often they use these words and phrases. Never confuse knowing that you should avoid a term with actually implementing that knowledge in your writing.

- “Death to modifiers!”
- “I don’t like any clunky legalese like ‘For the foregoing reasons,’ ‘heretofore,’ etc.”
- “‘Wherein,’ ‘heretofore,’ ‘aforesaid,’ ‘to wit’: they all should go the way of the dodo bird.”
- “Don’t use ‘at that time’ for ‘when.’”
- “Don’t use anything like ‘s/he.’”
- “I dislike formalistic terms that people don’t really use in ordinary life like ‘wherefore’ and ‘arguendo,’ unnecessary phrases like ‘[party] submits,’ and derogatory terms like ‘asinine’ used to describe the opposing party’s argument.”
- “Don’t use ‘prior to’ for ‘before’ or ‘subsequent to’ for ‘after.’”
- “I dislike ‘notwithstanding,’ ‘heretofore.’”
- “Don’t use words like ‘wherefore,’ ‘heretofore,’ ‘hereinafter’ that aren’t commonly used in everyday language.”
- “Don’t write ‘Pursuant to.’”

- “I believe ‘hereby,’ ‘hereinafter,’ ‘foregoing’ and other arcana have no place in modern legal writing.”
- “I do not care for ‘the instant’ anything.”
- “Tell them to stop writing ‘In the case at bar!’”
- “I don’t like unnecessary Latin phrases like ‘inter alia.’”
- “Get rid of the formalisms from the Middle Ages such as ‘Comes now Plaintiff, by and through his undersigned attorneys.’”
- “‘Aforesaid,’ ‘heretofore,’ etc. are all pretty much empty and add nothing. Same with ‘said,’ as in the ‘said contract was signed at the said meeting.’”
- “I loathe the word ‘utilize.’”
- “I do not like when lawyers tell me what I ‘must’ do. Just say that the court ‘should’ do something.”
- “‘Unfortunately for appellee’ (or for any party) should never appear in briefs.”

Another category of language irritation: Many lawyers are surprised when I tell them that judges really don’t find “respectfully submits” and “respectfully requests” to be, well, respectful. Cloying is more like it. And my survey results were right in line with my anecdotal experience.

- “Don’t write ‘Defendant respectfully requests.’ I prefer it if you just say what you want to say. I’ll know if it’s respectful or not!”
- “‘Respectfully submits’ or ‘it is our position that’ are wasted words: they communicate nothing, except potential insecurity about the argument that follows.”
- “Avoid ‘with all due respect.’”
- “Avoid phrases such as ‘respectfully submits that’ that can be stated in one word like ‘contends.’”

On the less-is-more theme, you’ll rarely if ever hear judges complain that sentences or briefs are too short. And yet, sometimes short is, in fact, too sweet. Two offenders: random “this” and “that” references such as “this proves” or “that explains.” Also, especially for traditionalist judges in the Justice Scalia mold, avoid contractions.

- “I do not like indefinite references and see the word ‘this’ used too often. It should be used in conjunction with another word such as ‘this argument’ or ‘this logic.’”
- “I REALLY dislike contractions. They make the argument sound like casual conversation and they give the writer an arch voice.”

When it comes to usage as opposed to word choice, American judges fall into three categories: (1) those who understand the finer points of usage and care (these are the judges who ask me in workshops about “pleaded” versus “pled,” predicate nominatives,

and the counterfactual subjunctive); (2) those who understand the finer points of usage but either don't notice or don't care, and (3) those who don't know enough about usage to notice mistakes.

- "I despise the use of 'impact' as a verb."
- "Learn to differentiate between 'that' and 'which.'"
- "I cannot stand 'As such' used as a synonym for 'Therefore.'"
- "Learn to use the subjunctive!"

Now let's talk about fact sections, and in particular dates. Whenever I relay judges' irritation with needless dates, someone in the audience retorts that some dates really matter. Well, that's why judges object to *needless* dates. And it's not as if you face a binary choice between a full date and nothing at all. Sometimes a word or phrase will do the trick.

- "It helps to vary how the passage of time is described. Instead of 'on May 26, 2016,' it's refreshing to read 'the next week' or 'two months later.'"
- "Dates are rarely essential and often overused. If I see a date, I assume it is important. If it's not, you have interrupted the flow of your argument for no good reason."
- "I HATE specific dates that have no relevance. I keep thinking the 24th day of September must really be important, for example, and then when it isn't, I'm unhappy I've spent brainpower waiting for writer to tell me why it was critical!"
- "Sometimes it's enough to refer to an event as 'mid-2015' rather than a specific date."
- "If two parties entered into a contract, and it makes no difference to the claim whether they did so on January 22, 2014, or March 6, 2015, leave the date out."

Now let's talk a bit about the beginning of motions and briefs. Don't short the introduction. Judges find strong introductions invaluable. They help lawyers hone their theory of the cases, and they help shape the fact section and legal argument to come.

- "Explain why you should win on the first page. 'The Court should deny Defendant's Motion for Summary Judgment for the following three reasons.'"
- "I've had briefs in fairly involved cases without executive summaries. I've likened reading them to putting together a jigsaw puzzle without having the cover of the box to know what the puzzle is supposed to look like when it's done."
- "I do appreciate a good 'statement of the case' section, particularly in complex civil appeals, in which, in a non-argumentative manner, the lawyer sets the stage for what issues the court is called upon to decide. That helps me focus on what facts and portions of the record will be most relevant to those issues."

How about cases and other authorities? Busy judges have become increasingly irritated with the way many litigators handle case law. Facile shorthand: "Too many and too much." But it's a bit more complicated than that. One common complaint is that many litigators appear to search case law databases for choice language even if a given case doesn't quite fit and even if the case doesn't come down procedurally the way the lawyer wants the current case to.

- "The main issue I run across is probably a function of Boolean searches: citations to 'blurbs' or quoted phrases within published decisions where the actual ruling, or the analysis, or the posture of the case is completely distinguishable (or even adverse) to the point the party is trying to make. I am much more persuaded by one or two authorities that are carefully analyzed and applied than by a sprinkling of quotations lifted from a dozen cases that are strung together."

It's also surprising how many cases some lawyers cite for a proposition that their opponents would never challenge, such as the summary judgment standard, the *Daubert* standard, or the standard of review.

- "For well-established law, such as the standard of review, I prefer only a single cite."
- "Cite just enough cases and not all cases. One controlling case is enough. For non-controlling cases, if there aren't any contrary or many contrary cases, cite two or three non-controlling cases, preferably the two or three most recent. If there are two contrary groups of cases and none is controlling, then it might be appropriate to cite one from each jurisdiction supporting the writer's side."

Once you know which cases to cite and how many, what should you do with them? On the one hand, most judges rail against including too many facts and too many quotations when it would be more effective to use a concise parenthetical or a pithy quoted phrase merged into a sentence about your own case. On the other hand, for complex or dispositive cases, some judges find that lawyers use a parenthetical when a fuller textual description would be more apt. Ask yourself this question: "If I were being asked to endorse proposition X, what would I need to know about case Y to be comfortable doing so?" And then don't write one more word.

- "Skip the long description. Just state the damn proposition, cite the damn case, and be done with it."
- "Long discussions of the facts of cited cases are often not helpful."
- "For the most important case, cover the important points in text, not in an explanatory parenthetical. But it's okay to use

explanatory parentheticals for the cases that support the main one.”

- “I prefer citation to one or two cases with a short, pertinent explanation in a parenthetical. I prefer a full paragraph for distinguishing an adverse authority. I don’t prefer distinguishing adverse authority in a footnote.”
- “I prefer that briefs directly address contrary authority organized by argument, not by case name.”

That brings me to the block-quote question. Most lawyers defend block quotes by insisting that they convey pivotal information that can’t be paraphrased. That may be true, but here’s the bad news about that “pivotal information”: If it’s presented in a block quote, judges are likely to skip it entirely. So meet judges halfway: Use block quotes only when the language of the text itself adds value. Use block quotes as little as possible. And introduce block quotes substantively and persuasively, focusing less on who said what and more on why the reader should care.

- “Do not block quote more than three lines. After that, I may stop reading.”
- “Don’t write ‘As follows:’ before quotes. Just use the colon; the ‘as follows’ is implied.”
- “Fold quotes into text if possible.”
- “Huge block quotes are terrible. It’s much more persuasive to paraphrase the reasoning and then quote only the crucial language.”
- “When quoting, do not overuse brackets—I call them punctuational potholes. If you’re quoting from a case, start the quote after the part of the sentence that makes you want to use a bracket. The same for quotes from the record. For example, instead of “The officer stated, “[i]f [we] catch [you] in [the area] again, if [you] don’t have something, [I]’ll make sure [you] have something,” put “The officer said that if Smith were ever caught in the neighborhood again and did not “have something,” the officer would make sure he did have something.”

One last issue. Even after Justice Scalia’s passing, the debate over where to put citations rages on. But with so many judges reading briefs on iPads or on other devices that require scrolling to see footnotes, 78 percent of the judges in my survey prefer to see citations in the text, the old-fashioned way. You should still try to avoid putting citations at the beginning or in the middle of your sentences. And, of course, some judges (12 percent in my survey, with the other 10 percent neutral) do love to see citations in footnotes, but those judges nearly always make their views known.

- “This is a show-your-work gig, and I need to see your work there—not go hunting for it. This is a bigger deal now, I think, since we all read electronically.”

- “We want to process the citation as we read. When a litigant makes a point, it matters if he or she is citing to a Supreme Court case, a circuit opinion, a treatise, etc. I don’t want to have to stop reading and look down and find the citation in the footnote or endnote. I understand the reasons some endorse it, but it is not practical for briefs and opinion writing, and everyone I work with hates that style of writing.”
- “I find citations in footnotes to be distracting. It also makes the case more difficult to read online such as in Westlaw.”

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Here’s the bottom line: Just as many associates in law firms think that knowing individual partner preferences is all there is to writing, many seasoned litigators think the same about knowing the preferences of individual judges.

Sure, there’s something satisfying about finding out whether a given judge likes the Oxford comma. (Since I brought it up, 56 percent of the judges I surveyed said they do, 21 percent said they don’t, and 23 percent said they don’t care). And it’s all too tempting to make brief writing mostly about rules and formatting preferences. But I suggest that both litigators and appellate advocates spend most of their energies developing the core persuasive writing skills that would make almost all judges much happier.

So shoot for strong, compelling, yet concise introductions; a restrained use of case law, with quality over quantity; a readable treatment of party names and industry lingo; helpful lead-ins to block quotations; a confident and professional tone; modern diction; and more white space, headings, and visual aids.

In a word, show empathy for the reader. And for those of you thinking that judges should practice in their opinions what they preach to lawyers about their briefs, that topic will have to be for another article! ■