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Candid courtroom: Outspoken judges prompt criticism, admiration

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Seventh U.S. Circuit Court of Appeals Judge Richard Posner edits his writing May 16 in his office at the Dirksen Federal Building in Chicago. (Staff photos by Kevin Harnack)

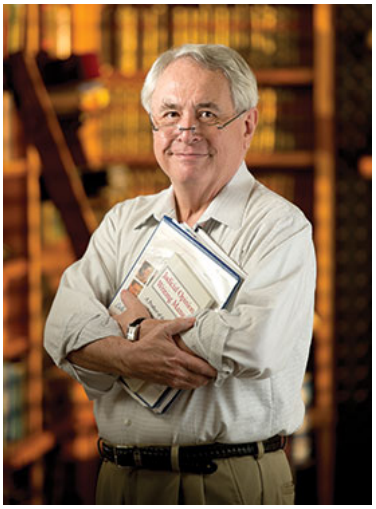
Not every judge would feel comfortable writing in an opinion that "the sight of a shackled litigant is apt to make jurors think they're dealing with a mad dog."

It's a sentence that cuts to the core of a legal topic without piling on legalese. Seventh U.S. Circuit Court of Appeals Judge Richard Posner wrote it in an April 4 opinion for Brian Maus v. Diane Baker.

"I do like the idea of trying to write opinions that nonlawyers can read because I don't think law is inherently that complex," Posner, who took the bench in 1981, said. "If it can be made simple, that's a benefit to everybody."

And true to form, Posner did not mince words when making it clear he disagreed with Eastern District of Wisconsin Judge Rudolph Randa's decision to make a detained plaintiff wear a prison outfit and shackles during trial.

"A truthful explanation for the shackles will be highly prejudicial – but without an explanation the jurors are left to wild conjecture," Posner wrote. "The proper course is thus to conceal from the jury that the defendant is shackled."



Ronald Hofer, a retired Wisconsin Court of Appeals attorney who teaches writing classes at The National Judicial College in Reno, Nev., holds some of his written works at his house in Brookfield.

Other judges might have hid behind precedence or legal terms, but Posner's use of the 'mad dog' imagery painted a clear picture of his opinion.

A fine line

Few judges are so frank and colorful in their opinions, however. Whether they should be inspires debate among judges and attorneys.

Brian Paul, an attorney who does appellate work with Ice Miller LLP in Indianapolis, said others should learn from Posner's style.

"Most opinions, in my experience, are dry as dust," Paul, a member of the 7th Circuit Board of Governors, said. "I think perhaps some judges say that's the appropriate way to write an opinion. To that extent, some judges may do it out of habit … [they] see no need to change."

For some, though, the additional judicial commentary, such as in the colorful writings of 7th Circuit Judge Frank Easterbrook and late 7th Circuit Judge Terry Evans, who was known for his use of sports metaphors in opinions, can be too much.

Ronald Hofer, a retired Wisconsin Court of Appeals attorney who teaches writing classes at The National Judicial College in Reno, Nev., said he thinks the best legal writing is simple and effective. Deviate from that, he said, and a judge runs the risk of making a case seem trivial or unimportant.

"To be honest with you, I'm not a big fan of being cute in an opinion at all," Hofer said. "I recognize that there is a line, however fine, between being cute or snide in an opinion and writing something that really does have some punch."

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Retired Wisconsin appellate Judge William Eich, who served from 1985 to 2000, agreed that simple is best.

"My feeling has always been: Opinions aren't a place for frivolity or wittiness necessarily," he said, "just clear expository … writing."

But as Kathy Keppel, an appellate attorney at Milwaukee-based Gimbel, Reilly, Guerin & Brown LLP, pointed out, injecting some personality can make an opinion stick out.

She said one of her favorite examples of that was a case in 1980 that Evans presided over while on the Eastern District of Wisconsin bench. In calling out an overly long brief filed in Edwin Marson v. Jones & Laughlin Steel Corp., Evans noted it took only 400 words to describe the creation of Earth in the book of Genesis and that the Gettysburg Address was only 266 words.

"On this routine motion to amend a civil complaint, Quarles & Brady has filed a brief … that contains approximately 41,596 words spread over an agonizing 124 pages," he wrote. "In this case, the term reply 'brief' is obviously a misnomer. Rather than impressive, the 'brief' is oppressive."

Keppel said it takes creativity and wit to make that style of writing work.

"I've read comments by judges who said he shouldn't be doing that," she said, "but those are some of the best decisions. They read them and remember them."

The election effect

The difference in writing styles is most apparent when comparing state and federal judges.

Keppel said it is much easier to tell which federal judge wrote an opinion. There is more uniformity to opinions from state appellate courts, she said.

"If you handed me an opinion [and] said, 'Which one of the four judges on the District 4 (Court of Appeals) wrote this?' I doubt that I'd be able to tell you," Keppel said.

Ronald Hofer works in his home library May 12 in Brookfield.

To many, the difference is in who is elected and who is in for life. Posner and his fellow federal judges aren't subject to the six-year election cycles Wisconsin appellate judges face.

"Judges who are concerned about election are more prone to speak in a dull legalese," said Michael O'Hear, an associate dean at Marquette University Law School.

Posner, on the other hand, said he often goes several paragraphs without a single citation because a "false sense of learnedness tends to be confusing" in judicial writing. He prefers to keep his writing brisk, with many of his recent opinions around 10 pages.

In a Nov. 23, 2011, six-page opinion for Monica Gonzalez-Servin v. Ford Motor Co., Posner devoted a good portion to admonishing the attorneys for barely recognizing precedent set by the 7th Circuit. His opinion included pictures of an ostrich and of a person in a suit with his or her head in the sand.

"The ostrich is a noble animal, but not a proper model for an appellate advocate," Posner wrote. "The 'ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is as unprofessional as it is pointless.'"

Beth Hanan, an appellate attorney with Milwaukee-based Gass Weber Mullins LLC, said she could not think of an instance when a Wisconsin appellate judge did something similar to Posner's opinion.

Wisconsin Court of Appeals Judge Kitty Brennan said state appellate judges often think of their role in the court system when writing an opinion.

"We're just an intermediate court," Brennan said. "There's going to be less of a likelihood of expounding on your high horse."

Posner, though, said he feels bad for admonishing those attorneys. He said such asides, for which he is known, often come from writing and researching an opinion while working on a first draft. Sometimes, he said, they can be borne out of frustration.

"The more the judge works on an opinion," he said, "the more he's going to notice stuff that may strike him as interesting."

Posner pointed out that he and Easterbrook are among the last federal appeals judges in the nation to write the first drafts of their opinions. Many of their colleagues let their law clerks do it.

"Law clerks tend to be very timid, cautious writers," Posner said. "They are very afraid of leaving anything out and making sure every 't' is crossed and 'i' is dotted. It tends to make their opinions somewhat predictable or tedious."

When it comes to a willingness to express an opinion, however, time spent on a case is nothing compared with time on the bench.

"You can't deny if I had lifetime tenure," Eich said, "I might think a little differently about how I phrase something."

That life tenure for federal judges, O'Hear said, gives them "more freedom to really fully convey what they are thinking in their opinions in a style that reflects who they are."

State judges, by comparison, Posner said, have "rather rigid principles."

"They think it's very bad for any note of levity in an opinion," he said. "I can't really imagine being an elected judge. I can't imagine running for office."