Cultured Writing

By Richard Bales

In an *ABA Journal* essay on legal writing about 20 years ago, the late Irving Younger found it appalling that only 10 of 150 students in his evidence class recognized Patroclus as a character in the *Iliad,* and only one student recognized "The rest is silence" as Hamlet's last words.[1] Lamenting the quality of secondary and undergraduate education is certainly nothing new. But consider the other side of the coin for a moment: what is the value of a reference that less than 10% of the audience understands?

Writers must walk a fine line when adding cultural references to their writing. On the one hand, an apt or clever reference can make the reader smile or nod or pause for reflection, and can be a valuable way to sustain the reader's attention on what otherwise may be a less-than-scintillating legal topic. On the other hand, a writer does not want to alienate readers by making them feel excluded because they don't understand the reference, or to trivialize the subject material by adding a reference that seems flippant.

Before using a cultural reference, consider the purpose you intend it to serve. If the purpose is to impress the reader with your wit or cultural erudition, resist the temptation. Wit for the sake of wit is likely to distract the reader from the legal point you're trying to make. Similarly, trying to impress the reader with cultural knowledge often backfires. That's because it relies on exclusion: it strokes the ego of the cultured reader who knows that the lumpen[2] masses won't understand. But someone who didn't take a college class on twentieth-century Russian literature may not understand the meaning of "lumpen masses" and may resent you for making him or her feel ignorant.

Moreover, it's easier to make readers feel ignorant today than it was several years ago. Forty or fifty years ago, the concept of culture was more homogenous; a writer could assume that a college-educated reader had read the Greek classics, most if not all of Shakespeare's plays, and a variety of other works of Western European literature. Today, however, the concept of culture has expanded significantly to include works from around the world, and some of the Western European classics have been put aside to make room. Thus, while most college-educated people have likely read one or some of Shakespeare's plays, few people have read them all, and the ones you have read may not be the same ones your reader has read.

One of my favorite recent cultural references is courtesy of Judge Karen Moore, of the United States Court of Appeals for the Sixth Circuit. Writing on how courts should approach consumer-arbitration agreements that shift arbitration fees to consumers, Judge Moore explained:

> [T]he *post hoc* judicial review approach places plaintiffs in a kind of "Catch-22." They cannot claim, in advance of arbitration, that the risk of incurring arbitration costs would deter them from arbitrating their claims because they do not know

Another Contest

Here's a little nugget:

> "This Agreement shall be governed by, and construed and enforced in accordance with, the Laws of the State of Michigan, regardless of the place of execution or the laws that might otherwise govern under applicable principles of conflicts of law thereof."

I'll send a copy of *Lifting the Fog of Legalese: Essays on Plain Language* to the first person who sends me an unembroidered A version of that sentence. (I'll have to be the sole judge.) E-mail your version to kimblej@cooley.edu before January 29. I can't respond to each e-mail but will print the winner in next month's column. —JK

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> what the costs will be, but if they arbitrate and actually incur costs, they cannot then argue that the costs deterred them because they have already arbitrated their claims. Just as Yossarian could not escape flying combat missions by claiming that he was crazy because anyone wanting to be released from combat must be sane, under this approach potential litigants cannot escape arbitration by claiming that the costs are prohibitive until after arbitration, at which point the costs were not prohibitive, because the litigants actually arbitrated their disputes.[3]

I might have broken up the two long sentences, but leave that aside. Even if I had not read Joseph Heller's *Catch-22*, I would understand Judge Moore's point that under the *post hoc* judicial-review approach, there is no effective way for a consumer to object to imposing arbitration fees. Judge Moore had the best of both worlds: she used her cultural reference to make her point, but she didn't risk alienating the reader.

Here are some suggestions for using cultural references in legal writing.

First, read nonlegal material regularly. This may enhance your understanding of other writers' cultural references, but more importantly, it will help give you a nonlegal frame of reference for what is good writing and what is not.

Second, keep a running list of cultural references, metaphors, and other phrases that enhanced your understanding of a subject. You might later have an opportunity to use them in your own writing.

Third, consider using popular references or references that are largely self-explanatory, such as Judge Moore's reference to "Catch-22."

Finally, remember that your goal is to lead your reader to a deeper understanding of your topic—not to impress the judge with your wit or your knowledge or cultural arcana.

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FOOTNOTES

1. Irving Younger, *Culture's the Thing*, reprinted in 8 Scribes J Legal Writing 137 (2001–2002).
2. "[O]f or relating to dispossessed and uprooted individuals." Merriam-Webster's Collegiate Dictionary (11th ed. 2003). The term "lumpen masses" was often used as a derogatory term by Russian cultural elites in the 1920s and early 1930s to describe the target audience for the culture—socialist realism—that Stalin directed the cultural elites to create for the masses. The term fell into disfavor after Stalin had most of the cultural elites shot.
3. *Morrison v Circuit City Stores*, 317 F3d 646, 662–663 (CA 6, 2003) (en banc).