

# What a Breeze: The Case for the “Impure” Opinion (Part 2)

By Ross Guberman

**M**ost of the world’s best-known judges have broken the mold just as Justice Kagan has done in the examples shared last month. Take this priceless explanation of an adhesion contract, courtesy of Lord Denning:

These cases were based on the theory that the customer, on being handed the ticket, could refuse it and decline to enter into a contract on those terms. He could ask for his money back. **That theory was, of course, a fiction. No customer in a thousand ever read the conditions. If he had stopped to do so, he would have missed the train or the boat.**<sup>1</sup>

Judge Posner, Lord Denning’s American heir apparent, is yet another judge who favors unusually direct, candid, and “impure” prose, as I mentioned above. Unlike Kagan, though, who has an unabashedly populist yet upbeat style, Posner has a bit of an edge:

When a codefendant drops out in the course of trial, **a juror would have to be pretty stupid not to surmise that he had pleaded guilty**; and if this knowledge were grounds for mistrial it would be impossible for a defendant in a multiple-defendant case to plead guilty after trial began.<sup>2</sup>

“Plain Language” is a regular feature of the *Michigan Bar Journal*, edited by Joseph Kimble for the Plain English Subcommittee of the Publications and Website Advisory Committee. To contribute an article, contact Prof. Kimble at Western Michigan University Cooley Law School, P.O. Box 13038, Lansing, MI 48901, or at [kimblej@cooley.edu](mailto:kimblej@cooley.edu). For an index of past columns, visit <http://www.michbar.org/generalinfo/plainenglish/>.

Posner’s Seventh Circuit colleague Judge Easterbrook sometimes pushes the envelope even further, even adopting in the example below some astronomical metaphors to discuss the problem of divining legislative intent, of all things:

Some cases **boldly stake out a middle ground**, saying, for example, “only the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the ‘plain meaning’ of the statutory language.” This implies that **once in a blue moon** the legislative history trumps the statute (as opposed to affording a basis for its interpretation) but **does not help locate such strange astronomical phenomena**. These lines of cases have coexisted for a century, and many cases contain statements associated with two or even three of them, not recognizing the tension. **What’s a court to do?**<sup>3</sup>

To be fair, some might find this imagery off-putting. But keep in mind that Judge Easterbrook is targeting caselaw, not the parties themselves, and so we should cut him a little slack.

In any event, a lighter touch can be more effective. Chief Justice Roberts has a knack for deploying wry humor to his advantage. Take this example from a case about

whether Congress violated the Constitution by withholding federal funding from law schools that excluded the military from on-campus recruiting:

We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so.... **Surely students have not lost that ability by the time they get to law school.**<sup>4</sup>

Or consider another Roberts classic in this soft-sarcasm vein. This one comes from his opinion in an otherwise austere dispute about whether a corporation, in this case AT&T, had a right to “personal” privacy under the Freedom of Information Act. The corporation argued that it did because it was a “person,” the root word of “personal.” Roberts snips away at those threads through a playful tour of the dictionary, ending with a dig that I imagine might have made even a few AT&T executives chuckle:

We reject the argument that because “person” is defined for purposes of FOIA to include a corporation, the phrase “personal privacy” in Exemption 7(C) reaches corporations as well. The protection in FOIA against disclosure of law enforcement information on the ground that it

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would constitute an unwarranted invasion of personal privacy does not extend to corporations. **We trust that AT&T will not take it personally.**<sup>5</sup>

There's a fine line between gentle humor and outright mockery, of course. When Chief Justice Roberts was first nominated to the United States Supreme Court, his opponents made hay over a single line in a dissent from a denial of rehearing that he had written on the D.C. Circuit. The case was about whether the arroyo toad could be protected under the Endangered Species Act, with the subtext that perhaps the act was unconstitutional altogether. Here is Roberts's infamous line, which proved to be one of the few hiccups in his meteoric rise:

The panel's approach in this case leads to the result that regulating the taking of a **hapless toad that, for reasons of its own, lives its entire life in California** constitutes regulating "Commerce . . . among the several states."<sup>6</sup>

Part of what fueled the objection to this line was substantive, of course. For his critics, Roberts's approach to the Commerce Clause here was radical. But part of the objection was decidedly stylistic, so much so that a pro-environment website even took on the name "The Hapless Toad." On the one hand, few judges have Roberts's gift for rhythm and cadence that inspired him to pen a phrase like "a hapless toad that, for reasons of its own, lives its entire life in California." But on the other hand, Roberts's wry language here could strike some as disdainful, if not callous. Perhaps that's exactly why so few judges attempt to write with flair. In the end, of course, these judgment calls often depend on how receptive you expect your readers to be—and per-

haps on the extent to which you're seeking to make the record books or the legal news.

Just in case the hapless-toad example is intimidating, controversial, or both, I want to end with a couple of more straightforward, and perhaps more realistic, examples of the "impure" style. The first comes from Bankruptcy Judge Benjamin Goldgar, a relatively unknown judge whom I find to be a superlative writer all around.<sup>7</sup> Notice the pattern in what I've highlighted below: each bolded phrase is close to what Judge Goldgar would likely have used were he recounting the case out loud:

Liou's misrepresentations to the court were quite serious, far worse than simply **checking the wrong box on a bunch of forms.**

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Liou unquestionably **should have known better.** He has represented debtors in chapter 13 bankruptcies for almost fifteen years and is a regular practitioner in this court. His practice of modifying the [Model Retention Agreement] with an addendum was not only inconsistent with the basic principle underlying the court's flat fee arrangement but plainly so. If, as he now says, he did not actually intend to conceal anything or mislead anyone, he should certainly have realized that was the effect. **The call is not even a close one.** All told, Liou's **moral compass badly needs repair.**

Although reliance on counsel is not usually relevant to the question of whether there has been a Rule 9011 violation, it can be relevant to the sanction itself. The problem for Liou is that the record shows he consulted Sukowicz about fee agreements other than the MRA. He never sought Sukowicz's advice about using the

MRA with the addendum and then representing on his fee applications that he had entered into the MRA, the specific violation here. Liou **gets no points** for consulting counsel over a different ethical problem.

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Finally, Liou asks to be recognized for "taking corrective action." After the December 2010 show cause order suggested his conduct was sanctionable, Liou says he amended the MRAs and withdrew and then refiled any pending fee applications. But Liou's "corrective action" was **half-hearted at best.** He filed amended MRAs in only thirty-three cases and withdrew fee applications in only eighteen. In several instances, moreover, Liou **added insult to injury** by committing yet another set of Rule 9011 violations. Ten of the thirty-three amended MRAs were not true amendments at all but, as described earlier, simply had the word "amended" added to the title and the phrase "see attached addendum" **scratched out.** The debtors in these cases evidently never saw, let alone signed, the amended agreements. **There is no such thing in Illinois law** as a unilateral contract amendment, as Liou surely knew.<sup>8</sup>

In Judge Goldgar's style, you can almost feel the air lifting you up: lots of short and crisp words, idiomatic turns of phrase, and visual imagery.

My final example really pushes the limits, and it may push your buttons as well. It's from a relatively new federal judge, First Circuit Judge O. Rogeriee Thompson. She spouts an unusually conversational tone and even indulges in slang (her uses of "legit" and "gobs" are head-turners), all to breathe life into an otherwise dry tale of financial shenanigans:

A federal jury convicted James Bunchan and Seng Tan, a husband and wife team, of numerous mail-fraud, money-laundering, and conspiracy crimes committed in furtherance of a classic pyramid scheme that **swindled some 500 people** out of roughly \$20,000,000 in the **early to mid-2000s.** Fellow **scammer** Christian Rochon pled guilty to similar charges . . . .

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**Here is how it all worked.** Bunchan tasked Tan with **drumming up** new members, something **she was born to do, apparently**. . . . As “CEO Executive National Marketing Director,” Tan ran informational seminars for potential investors, meeting them at hotels, their homes, and elsewhere. **She usually made quite an entrance**, showing up in a chauffeur-driven Mercedes. . . .

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When prospective investors asked her **point-blank** whether they had to sell company merchandise to get money, Tan answered no. She and Bunchan reduced their promises to writing, with Tan even signing letters guaranteeing monthly returns **basically forever**. One member who got **cold feet** and asked for her investment back received a letter from Tan saying that she (Tan) would return her money if [the marketing scheme] **went belly up**. . . .

The scheme started out **swimmingly**. [The marketing schemes] used newly-invested money to **trick** old investors into thinking that the **good times were**

**here to stay**. Not knowing any better, members were ecstatic. Bunchan and Tan were too, **obviously**. And with cash pouring in, the pair used the companies’ coffers as **their own personal piggy bank**.<sup>9</sup>

As much as I like the style here generally, I cringe at the teenager-like phrase “basically forever.” That one goes too far, in my view, and in exchange for a more staid expression there, I’d change “numerous” to “many” toward the start.

If I can use a breezy expression myself to characterize the examples in this article, it would be “Lighten Up.” Direct and brisk wording choices do more than just boost the chances that you’ll find your name in a casebook one day or even in the pantheon of “Great Judicial Writers.” They make your substantive points more memorable as well. And they also bring you closer to your readers, infusing your analysis with a populist and democratic flavor that conveys a lot about how you see the role of a judge. ■

*This column is based on an excerpt from the author’s recently published book, Point Taken: How to Write Like the World’s Best Judges.*

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#### ENDNOTES

1. *Thornton v Shoe Lane Parking*, 1 Lloyd’s Rep 289; 2 WLR 585 (1970).
2. *United States v Gutman*, 725 F2d 417, 422 (CA 7, 1984).
3. *In re Sinclair*, 870 F2d 1340, 1342 (CA 7, 1989) (citations omitted).
4. *Rumsfeld v Forum for Academic & Inst Rights, Inc.*, 547 US 47, 65; 126 S Ct 1297; 164 L Ed 2d 156 (2006) (citations omitted).
5. *FCC v AT&T*, 562 US 397, 409–410; 131 S Ct 1177; 179 L Ed 2d 132 (2011).
6. *Rancho Viejo, LLC v Noriton*, 357 US App DC 336, 338; 334 F3d 1158 (2003) (Roberts, J., dissenting).
7. See Ross Guberman, Legal Writing Tips for Attorneys and Judges, *The Seven Writing Strategies of Highly Effective Trial Judges* (posted March 9, 2014) <<http://legalwritingpro.com/blog/the-seven-writing-strategies-of-highly-effective-trial-judges/>> (accessed October 14, 2015).
8. *In re Brent*, 458 BR 444, 463–464 [Bankr ND Ill, 2011] (citations omitted).
9. *United States v Seng Tan*, 674 F3d 103, 104–106 (CA 1, 2012).

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