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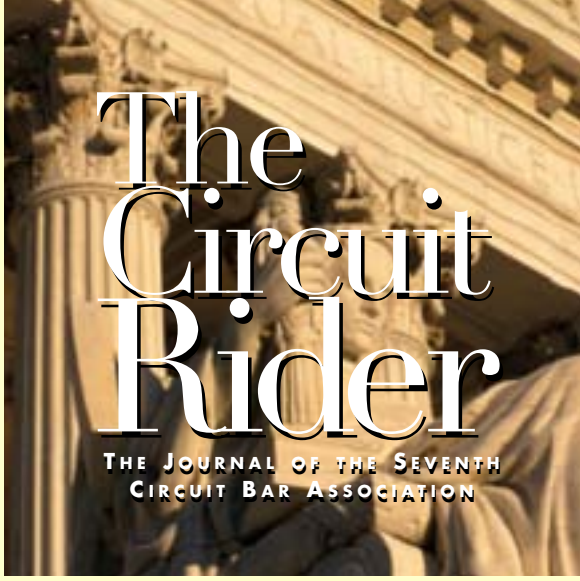
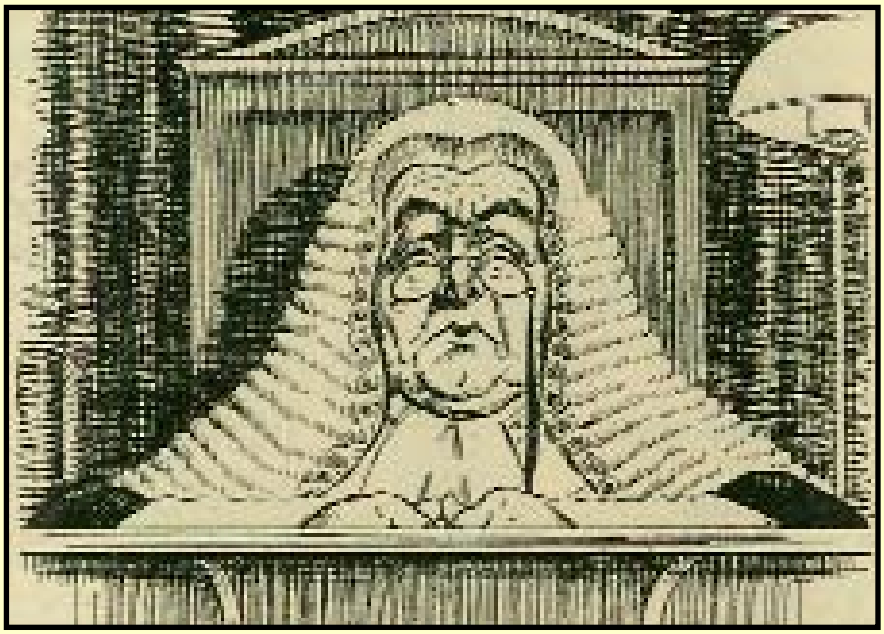
Zen And The Art Of Bankruptcy Practice

Remembering Attorney General Edward H. Levi Through His Own Words

My Favorite Year: Clerking for Judge Harlington Wood, Jr.



Character, Creativity, *and* Complications



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Letter *from the* President

President J. Andrew Langan
Kirkland & Ellis LLP

It is my honor and privilege to be President of the Seventh Circuit Bar Association in 2007-2008. I look forward to continuing and building on the fine leadership of my predecessors, Dan Conley, Jim Figliulo, and many others.

Annual Meeting

Last May, we completed a very successful Annual Meeting and Judicial Conference in Milwaukee that was attended by several hundred lawyers and judges. The substantive meeting sessions were very well received and the prominent speakers at the Annual Dinner -- including Justice Stevens and Solicitor General Clement -- received strong reviews.

Goals

My goals for this year include. First, working with Chief Judge Easterbrook and the Circuit, we will strive to organize a superior Annual Meeting and Judicial Conference on May 18-20, 2008, at the Hotel Intercontinental in Chicago. We are pleased to announce that both Justice Stevens and Justice Scalia have indicated they plan to attend our meeting next May. Please mark your calendars now for this event. Second, we will improve the services to our membership by, among other things, expanding and improving the Association's website. Third, we will strive for active committee work throughout the year and seek to have several substantive programs sponsored by the Association that will attract new members and provide benefits to our existing ones. Fourth, we will seek to aid the Circuit in the improvement in the administration of justice by, among other things, continuing support of the groundbreaking American Jury Project started by the Circuit and this Association two years ago. Fifth, we are pleased to continue with the publication of The Circuit Rider, the acclaimed journal of the Association.

If you are not a member, yet practice in the federal courts in the Seventh Circuit, we urge you to join the Association. Membership benefits include information about Association activities, a copy of the Association's Directory (with handy information about the federal courts and court personnel), and a subscription to the Circuit Rider. We are especially interested in attracting younger lawyers into our ranks and we have a very active younger lawyers group in our Association.

I am proud to be a leader of the Seventh Circuit Bar Association. The other officers and I, and the Board of Governors, encourage your active participation throughout the year and also encourage you to share with us any ideas you may have on how to make the Association even stronger.

Sincerely,

J. Andrew Langan

How Will Seventh Circuit Pleading Requirements and Dismissal Standards Change in the Wake of *Bell Atlantic*

By Joshua Yount [1]

This past May, in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), the Supreme Court stepped away from the path of minimal notice pleading that it had been walking for 40 years. Now, dismissal can result from a failure to plead facts that both give notice of a claim's grounds and make a right to relief plausible. The consequences of the *Bell Atlantic* decision in the Seventh Circuit—where the law favoring minimal notice pleading had been particularly strong—are just beginning to unfold. Thus far, the Seventh Circuit has been hesitant to read *Bell Atlantic* too broadly, but much about the decision's implications remains unresolved.

Pleading In The Seventh Circuit Prior to *Bell Atlantic*

As recently as April 2007, the Seventh Circuit instructed litigants and district courts that "a judicial order dismissing a complaint because the plaintiff did not plead facts has a short half-life." *Vincent v. City Colls. of Chi.*, 485 F.3d 919, 923 (7th Cir. 2007). Indeed, the court had taken the position that "[a]ny decision declaring 'this complaint is deficient because it does not allege X' is a candidate for summary reversal, unless X is on the list in Fed. R. Civ. P. 9(b)." *Kolupa v. Roselle Park Dist.*, 438 F.3d 713, 715 (7th Cir. 2006). In the Seventh Circuit, a complaint needed only "to name the plaintiff and the defendant, state the nature of the grievance, and give a few tidbits (such as the date) that will let the defendant investigate." *Id.* at 714. "Silence" on other factual circumstances, even those necessary to prove an asserted cause of action, the court had explained, "is just silence and does not justify dismissal unless Rule 9(b) requires details." *Id.* at 715. In the court's view, "[a]rguments that rest on negative implications from silence are poorly disguised demands for fact pleading." *Id.*

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[1] *Mr. Yount is a Partner at Mayer Brown LLP and an Associate Editor of the Circuit Rider. He clerked for Circuit Judge Ann Williams and served as a Staff Attorney for the Seventh Circuit. Mayer Brown represented one of the petitioner-defendants in Bell Atlantic.*

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***Bell Atlantic's* Retrenchment On Pleading**

Now it seems the Seventh Circuit's *Vincent* decision may itself have "a short half-life." Within a month of *Vincent*, the Supreme Court handed down *Bell Atlantic*, a 7-2 decision authored by Justice Souter that appears to reject the minimalist notice pleading standards articulated by the Seventh Circuit. Most prominently, the Court repudiated the instruction of *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." The Court found the "no set of facts" rule—under which lower courts allowed "any statement revealing the theory of the claim [to] suffice unless its factual impossibility [could] be shown from the face of the pleadings"—to be inconsistent with the requirement of Fed. R. Civ. P. 8(a)(2) that a complaint contain a statement of the claim "showing that the pleader is entitled to relief." 127 S. Ct. at 1964, 1968-69.

The *Bell Atlantic* Court further explained that "a plaintiff's obligation to provide the grounds of his entitlement to relief" under Rule 8(a)(2) "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 127 S. Ct. at 1964-65 (internal quotation marks omitted). Rather, the "[f]actual allegations" in a complaint "must be enough to raise a right to relief above the speculative level." *Id.* at 1965. Put differently, a complaint must plead "enough facts" to make a claim for relief "plausible on its face" (*id.* at 1974), must contain "allegations plausibly suggesting (not merely consistent with)" actionable conduct (*id.* at 1966), or must show "a reasonably founded hope" that discovery will support a claim (*id.* at 1967, 1969 (internal quotation marks omitted)). The Court emphasized, moreover, that the burdens of modern discovery imbue these pleading requirements with "practical significance" and favor empowering district courts "to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id.* at 1966-67 (internal quotation marks omitted).[2]

Applying these standards, the *Bell Atlantic* Court reinstated the dismissal of an antitrust complaint claiming that the "Baby Bells" agreed among themselves to prevent entry into local telephone and internet service markets while avoiding competition with each other. 127 S. Ct. at 1970-74. Bare allegations of "agreement" were "merely legal conclusions" insufficient to state a claim, in the Court's view. *Id.* at 1970. And allegations of "parallel conduct" among the Baby Bells did not plausibly suggest conspiracy because there was a natural, non-conspiracy explanation for the conduct. *Id.* at 1971-73. The Court concluded, in short, that the plaintiffs had "not nudged their claims across the line from conceivable to plausible." *Id.* at 1974.

Notwithstanding the many indications that the Supreme Court intended to tighten pleading standards, the *Bell Atlantic* opinion also contains several pronouncements signaling continued fidelity to notice pleading. For instance, the Court made clear that "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations." 127 S. Ct. at 1964. The Court likewise noted that its understanding of Rule 8 does "not require heightened fact pleading of specifics." *Id.* at 1974.

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[2] Notably, the *Bell Atlantic* Court relied in part on an older Seventh Circuit opinion that predates the development of the Seventh Circuit's minimalist approach to pleading, *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101 (7th Cir. 1984). In particular, the Court quoted *Car Carriers* on the significance of wasteful litigation in judging a complaint's sufficiency and the need for allegations suggesting a right to relief. 127 S. Ct. at 1967 ("'[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.'"); *id.* at 1969 ("'[i]n practice, a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory'").

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Moreover, two weeks after issuing the *Bell Atlantic* opinion, the Supreme Court summarily reversed a Rule 12(b)(6) dismissal, rejecting the Tenth Circuit's determination that allegations in an Eighth Amendment suit—namely, that a prison official's refusal to provide an inmate with medication for hepatitis endangered the inmate's life—were too conclusory on the question of harm. *Erickson v. Pardus,* 127 S. Ct. 2197 (2007). The per curiam *Erickson* opinion, citing *Bell Atlantic*, explains that under Rule 8(a)(2) "[s]pecific facts are not necessary; the [requisite short and plain] statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Id.* at 2200 (internal quotation marks omitted).

***Bell Atlantic* In The Seventh Circuit**

In the months since the *Bell Atlantic* decision came down, the Seventh Circuit has tried to make sense of the decision's impact on its very liberal pleading jurisprudence. Thus far, the predominant tendency has been to minimize the changes worked by *Bell Atlantic*. The most thorough treatment of the subject occurs in *EEOC v. Concentra Health Services, Inc.*, 496 F.3d 773 (7th Cir. 2007), which affirmed the dismissal of Title VII retaliation action in which the EEOC amended its complaint to delete allegations suggesting that the claimed retaliation was for reporting favoritism toward a paramour rather than for reporting sex discrimination.

The *Concentra* court viewed *Bell Atlantic* as interpreting Rule 8(a)(2) "to impose two easy-to-clear hurdles": (1) "the complaint must describe the claim in sufficient detail to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests"; and (2) "its allegations must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a speculative level." *Id.* at 776 (internal quotation marks omitted). The court did recognize, however, that Seventh Circuit decisions like *Kolupa* "are no longer valid in light of" *Bell Atlantic's* "rejection" of *Conley's* "no set of facts" rule, explaining that "it is not enough for a complaint to avoid foreclosing possible bases for relief; it must actually suggest that the plaintiff has a right to relief." *Id.* at 777. But that obligation, the *Concentra* court seemed to suggest, might be satisfied by a bare allegation of retaliation so long as any supporting allegations did not undermine the plausibility of the alleged illegal conduct. *Id.* at 777 n.1.

As for the fair notice requirement, the *Concentra* court opined that a complaint "must contain a minimal level of factual detail, although that level is indeed very minimal" (496 F.3d at 779), that, in close cases, a court should be guided by the liberality of notice pleading and prior decisions by the Seventh Circuit (id.), and that it "seems doubtful" that "*Bell Atlantic* changed the level of detail required by notice pleading" (*id.* at 782 n.4). The court nonetheless determined that the EEOC's complaint failed to give fair notice because the deletion of previously pleaded facts "critically important to the case" that "might facilitate a quick resolution on the merits" amounted to "obfuscation" that "does not intuitively comport with the purposes of notice pleading." *Id.* at 780-81. Such "easily provided, clearly important facts" must be pleaded. *Id.* at 782.

In a concurrence, Judge Flaum took issue with how the *Concentra* majority (Judges Cudahy and Bauer) read *Bell Atlantic*. He did not "share the majority's view that *Bell Atlantic* left our notice pleading jurisprudence intact." 496 F.3d at 784. Instead, he read *Bell Atlantic* to require a plaintiff to "plead enough facts to demonstrate a plausible claim." *Id.*

Aside from *Concentra*, nine published Seventh Circuit decisions have considered *Bell Atlantic*. Three merely quote from the opinion in describing what must be pleaded to avoid dismissal, without analyzing or applying its teachings. *Estate of Sims v. County of Bureau,* No. 01-2884, 2007 WL 3036752, at *3 (7th Cir. Oct. 19, 2007); *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 633 (7th Cir. 2007); *Local 15, IBEW v. Exelon Corp.,* 495 F.3d 779, 782 (7th Cir. 2007).

Three others offer dicta on *Bell Atlantic's* meaning. In instructing the district court to ensure on remand that the complaint contain "'enough factual matter (taken as true)' to provide the minimum notice" owed a defendant under *Bell Atlantic*, *In re Ocwen Loan Servicing, LLC Mortgage Servicing Litigation,* 491 F.3d 638, 648-49 (7th Cir. 2007), noted that the Supreme Court had rejected *Conley's* "no set of facts" rule out of concern that defendants would have to endure expensive pretrial discovery to demonstrate the

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groundlessness of a plaintiff's case. With a somewhat different emphasis, *Airborne Beepers & Video, Inc. v. AT&T Mobility LLC,* 499 F.3d 663, 667 (7th Cir. 2007), opined, "Taking *Erickson* and *Twombly* together, we understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8." And in faulting a prisoner for failing to supply factual details at any time up through his summary judgment appeal, *George v. Smith*, No. 07-1325, 2007 WL 3307028, at *2 (7th Cir. Nov. 9, 2007), explained that under *Bell Atlantic* plaintiffs "must give enough detail to illuminate the nature of the claim and allow defendants to respond."

Two cases instructively apply *Bell Atlantic* without offering any special analysis of the decision. One, *Jennings v. Auto Meter Products, Inc.,* 495 F.3d 466 (7th Cir. 2007), affirms the dismissal of a RICO complaint. In relevant part, *Jennings* determines that the plaintiff failed to allege "a sufficient number and variety of predicate acts" and "reject[s]" the plaintiff's "characterization" of the number of injuries allegedly suffered. *Id.* at 475-76. The other, *St. John's United Church of Christ v. City of Chicago,* 502 F.3d 616 (7th Cir. 2007), affirms the dismissal of a number of challenges to O'Hare International Airport expansion plans. In doing so, the decision rejects "legal conclusions" and "unsupported conclusions of fact" alleged in support of the plaintiff church's claims that the City of Chicago and the State of Illinois impermissibly targeted religious rights in the law authorizing the expansion plans and finds that the motion to dismiss record contained "no facts" and "no plausible evidence" supporting the requested relief. *Id.* at 633, 635, 637, 639, 640.

The last case, *Killingsworth v. HSBC Bank Nevada, N.A.,* Nos. 06-1616, 06-2178, 2007 WL 3307084 (7th Cir. Nov. 9, 2007), reviews *Bell Atlantic's* holding and reinstates a dismissed Fair Credit Reporting Act ("FCRA") complaint. The *Killingsworth* court emphasized the need plead "enough facts to state a claim to relief that is plausible on its face" and "to raise a right to relief above the speculative level." *Id.* at *3 (quoting *Bell Atlantic*). But the court also restated the minimalist view of *Bell Atlantic* expressed in *Airborne Beepers*. *Id.* Without further specifying the level of factual detail necessary, the *Killingsworth* court found the plaintiffs' complaints adequately alleged willfulness by pleading specific, intentional acts by the defendants that would violate the FCRA. *Id.* at *8.

Litigating In The Seventh Circuit Under *Bell Atlantic*

Three-and-a-half months after *Bell Atlantic,* much remains uncertain about the decision's impact on pleading requirements and dismissal standards in the Seventh Circuit. Still, three teachings can be stated with some confidence. First, courts may no longer hypothesize allegations to save a complaint from dismissal. Only a complaint's actual allegations and reasonable inferences from those allegations count in assessing whether a complaint states a claim. Second, Rule 8 definitely does not require detailed fact pleading. Such pleading is necessary only for the matters identified in Rule 9(b) and similar statutory provisions requiring heightened pleading. Third, courts should disregard factual conclusions, labels, and characterizations in a complaint, at least in some circumstances. Usually, plausibility and notice turn on the underlying facts, not conclusory allegations.

In the coming months and years, the Seventh Circuit (and perhaps the Supreme Court, too) will have to grapple with the uncertain implications of *Bell Atlantic* on a host of other matters. The most significant matter is the level of detail a complaint must plead. Is it still true that only a few "tidbits" sufficient to allow the defendant to investigate will do? What about "easily provided, clearly important facts," do they have to be supplied even when not pleaded in a previous complaint? And to what extent does the plausibility inquiry demand factual details, as opposed to an abstract assessment of the type of claim asserted?

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That last question, of course, also relates to the separate, undecided matter of how to determine a pleaded claim's legal plausibility. Is it really sufficient, as the *Concentra* dicta suggests, that the type of claim asserted is plausible, as a general matter? Furthermore, what should a court consider in judging plausibility? The *Bell Atlantic* Court undertook a fairly sophisticated economic analysis of the claims before it. And the Supreme Court's contemporaneous decision in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 127 S. Ct. 2499, 2509 (2007), approved consideration of "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." Plausibility also might require a plaintiff to allege facts going to each element of the pleaded causes of action, if the *Bell Atlantic* Court's references to the Seventh Circuit's older *Car Carriers* decision are credited. Could an obligation to rebut obvious (or not so obvious) affirmative defenses in the complaint follow?

Also unresolved is when conclusory allegations must be ignored. Some conclusions, it would seem, will have to be ignored: conspiracy and discrimination, to name two. *Bell Atlantic*, 127 S. Ct. at 1970 n.10 (conspiracy); *Concentra,* 496 F.3d at 781-82 (discrimination). Others appear acceptable, with negligence being a prominent example. *See Bell Atlantic,* 127 S. Ct. at 1970 n.10 (speaking with seeming approval of the negligence complaint that is Form 9 to the federal rules). Developing general principles to separate the impermissibly conclusory from the sufficiently factual will be no easy task, and may be further complicated if the same conclusions receive different treatment in different areas of the law. *See Concentra,* 496 F.3d at 782 ("It is rarely proper to draw analogies between complaints alleging different sorts of claims; the type of facts that must be alleged depend upon the legal contours of the claim.").

Finally, what should courts make of *Bell Atlantic's* emphasis on the importance of fuller pleading to prevent massive discovery in groundless cases? Should courts be more forgiving of sketchy pleading and marginal claims in cases with limited discovery? Distinguishing among types of cases in such a pragmatic manner certainly has not found favor in the past. *See Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 513 (2002). But even prior to *Bell Atlantic,* some decisions treated the prospect of costly discovery as a factor relevant to a dismissal motion. *See Bell Atlantic,* 127 S. Ct. at 1966-67 (citing, among other cases, *Dura Pharms., Inc. v. Broudo,* 544 U.S. 336, 347 (2005); *Associated Gen. Contractors of Cal., Inc. v. Carpenters,* 459 U.S. 519, 528 n.17 (1983); and *Car Carriers,* 745 F.2d at 1106).

While the courts work out these issues, litigants must be alert to raise and preserve them. Indeed, litigants have a unique opportunity to shape pleading and dismissal standards as courts consider *Bell Atlantic's* implications. In the immediate future, therefore, new and careful attention should be paid to those standards in briefing dismissal motions and appeals from dismissals.

Writers Wanted!

The Association publishes The Circuit Rider twice a year. We always are looking for articles on any substantive topic or regarding news from any district — judges being appointed or retiring, new courthouses being built, changes in local rules, upcoming seminars.

If you have information you think would be of interest, prepare a paragraph or two and send it via e-mail to Editor Jeffrey Cole at Jeffrey_Cole@ilnd.uscourts.gov or call 312.435.5601.

APPEALING AN INTERLOCUTORY DECISION:

What *EXACTLY IS* a Controlling Question *of* Law

Under 28 U.S.C. § 1292(b)?

By Dean A. Morande [1]

As most appellate practitioners are aware, an interlocutory federal district court order, such as an order denying a motion to dismiss, is usually not immediately appealable. There is, however, a statutory mechanism through which an otherwise unappealable interlocutory order can be brought before the Court of Appeals for immediate review. That mechanism is 28 U.S.C. § 1292(b).

Section 1292(b) provides that, if an "order involves a controlling question of law as to which there is substantial ground for difference of opinion and … an immediate appeal from the order may materially advance the ultimate termination of the litigation," the district court can certify to that effect in its written order. The Court of Appeals then has the discretion to take jurisdiction over an appeal of that otherwise unappealable order. However, keep in mind that, even if all of § 1292(b)'s technical elements are present, the Court of Appeals still must be satisfied that exceptional circumstances exist warranting the exercise of its discretionary jurisdiction over the interlocutory appeal.[1]

While many elements must be considered in attempting to utilize § 1292(b) as a means of obtaining immediate review of an interlocutory decision, this piece is focused on what various courts have determined to be a "controlling question of law" as that term is used in § 1292(b).

The most obvious example of a "controlling question of law" would be if the order appealed from turns on a question of law that would be dispositive of the litigation.[2] An example of a such a decision would be where the question presented on appeal is whether the substantive claim on which the action is based exists as a matter of law.[3] The determination of whether a private cause of action exists under a particular statutory framework falls into this category and therefore would present a controlling question of law under § 1292(b).[4]

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[1]*Mr. Morande is an associate with Carlton Fields in West Palm Beach, Florida. He is a member of the firm's Appellate Practice and Trial Support Practice Group. He clerked on the Eleventh Circuit for Judge Edward E. Carnes, after graduating with highest honors from Florida State University College of Law, where he was Order of the Coif.*

What *EXACTLY IS* a Controlling Question *of* Law

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The availability of a complete legal defense to an action can also be dispositive of the litigation and can, therefore, constitute a controlling question of law. For example, a defense based on a statute of limitations,[5] the Eleventh Amendment,[6] federal preemption,[7] qualified immunity,[8] or double-jeopardy[9] can involve questions of law that, if decided in favor of the defendant, would dispose of the litigation. Other issues, such as whether the district court has subject matter jurisdiction[10] or personal jurisdiction,[11] whether venue is proper,[12] or whether a party has standing to pursue the action[13] can also be dispositive of the litigation.

The entire appeal, however, need not hinge on a single question of law to satisfy § 1292(b)'s controlling question of law requirement. If an order involves a question of law that disposes of only one claim, that question of law can be controlling, thereby permitting the Court of Appeals to exercise its appellate jurisdiction.[14] Even a question of law that conclusively establishes a single element of a claim can be controlling in certain instances. For example, one court determined that its decision effectively setting the amount of damages involved a controlling question of law pursuant to § 1292(b).[15] Similarly, another court found a controlling question of law in its determination of liability, even though the damages issue remained unresolved.[16]

As some of the various examples listed above confirm, the question of law at issue need not involve a substantive contention; even a procedural issue can constitute a controlling question of law.[17] Moreover, the controlling question of law presented for review need not directly relate to the issues that make up the dispute between the parties. A question of law need only be controlling in the sense that its resolution would materially advance the disposition of the litigation. On that theory, decisions have found controlling questions of law in the transfer of an action,[18] the stay of an action pending another action or appeal,[19] the disqualification of counsel,[20] the determination of sufficiency of service of process,[21] an order denying a motion to remand an action to state court,[22] and even some discovery issues.[23] While these examples do not necessarily reach the issues underlying the controversy between the parties, they materially advanced the ultimate resolution of the litigation.

Regardless of the particular variant of the question of law decided in the order sought to be reviewed, the district court's decision on that question of law, if erroneous, must constitute reversible error.[24] It is also imperative that the controlling question of law involve a "pure" question of law, rather than the application of law to settled facts.[25] A pure question of law is an issue that the court can decide "quickly and cleanly," without having to resort to the record.[26] A question cannot be a controlling question of law under § 1292(b) unless it involves an abstract question of law that is independent of the facts of the case, even if the facts of the case are undisputed. For example, the question of whether a jury's verdict is so excessive as to shock the court's conscience does not present a controlling question of law because it cannot be decided without in-depth consideration of the facts of the case.[27] Similarly, discretionary matters such as pretrial rulings on the admissibility of evidence generally do not satisfy § 1292(b)'s requirements because the facts are often key to questions of relevance and the like.[28]

The level of legal abstraction required for a controlling question of law leads into a somewhat related requirement under § 1292(b). There is some authority for the proposition that a "controlling" question of law must not only be determinative of the question at hand, but it should also have precedential value for a significant number of other cases.[29] Other authority, however, takes the view that an inquiry into the impact an immediate decision will have on other cases, while a factor to take into account in determining whether certification is proper under § 1292(b), is not necessarily informative as to whether a question of law is controlling.[30] The result, however, may be a distinction without a difference as, under either view, the court will consider the precedential value of the decision in determining whether an interlocutory appeal is warranted.

Another factor that could complicate matters under § 1292(b) is that the "controlling" nature of a question of law can change as time goes on and the litigation progresses. For purposes of § 1292(b), however, whether a question of law is controlling is based on the situation as it existed when the Court of Appeals exercised its discretion to permit the interlocutory appeal.[31]

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What *EXACTLY IS* a Controlling Question *of* Law

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In sum, myriad issues must be accounted for in attempting to present the district court and the Court of Appeals with a "controlling question of law" in an appeal taken pursuant to § 1292(b). In a judicial system where interlocutory appeals are generally viewed with disfavor, § 1292(b) provides a mechanism to overcome that skepticism and potentially save both the parties and the judiciary significant resources by resolving the case at an earlier stage of the litigation. Because of the potential for abuse, however, the judiciary has had no choice but to fashion significant hurdles that must be surmounted before discretionary interlocutory review can be had. As a result, presenting a convincing argument that the order sought to be reviewed involves a "controlling question of law" is absolutely critical to persuading the district court and the Court of Appeals that immediate review under § 1292(b) is warranted.

[1] *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 475 (1978).
[2] *See Harris v. Lucky,* 918 F.2d 888, 892 (11th Cir. 1990) (explaining that § 1292(b) appeal was warranted where question certified for review could terminate the litigation).
[3] *Pollack v. Laidlaw Holdings, Inc.,* 27 F.3d 808, 809 (2d Cir. 1994) (reviewing whether mortgage participations are "securities" under federal law).
[4] *Three Rivers Ctr. for Indep. Living v. Hous. Auth. of Pittsburgh,* 382 F.3d 412, 418-19 (3d Cir. 2004).
[5] *South v. Saab Cars USA, Inc.,* 28 F.3d 9, 11 (2d Cir. 1994).
[6] *S.W. Bell Tel. Co. v. City of El Paso,* 243 F.3d 936, 937 (5th Cir. 2001).
[7] *Shots v. CSX Transp., Inc.,* 38 F.3d 304, 305 (7th Cir. 1994).
[8] *Kirkland ex rel. Jones v. Greene County Bd. of Educ.,* 347 F.3d 903, 904 (11th Cir. 2003); *Brayman v. United States,* 96 F.3d 1061, 1062 (8th Cir. 1996).
[9] *United States v. Barnette,* 10 F.3d 1553, 1554-55 (11th Cir. 1994).
[10] *See 19 James Wm. Moore, et al., Moore's Federal Practice* § 203.31[2], 203-88 n.6 (3d ed.1999) (collecting cases).
[11] *See id.* at 203-89 n.8 (collecting cases).
[12] *See id.* at 203-89 n.7 (collecting cases).
[13] *See id.* at 203-89-90 n.9 (collecting cases).
[14] *Harris v. Lucky,* 918 F.2d 888, 892 (11th Cir. 1990).
[15] *Junco v. Eastern Air Lines, Inc.,* 399 F. Supp. 666, 667 (S.D. N.Y. 1975), aff'd, 538 F.2d 310 (2d Cir. 1976).
[16] In re *Air Crash Disaster at John F. Kennedy Int'l Airport,* 479 F. Supp. 1118, 1121 (E.D. N.Y. 1978).
[17] *Eisenberg v. U.S. Dist. Court for S. Dist. of Ill.,* 910 F.2d 374, 376 (7th Cir. 1990).
[18] *See 19 James Wm. Moore, et al., Moore's Federal Practice* § 203.31[3], 203-91 n.13 (3d ed.1999) (collecting cases).
[19] *See id.* at 203-92 n.14 (collecting cases).
[20] *See id.* at 203-92 n.16 (collecting cases).
[21] *Johnson v. Burden,* 930 F.2d 1202, 1205-06 (7th Cir. 1991).
[22] *See Moore's Federal Practice* § 203.31[3], at 203-93 n.18 (collecting cases).
[23] *See id.* at 203-92 n.17 (collecting cases).
[24] *APCC Services, Inc. v. AT & T Corp.,* 297 F. Supp. 2d 101, 105 (D.D.C. 2003).
[25] *McFarlin v. Conseco Servs., LLC.,* 381 F.3d 1251, 1258 (11th Cir. 2004); *Ahrenholz v. Bd. of Trs. of the Univ. of Ill.,* 219 F.3d 674, 676-77 (7th Cir. 2000).
[26] *Ahrenholz,* 219 F.3d at 676-77.
[27] *See Casey v. Long Island R.R.,* 406 F.3d 142, 147 (2d Cir. 2005).
[28] *See Coursen v. A.H. Robins Co.,* 764 F.2d 1329, 1342 (9th Cir. 1985).
[29] *McFarlin,* 381 F.3d at 1259; *APCC Services, Inc. v. AT & T Corp.,* 297 F. Supp. 2d 101, 105 (D.D.C. 2003).
[30] *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro In Amministrazione Straordinaria,* 921 F.2d 21, 24 (2d Cir. 1990).
[31] *Johnson v. Burken,* 930 F.2d 1202, 1205 (7th Cir. 1991).

Upcoming Board *of* Governors' Meeting

Meetings of the Board of Governors of the Seventh Circuit Bar Association are held at the East Bank Club in Chicago, with the exception of the meeting held during the Annual Conference, which will be in the location of that particular year's conference. Upcoming meetings will be held on:

Saturday, March 1, 2008
Tuesday, May 20, 2008
(During the Annual Conference)

All meetings will be held at the East Bank Club, 500 North Kingsbury Street, Chicago at 10:00 AM

TOWARD A MORE IMPURE WRITING STYLE:

The Opinions *of Judge Posner and Chief Judge Easterbrook*

and What the Bar Can Learn from Them

By Brian J. Paul [1]

Lawyers tend to be wretched writers, which is odd given that the written word is their stock in trade. Perhaps the problem comes from reading principally the work of other lawyers.

— Interview of Hon. Frank Easterbrook, Chief Judge of the U.S. Court of Appeals for the Seventh Circuit, How Appealing, http://howappealing.law.com/20q.

There is more truth to this statement than many of us would care to admit. The problem isn't so much that we don't care about our writing; in a sense it is that we care too much about our writing. For ours (I'm speaking in generalities here of course) is a style premised on meticulous imitation. We begin our motions more or less the same way every time: "Party so and so, by counsel, respectfully requests . . . ." We tend to end them the same way every time, too: "For the foregoing reasons . . . ." We are fond of using the same high-sounding legalisms: there are the hoary classics, such as "instant" (as in "the instant case") and "said" (as in "said agreement"); there are also the hedgers ("on or about" is popular); the redundancies ("true and correct" and "any and all" are common); and the worn-out intensifiers ("clearly" may just be the single most overused word in legal writing today). We quote liberally from case law, instead of paraphrasing; block quotes blot our briefs. We take great pains to detail propositions of law that judges know by heart. We observe certain rules of grammar to a fault, even if it results in awkward-sounding sentences—the sort of English up with which Winston Churchill would not put. Alas, the typical brief is formulaic, prissy, and detached—in a word, tedious.

There is a better way. I want to suggest just one modeled after the writing styles of two prominent federal judges who currently sit on the Seventh Circuit: Judge Richard Posner and Chief Judge Frank Easterbrook. But first let's talk a little bit more generally about style and why it matters.

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[1]*Brian J. Paul is an appellate attorney with Ice Miller LLP in Indianapolis.*

The Opinions *of Judge Posner and Chief Judge Easterbrook*

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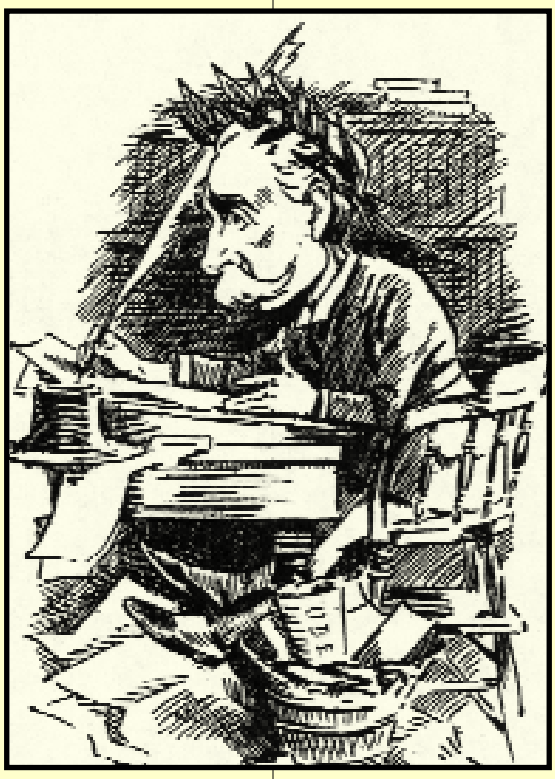
Style Matters

Lawyers are fond of telling each other that style is so much fluff, especially when editing each other's work. Emails accompanying redline drafts usually distance the editor from his stylistic revisions. "You can ignore these changes if you like—they're just stylistic," a typical email will read. We include disclaimers like this for various reasons. One is that editing for style is viewed by many lawyers to be a waste of time; what really matters is what's said, not how it's said, the reasoning goes. Another is that style is considered to be strictly personal, and lawyers don't want to be in the business of spilling red ink all over a colleague's ego. The third is that lawyers are comfortable with the predominant style; it's what we were taught in law school, it's familiar, and above all it's safe.



There is something to all of this. Substance is a common denominator: a unanimous Supreme Court opinion could be written by any one of nine justices and the syllabus is likely to describe the holding in more or less the same terms. Style, moreover, *is* personal: Justice Souter's writing style (detailed and cautious) is poles apart from that of Justice Scalia's (sweeping and impassioned), and this difference seems to reflect their individual judicial philosophies. And there *is* something to be said for hewing to tradition; we're less likely to invite criticism if we do.

But these truths mask important realities. We all know (if only intuitively) that the way something is communicated is often every bit as important as what is communicated, particularly so in persuasive writing. We'd be out of a job if it weren't—as would diplomats, presidential speech writers, public relations consultants, and any other number of professionals who regularly use the written word to persuade. Most of the opinions written by Holmes and Hand are irrelevant to modern legal questions, but the reason we still read them has as much to do with the genius of how they said things as with what they had to say.

Just because style is personal, furthermore, doesn't mean we shouldn't edit for it. If we are willing to accept the proposition that certain styles are easier to read than others, and I hazard to guess that most of us are, then we should be willing to accept the further proposition that certain styles are better than others. This is not to say that clarity necessarily translates into superiority: Grisham goes down like a milkshake compared to Faulkner, but few literary critics would say A PAINTED HOUSE is "better" than ABSALOM, ABSALOM!. In legal writing, however, clarity counts for a lot. Judges are too busy to re-read briefs that should be clear on the first pass. Instantaneous comprehension has to be our goal. So if editing for clarity means editing for style, so be it; for as Bryan Garner has written, "[t]he chief aim of style is clarity." BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE 4 (2d ed. 2002) (emphasis added).

The need to change our ways may be the bitterest pill of all to swallow. Most of us see no need to change; some might even say the predominant style is how lawyers *should* write. It predominates for a reason, right? I leave it to others to debate why we write like we do. I suspect though that it is more a relic of an antiquated guild mentality—the felt need to set ourselves apart from other professionals—than it is an instance of the cream rising to the top. What I know for certain, however, is that writing styles among American business professionals in general have been drifting (critics would say "sliding") toward a more relaxed, "oral" style in recent years. *See* Lecture by Brenda Danet, *The Language of Email* 23-24 (2002), http://pluto.mscc.huji.ac.il/~msdanet/papers/email.pdf (last visited Sept. 17, 2007). The proliferation of email communication has accelerated the trend. It's at least worth pausing to consider, then, whether a plainer, more informal style of legal writing might be a more effective way of communicating in this day and age.

So style matters. But what style might we emulate? And what exactly does "a plainer, more informal" style look like?

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The Opinions *of Judge Posner and Chief Judge Easterbrook*

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The Impure Style

Some years ago Judge Posner wrote an article in which he distinguished between the two basic types of judicial writing styles. *See* Richard A. Posner, *Judges' Writing Styles (And Do They Matter?),* 62 U. CHI. L. REV. 1421 (1995). The one that I have been referring to as the "predominant" style he called the "pure" style. *See id.* at 1428. The pure style, wrote Posner, is "lofty, formal, imperious, impersonal, 'refined,' ostentatiously 'correct' (including 'politically correct'), even hieratic . . . ." *Id.* at 1426. It is marked by detailed factual narratives, extended discussions of background propositions of law, rote recitations of undisputed legal principles, deliberate use of refined terms in place of their commoner cousins ("employ" instead of "use," to give just one example), as well as frequent use of substantive (as opposed to citational) footnotes. *See id.* at 1426-27, 1430. It is "solemn, highly polished and artifactual—far removed from the tone of conversation . . ."; indeed, purists are careful to underscore the difference between their diction and the diction of ordinary speech. *Id.* at 1429.

Then there is the "impure" style. Impure stylists "tend to be more direct, forthright, 'man to man,' colloquial, informal, frank, even racy, even demotic." *Id.* at 1426. The impure style is more exploratory than it is declaratory. *Id.* at 1427. Impure stylists are apt to be concrete in their writing, *id.* at 1430, and thus make more frequent use of analogies, examples, hypotheticals, and illustrations, so as to bring abstract concepts home. Heeding Holmes' admonition to "strike the jugular and let the rest go," OLIVER WENDELL HOLMES, JR., SPEECHES 77 (1934), impure stylists tend to eschew unimportant details, Posner, *supra,* at 1430. They also tend to elevate their personal voice; instead of quoting from prior authority, for example, "they speak with their own tongue." *Id.* Theirs is a conversational tone. *Id.* They write for the ear, not the eye. *Id.* Impure stylists mind the cadence of their sentences, even if it means disregarding the rules of grammar. *See id.* at 1424. This approach to legal writing is bolder than the pure style, if only because it runs counter to the expectations of its audience. *See id.* at 1431.

This is a study in extremes, as Posner himself acknowledged; few legal writers dwell squarely in one camp or another. *Id.* at 1431-32. Judge Henry Friendly is a notable example. *Id.* at 1432. And it is not as though there are no purists worth emulating. Cardozo, Brandeis, Frankfurter, Brennan, and the second Harlan, pure stylists all according to Posner, *id.*, were some of the finest legal writers of the last century. It's just that, as Garner has put it, those of us less talented than a Cardozo, Brandeis, Frankfurter, Brennan, or Harlan are more likely to "stumble—or plunge—when we try it." GARNER, *supra,* at 11.

So then let's take a look at a few specific examples of the impure style. At the risk of being parochial, and as I mentioned earlier, I'm going to use excerpts from the opinions of Judge Posner and Chief Judge Easterbrook. I use their opinions largely because I happen to practice in the Seventh Circuit (Indiana) and therefore am more familiar with their work than that of judges in other circuits. But to be sure there are other first-rate impure stylists sitting on courts located elsewhere; Judge Alex Kozinski of the Ninth Circuit Court of Appeals comes immediately to mind.

My focus is on three concepts: what I'll refer to here as concreteness, plain talk, and cadence.

Concreteness

Posner and Easterbrook put abstract concepts into concrete terms. This is a remarkably persuasive writing technique that adherents of the predominant, purist style tend to underutilize.

A paragraph from Posner's opinion in *Ty, Inc. v. Publications International Ltd.,* 292 F.3d 512 (7th Cir. 2002), will illustrate. The basic issue in that case was whether Publications International had been properly enjoined from selling books containing pictures of Beanie Babies, pellet-stuffed plush toys manufactured by Ty. Publications International's main defense and argument on appeal was that its books were protected by the fair use doctrine.

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Posner's discussion of the doctrine starts with an affirmation of its importance: "The defense of fair use, originally judge-made, now codified, plays an essential role in copyright law. Without it, any copying of copyrighted material would be a copyright infringement." *Id.* at 517. This is all well and good, we might say to ourselves at this point, but Posner is at such a high level of generalization that, if he were to stop there, we'd be unconvinced. Posner knows this, so to sharpen the point he provides an illustration: "A book reviewer could not quote from the book he was reviewing without a license from the publisher." *Id.* Ah, now he's getting somewhere! That seems extreme—having to get permission just to quote something. If that were the law, copyright holders could squelch written criticism of their work. But there's more to it than that, as Posner explains:

> Quite apart from the impairment of freedom of expression that would result from giving a copyright holder control over public criticism of his work, to deem such quotation an infringement would greatly reduce the credibility of book reviews, to the detriment of copyright owners as a group, though not to the owners of copyright on the worst books. Book reviews would no longer serve the reading public as a useful guide to which books to buy. Book reviews that quote from ("copy") the books being reviewed increase the demand for copyrighted works; to deem such copying infringement would therefore be perverse, and so the fair-use doctrine permits such copying. On the other hand, were a book reviewer to quote the entire book in his review, or so much of the book as to make the review a substitute for the book itself, he would be cutting into the publisher's market, and the defense of fair use would fail.
>
> Generalizing from this example in economic terminology that has become orthodox in fair-use case law, we may say that copying that is complementary to the copyrighted work (in the sense that nails are complements of hammers) is fair use, but copying that is a substitute for the copyrighted work (in the sense that nails are substitutes for pegs or screws), or for derivative works from the copyrighted work, is not fair use . . .

Id. (internal citations omitted). Even if we disagree with Posner's economic analysis, we'd probably concur with him when he suggests that a critic should have the freedom to quote select portions of a book without risking a federal lawsuit; at least that much rings true. Yet we'd also likely agree that someone can't just reprint a book under the guise of criticism; that, too, makes sense. So here, with this illustration, Posner has shown us the purpose of the fair use doctrine, and thus its importance. This in turn frames the discussion for the remainder of the opinion.

Notice again that Posner doesn't simply tell us that the fair use doctrine is important—he *shows* us its importance. Why might this be an effective persuasive-writing technique for lawyers to use? For at least a couple of reasons. First, critical readers are more apt to accept a conclusion if they come to it themselves. The fair use doctrine may indeed "play an essential role in copyright law," but if Posner had just stopped there, we'd have to take his word for it; that's telling, not showing. Putting the fair use doctrine to work in the context of a book review, however, allows even copyright neophytes to appreciate the doctrine's importance.

Second of all, illustrations aid in instantaneous comprehension. We might be confused if Posner had declared only that "copying that is complementary to the copyrighted work is fair use." Complementary how? we might wonder. As in similar? Related? Supplementary? It's not clear. But when Posner adds, "in the sense that nails are complements of hammers," we know exactly what he means.

Bryan Garner again: "Don't say that something is unfair; show why it is, and let the reader conclude that it is. * * * Don't say that somebody acted unprofessionally; explain what the person did, and let the reader decide. * * * Don't call an argument absurd; show why it is." Bryan A. Garner, The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts 398 (2d ed. 2003). In short, "[s]how, don't tell." *Id.* at 397.

Plain Talk

Most lawyers seem to be repulsed by the spoken word when it comes to putting pen to paper. Why? You wouldn't say, "This automobile has required recurrent maintenance from the date of purchase." So why write that way? You're more likely to say, and therefore you should consider writing, "This car has been in the shop ever since she bought it." Or just: "It's a lemon."

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The Opinions *of Judge Posner and Chief Judge Easterbrook*

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The writings of Posner and Easterbrook have an oral quality to them. Theirs is an easy, conversational style. They aren't afraid to use colloquialisms, for example. As a result their tone is unceremonious, informal, almost folksy:

Instead of writing this:	***They wrote this:***
He did not profess to be privy to knowledge only a few had.	"He did not pretend to have the inside dope." *Haynes v. Alfred A. Knopf, Inc.,* 8 F.3d 1222, 1227 (7th Cir. 1993) (Posner).
This is a recurrent misunderstanding that must be clarified.	"This is a recurrent misunderstanding and it is worth taking a moment to try to straighten the matter out." *Mucha v. King,* 792 F.2d 602, 604 (7th Cir. 1986) (Posner).
Plaintiff raises several additional issues. However, they are either frivolous or likely to be resolved at a second trial.	"Some other issues are raised, but they are either unimportant or likely to wash out at a new trial if one is held." *Ty Inc. v. Softbelly's, Inc.,* 353 F.3d 528, 537 (7th Cir. 2003) (Posner).
Canons of construction aid in ascertaining the meaning of an ambiguous statute.	"Canons are doubt-resolvers . . . ." *United States v. Marshall,* 908 F.2d 1312, 1318 (7th Cir. 1990) (Easterbrook).
Minimum sentences are designed for low-level offenders.	"Minimum sentences are designed for little fish, the ones judges would throw back if the legislature would let them." *Id.* at 1322.

And when they do use colloquialisms, they don't draw attention to it; they just treat them as a natural part of their writing:

They wrote this:	***Not this:***
Alarm bells went off when we read the jurisdictional statement of Fred Hart's brief: "Amount in controversy: $72,436.62 plus Plaintiff's attorney's fees, to be assessed by the court, should plaintiff prevail, pursuant to 705 ILCS § 225/1." Oops. *Hart v. Schering-Plough Corp.,* 253 F.3d 272, 273 (7th Cir. 2001) (Easterbrook).	"Alarm bells" went off when we read the jurisdictional statement of Fred Hart's brief . . . . "Oops."
Big fish then could receive paltry sentences or small fish draconian ones. *Marshall,* 908 F.2d at 1315 (Easterbrook).	"Big fish" then could receive paltry sentences or "small fish" draconian ones.
Jiri smelled a rat. *Mucha,* 792 F.2d at 612 (Posner).	Jiri "smelled a rat."

Impure statements like these are in the main punchier, more personal, more relaxed, more concrete (there's that word again), and livelier than the corresponding purist versions. We get the sense that the author actually enjoys writing, that he thinks the law is interesting. With the purist we get a different sense—that writing is a chore reducible to a formula. Issue, rule, application, conclusion; issue, rule, application, conclusion; repeat. Whose writing would you rather read?

Cadence

Impure stylists also pay attention to the rhythm and movement—the cadence—of their sentences and paragraphs. This means you usually won't see many substantive footnotes in their writing. Nor will you see many of those one-word transitions (invariably followed by a comma)—"However," "Moreover," "Therefore," "Thus," "Hence," "Accordingly," and so on—that lawyers like to use so much at the beginning of their sentences. Block quotes are also few and far between in their writing. Instead of long parentheticals following case citations, you're more apt to see just the cite with an explanation of its significance seamlessly woven into the adjoining text. And "but" and "and" are used to begin sentences.

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The Opinions *of Judge Posner and Chief Judge Easterbrook*

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Two examples will give you a flavor of what I mean by "cadence." First is an excerpt from Easterbrook's opinion in *American Booksellers Association, Inc. v. Hudnut,* 771 F.2d 323, 330-31 (7th Cir. 1985), a case that challenged an Indianapolis pornography ordinance:

> Much of Indianapolis's argument [in defense of the ordinance] rests on the belief that when speech is "unanswerable," and the metaphor that there is a "marketplace of ideas" does not apply, the First Amendment does not apply either. The metaphor is honored; Milton's *Aeropagitica* and John Stewart Mill's *On Liberty* defend freedom of speech on the ground that the truth will prevail, and many of the most important cases under the First Amendment recite this position. The Framers undoubtedly believed it. As a general matter it is true. But the Constitution does not make the dominance of truth a necessary condition of freedom of speech. To say that it does would be to confuse an outcome of free speech with a necessary condition for the application of the amendment.
>
> A power to limit speech on the ground that truth has not yet prevailed and is not likely to prevail implies the power to declare truth. At some point the government must be able to say (as Indianapolis has said): "We know what the truth is, yet a free exchange of speech has not driven out falsity, so that we must now prohibit falsity." If the government may declare the truth, why wait for the failure of speech? Under the First Amendment, however, there is no such thing as a false idea, *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 339, 94 S.Ct. 2997, 3006, 41 L.Ed.2d 789 (1974), so the government may not restrict speech on the ground that in a free exchange truth is not yet dominant.
>
> At any time, some speech is ahead in the game; the more numerous speakers prevail. Supporters of minority candidates may be forever "excluded" from the political process because their candidates never win, because few people believe their positions. This does not mean that freedom of speech has failed.
>
> The Supreme Court has rejected the position that speech must be "effectively answerable" to be protected by the Constitution. For example, in *Buckley v. Valeo, supra,* 424 U.S. at 39-54, 96 S.Ct. at 644-51, the Court held unconstitutional limitations on expenditures that were neutral with regard to the speakers' opinions and designed to make it easier for one person to answer another's speech. See also *FEC v. National Conservative PAC,* 470 U.S. 480, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985). In *Mills v. Alabama,* 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966), the Court held unconstitutional a statute prohibiting editorials on election day—a statute the state had designed to prevent speech that came too late for answer. In cases from *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), through *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982), the Court has held that the First Amendment protects political stratagems—obtaining legislation through underhanded ploys and outright fraud in *Noerr,* obtaining political and economic ends through boycotts in *Clairborne Hardware*—that may be beyond effective correction through more speech.

Here we see several of the hallmarks of an impure stylist at work. Easterbrook's sentences tend to begin or end in important words. They vary in length, some long, some short; short sentences in particular are used for impact, longer ones for elaboration. Case law is discussed in such a way that it becomes part of the fabric of the opinion; cases are rarely discussed in separate paragraphs or parentheticals, and when they are, they're *short* paragraphs and parentheticals. One sentence in the first paragraph begins with "but," not "however," and where the word "however" does appear, it's pushed to the middle of the sentence. And finally, in the third paragraph, Easterbrook uses the colloquialism "ahead in the game," without quotation marks.

Now for an excerpt from one of Posner's opinions, *Peaceable Planet, Inc. v. Ty, Inc.* 362 F.3d 986, 988-89 (7th Cir. 2004) (internal citations omitted), yet another Beanie Baby case:

> In the spring of 1999, Peaceable Planet began selling a camel that it named "Niles." The name was chosen to evoke Egypt, which is largely desert except for the ribbon of land bracketing the Nile. The camel is a desert animal, and photos juxtaposing a camel with an Egyptian pyramid are common. The price tag fastened to Niles's ear contains information both about camels and about Egypt, and the Egyptian flag is stamped on the animal.

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A small company, Peaceable Planet sold only a few thousand of its camels in 1999. In March of the following year, Ty began selling a camel also named "Niles." It sold a huge number of its "Niles" camels—almost two million in one year—precipitating this suit. The district court ruled that "Niles," being a personal name, is a descriptive mark that the law does not protect unless and until it has acquired secondary meaning, that is, until there is proof that consumers associate the name with the plaintiff's brand. Peaceable Planet did not prove that consumers associate the name "Niles" with its camel.

The general principle that formed the starting point for the district court's analysis was unquestionably sound. A descriptive mark is not legally protected unless it has acquired secondary meaning. An example is "All Bran." The name describes the product. If the first firm to produce an all-bran cereal could obtain immediate trademark protection and thereby prevent all other producers of all-bran cereal from describing their product as all bran, it would be difficult for competitors to gain a foothold in the market. They would be as if speechless. Had Peaceable Planet named its camel "Camel," that would be a descriptive mark in a relevant sense, because it would make it very difficult for Ty to market its own camel—it wouldn't be satisfactory to have to call it "Dromedary" or "Bactrian."

Although cases and treatises commonly describe personal names as a subset of descriptive marks, it is apparent that the rationale for denying trademark protection to personal names without proof of secondary meaning can't be the same as the rationale just sketched for marks that are "descriptive" in the normal sense of the word. Names, as distinct from nicknames like "Red" or "Shorty," are rarely descriptive. "Niles" may evoke but it certainly does not describe a camel, any more than "Pluto" describes a dog, "Bambi" a fawn, "Garfield" a cat, or "Charlotte" a spider. (In the *Tom and Jerry* comics, "Tom," the name of the cat, could be thought descriptive, but "Jerry," the name of the mouse, could not be.) So anyone who wanted to market a toy camel, dog, fawn, cat, or spider would not be impeded in doing so by having to choose another name.

There are a few things to note about this excerpt. One is that it contains little factual detail. There are some additional facts, both before and after this part of the opinion, but not many. And many of the facts that the opinion does contain are approximations. Posner tells us that Peaceable Planet began selling its Niles camels "[i]n the spring of 1999," not on April 3, 1999; and that the company sold only "a few thousand," not 5,402. Not only would this additional level of detail have added nothing to the opinion, it would have interrupted the opinion's cadence. Further precision also would have distracted us from the details that are important, such as the camels' name, "Niles." Note also Posner's use of contractions ("wouldn't" and "can't"), and, to use his word, the "huge" number of illustrations. These qualities give the excerpt a flowing feel; you get the sense that Posner is spinning these scenarios out in his head and telling us about them as he does.

* * * * *

My point is not that lawyers should disregard all traditional stylistic conventions. It is rather that the impure style is an antidote to the most unproductive aspects of those conventions: abstraction, excessive formality, and a wooden, stilted prose. So be concrete. Use your speaking voice and write directly and plainly. And mind the cadence of your sentences. Your writing will improve by leaps and bounds if you do.

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Zen *and the* Art *of* Bankruptcy Practice

By Pam Pepper [1]

Despite the over-all decrease in bankruptcy filings since the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), it is safe to say that all of the bankruptcy courts in the Seventh Circuit have a substantial percentage of their dockets occupied by consumer bankruptcy matters. The same, however, cannot be said for Chapter 11 reorganization cases. While judges in the Northern District of Illinois may routinely see large Chapter 11 cases, judges in other areas around the circuit may see few such cases. Some see few Chapter 11s of any size. Accordingly, an experienced Chapter 11 practitioner often faces the delicate, diplomatic dance involved in educating a judge. As in any other area of the law, this dance requires you to impart information without appearing to patronize the court, to press points without seeming overly argumentative or bellicose, and occasionally to accept adverse rulings – even those you perceive to be unfair or incorrect – with grace in order to live to fight another day. It is winning the war that counts.

So–how is the savvy Chapter 11 practitioner to navigate such unpredictable waters? The following humble–perhaps obvious–proposals may provide some assistance.

1. Educate Yourself About The Judge

Lawyers hear it time and again–"Know your judge." Talk to colleagues in the district in which you are going to practice. Find out how many Chapter 11 matters your assigned judge has handled. Did those cases have committees? Did they involve plans that reached confirmation, or did they result in sales? Did they complete as Chapter 11s, or convert to Chapter 7s? With a few telephone calls, you can find out relatively quickly how much of a working knowledge of general Chapter 11 concepts you might expect your judge to have.

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[1] *Pam Pepper is a Bankruptcy Judge in Milwaukee and is the Wisconsin Associate Editor of the Circuit Rider.*

Bankruptcy Practice

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In addition, the bankruptcy courts of the Seventh Circuit have web sites. All of those sites have information, in varying degrees of detail, regarding the court's policies and procedures and those of the judges. Check the district's site to see if the judge in front of whom you will appear has posted particular procedures for appearing in her court in general, and for Chapter 11 work specifically. For handy reference, the sites for each district follow.

Southern District of Illinois–www.ilsb.uscourts.gov

Central District of Illinois–www.ilcb.uscourts.gov

Northern District of Illinois–www.ilnb.uscourts.gov

Southern District of Indiana–www.insb.uscourts.gov

Northern District of Indiana–www.innb.uscourts.gov

Eastern District of Wisconsin–www.wieb.uscourts.gov

Western District of Wisconsin–www.wiw.uscourts.gov

2. Know Your United States Trustee

This is a corollary to "know your judge." In some districts, the U.S. Trustee takes a very passive role in Chapter 11 proceedings. In others, they are much more active. Knowing ahead of time whether the U.S. Trustee in the district where you are going to practice is likely to be a party who could make or break your case is critical.

3. Consult the Local Rules

Some districts have extensive local rules (as well as "standing," or "general" orders) which may provide you with specific information about how you can expect courts in that district to handle certain issues in Chapter 11 litigation. Others have few local rules specifically dealing with Chapter 11 practice (and still others have few local rules, period). Check to see if the district in which you are about to practice has rules or orders that can provide you with guidance.

In addition to consulting the local rules regarding particular courtroom or motions practices, find out about the particular district's policies regarding electronic filing. Electronic filing is mandatory in some districts, strongly recommended but not required in others. Some districts will not provide an attorney with a CM/ECF ("Case Management/Electronic Case Filing") password and log-in unless that attorney has been admitted to practice in the district.

And of course, different districts have different rules regarding pro hac vice admission. If, for example, you represent a small-dollar trade creditor and expect to appear in court only to file your administrative claim, some districts may allow you to make that appearance without going through the process of being admitted to practice in the district. Others have strict admission rules, and require you to be admitted formally before you can appear or file in any capacity.

4. Consider Employing Local Counsel

For those who do not know, the process of creating "local rules" can be long and cumbersome. Many courts will appoint a local rules committee, which will meet–and meet, and meet, and meet–to discuss formulating proposed rules. Once that committee has settled on a set of proposed rules, there are a number steps through which those proposed rules must go before they truly become the "local rules." Comment periods, review by a law professor, approval by a higher court–all of these things take time. Accordingly, most districts have a collection of unwritten "local practices" which, while observed by local practitioners and judges, have not reached the exalted status of formalized "local rules." Retaining local counsel can help you identify these unwritten practices and learn "the way we do it here."

5. Cite the Code and the Rules

Not all bankruptcy judges have an eidetic memory for Bankruptcy Code sections and rules. Telling a judge that "the Code says" something, or that something is "in the rules," is not nearly as effective as being able to direct the judge to the particular section of the Code or the particular rule. Citing them in court is good; citing them in your moving papers is even better.

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6. Warn the Court of Last-Minute Filings

As Chapter 11 practitioners are woefully aware, much of the practice takes place amid the chaos of urgent time deadlines. Counsel may reach agreements or complete necessary motions and objections hours or minutes before court hearings. This is unavoidable, given the nature of the practice. But where you have resolved the matter, be sure to tell the judge as soon as possible so that he can turn his attention to other cases that require resolution. Few things are more vexing than spending time needlessly working on an opinion in a case that has been settled but that the judge thinks is alive and well. If you have additional authority, provide it as quickly as possible to the judge so that he can provide you with a more reasoned, thoughtful decision.

There are several ways to help the court with last-minute filings. One way is to understand how electronic filing works. When you or your assistant push the button that says "transmit," that does not mean that an e-mail notification pops up on the judge's computer monitor two seconds later, informing him that you've filed something. Indeed, were judges to receive an e-mail every time a party filed a document in a case assigned to them, they would be so overwhelmed with e-mail pop-up notifications that they would be incapable of using the computer. Instead, when you hit the "send" button, your document goes to the clerk's office. In many offices, someone has to conduct "quality control" review of that document, after which it appears on a report that someone in the judge's chambers reviews. Each district has its own policy regarding the timing of quality control procedures, and each chambers has its own policies regarding when daily reports are checked. Depending on the district and, indeed, the particular chambers, the judge may not see the document you e-filed until 24 hours after it was filed.

Accordingly, if you are filing something that you want the judge to review in the next couple of hours (or minutes), it may be helpful to provide a courtesy copy of the document to chambers. Some judges have policies against this, of course, and thus you return to Tip #1–Know Your Judge. But if your judge does not have a particular prohibition against chambers copies, providing one can mean the difference between a judge who knows your arguments and one who does not.

You also may call the court and let the judge's staff know that something will be filed in the hours or minutes before a hearing. While this may not guarantee that the judge will have had the opportunity to review the document before the hearing, it increases that likelihood.

And finally, of course, if you want a thoughtful decision, provide the court with as much thinking time as possible before a hearing.

7. Consider Avoiding Lingo

Like many "clubs," the Chapter 11 "club" is rife with insider lingo. "Stalking horses," "mezzanine financing," "EBITDA"– for those who equate being incomprehensible with being intelligent, Chapter 11 lawyers must seem geniuses indeed. It becomes second nature for anyone in a "club" to use that "club's" insider lingo, often without thinking. But resisting the urge to use the lingo in the first instance may, with a judge who either has not had a great deal of Chapter 11 experience or who sits in a region which may use different jargon, accomplish two goals. First, it can educate the judge about what you really mean. Second, it can do so in a way that avoids seeming condescending or patronizing toward the judge. While many of the judges I've had the good fortune to meet are humble, well aware of their shortcomings, and quite willing to learn, one nonetheless is more likely to get a receptive hearing if one does not appear to be "talking down" to the judge. Avoiding industry jargon in the first place can educate the judge without being obvious.

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8. Don't Forget the Committee

In cases where there is a committee, consult with counsel for the committee or the committee itself when you are trying to resolve an issue. Certainly there is a great deal of persuasive power the debtor and the secured lender can exert by walking into the courtroom arm-in-arm, having resolved their differences. And perhaps, at the end of the day, no matter what objection the committee might raise to such an agreement, the judge will conclude that she has no choice but to sanction the agreement. But few judges feel comfortable completely ignoring one constituency, especially one that appears to be shut out of the proceedings. Conscientious judges will want to know whether, in crafting a resolution, the parties have talked with the committee, have considered its concerns, and have given some thought to whether those concerns can be addressed. This avoids the awkwardness of announcing to the court that you have resolved a matter, only to have counsel for the committee state indignantly that "no one talked to us about this."

9. Avoid "All-The-Other-Judges" Stories

It must be tempting to tell a judge who is making a decision which seems absurd in light of your experience that "all the other judges in front of whom I've practiced have done so-and-so or such-and-such." This is probably particularly tempting when it is true. But using that tactic is a risky gamble. First, from a human psychology perspective, one runs the risk of making the judge defensive. You do not know if this particular judge will respond by saying, "Well, just because they do it doesn't mean I have to."

Further, judges do consult with one another. If you tell the judge, "All the other judges do it," you'd best be right. It is likely that your judge will, in short order, e-mail or call the people with whom he attended "Baby Judges' School" (yes, there is such a thing, and yes, that is what it is called), or his colleagues on other benches, and ask if they do whatever it is that you've just insisted that they do. If that judge gets one, "What???!!! I've NEVER done that," you may find yourself with reduced credibility and a ruling against you.

Finally, many orders which issue out of Chapter 11 litigation are agreed orders to which no one has objected. Many judges sign such orders because, if no party has objected and the orders do not violate any provision of the Code, there is no reason to reject them. As one bankruptcy judge in the Seventh Circuit has pointed out, however, that kind of order has no precedential value in a case where a party objects–the fact that parties agreed to something in another case is not, on its own, a compelling reason for the judge in your contested case to rule in your favor.

Conclusion

Judges want to do the right thing, and try very hard to do so. Gentle, thoughtful education and help from the lawyers is the basic tool for enabling a court to make the right decision. *Donnelly v. Chicago Park Dist.,* 417 F.Supp.2d 992, 994 (N.D.Ill. 2006) put it this way:

> "There is a necessarily symbiotic relationship between judges and lawyers. The truth, whether one openly admits it or not, is that judicial accuracy for most judges in any given case-and especially over time-is often affected (to some degree) by the quality of the presentations of the lawyers in the case. Justice Brandeis said it best: 'A judge rarely performs his functions adequately unless the case before his is adequately presented.' *The Living Law,* 10 Ill.L.Rev. 461, 470 (1916). *See also* Holmes, *The Law,* In Collected Speeches, 16 (1931)('Shall I ask what a court will be, unaided? The law is made by the Bar, even more than by the bench.')."

Not only does the adversary system depend upon input from lawyers, but believe it or not judges actually appreciate it.

The tips in this article are certainly not the equivalent of the Eightfold Path, and following them won't guarantee you success. But it will certainly improve your chances of winning and might actually bring you some peace of mind.

Remembering Attorney General *Edward H. Levi* Through His Own Words

By John Beal [1]

The Department of Justice has recently gone through a period in which public confidence in the Department has been challenged. We also live in a time of great partisanship and divisiveness in government and politics. Edward Levi's stewardship of the Department of Justice from 1975 through 1977, although short, provides a model that would be well emulated today. He was selected by President Gerald Ford to restore public confidence in the Department of Justice after the era of Watergate, President Nixon's enemies list, and the FBI's COINTELPRO program that targeted domestic dissidents. This is a good time to remember Edward Levi and to reflect on his tenure as United States Attorney General and that for which he stood.

Edward Levi attended college and law school at the University of Chicago, graduating from the law school in 1935, and in 1938 receiving a post-graduate degree from the Yale Law School. From 1936 to 1940, he was Assistant Professor of Law at the University of Chicago. From 1940 to 1945 he went to Washington, where he served as Special Assistant to Attorney General Francis Biddle and as first assistant in the Antitrust Division. In 1945, he returned to the University of Chicago Law School. He was the Dean from 1950 to 1962. In 1962, he was named Provost of the University. Six years later he became President of the University until 1975, when President Ford named him Attorney General.

Examples of his wide-ranging outside activities included serving in 1950 as counsel to the Subcommittee on Monopoly Power of the United States House Judiciary Committee and conducting the committee's hearing on the steel and newsprint industries; to being a member of the White House Task Force on Education in 1967-1968; to being elected as president of the American Academy of Arts and Sciences in 1986, and serving as vice-president of the American Philosophical Society.

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[1] *Mr. Beal practices criminal and civil law in the federal and state courts in the Northern District of Illinois. He served as an attorney in the Department of Justice in Washington from 1976 through 1984. The speeches quoted in this article are from Mr. Beal's personal collection.*

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In writing about the recent crisis of leadership at the Department of Justice, David Brooks in his August 28, 2007, column in the New York Times drew a comparison with, "the man everybody points to as the superlative attorney general...Edward Levi...Everybody mentions that he was a highly respected legal scholar with a detached, dignified leadership style and that he brought exceptionally smart lawyers to Justice to serve with him." And University of Chicago Law School Professor Geoffrey Stone made a similar observation in an op ed essay in the Chicago Tribune on August 29, 2007, writing that Mr. Levi was a man "of great intellectual distinction, integrity and character" who as attorney general represented "the highest ideals of public service and the true spirit of the legal profession."

At Mr. Levi's memorial service on April 6, 2000, President Ford described him as "the rabbi's son from Chicago who has been called, justifiably, the greatest lawyer of his time." President Ford went on to say that when he became President, "I hoped to restore popular confidence even as we drew off the poisons that had infected our public life because of Vietnam and Watergate." In appointing an attorney general "the situation demanded someone of towering intellect and spotless integrity. No campaign managers need apply, nor members of the family, official or political." President Ford continued, "I didn't know his politics when I appointed him. All I knew was that he shared my reverence for the Constitution - along with a view that America's greatness lies not in the power of its government, but in the freedom of its people. Thanks to Ed Levi, American citizens protesting the policies of their government no longer had to fear illegal surveillance, improper wiretaps or outright harassment. Indeed, it is no exaggeration to say that Attorney General Levi helped give us back our government."

How Mr. Levi came to be held in such esteem is evident from both his actions and his words as attorney general. For example, under Mr Levi's direction, guidelines were implemented controlling the FBI's domestic security and civil disturbance investigations.

The guidelines tied domestic security investigations closely to the enforcement of federal criminal statutes, and they provided a series of legal standards that had to be met before various investigative techniques could be used. Mr. Levi told the Los Angeles County Bar Association on November 18, 1976, "As a result of the guidelines and the Bureau's own reassessments, the number of domestic security investigations has dramatically dropped....In July 1973, the FBI had more than 21,000 open domestic security cases. By September of this year (1976), that number had been reduced to 626." By 1982, the number of open domestic security investigations was down to five, as related in a March 4, 1982, memorandum to Attorney General William French Smith from Special Assistant Hank Habicht, entitled Overview of FBI Guidelines. That memorandum also stated "The guidelines which have been most controversial are the Domestic Security Guidelines – the 'Levi Guidelines' criticized by many conservatives." This memorandum was released by the National Achieves as a part of the confirmation process of Chief Justice John Roberts, who was another of the special assistants to Attorney General Smith. In the Chicago Tribune op ed piece referred to above, Proffessor Stone wrote that Attorney General Alberto "Gonzalez helped eviscerate the Levi Guidelines during the Bush presidency."

In the area of domestic electronic surveillance for foreign intelligence purposes, Mr. Levi was involved in the development of legislation and executive regulations. He noted that this was a topic on which open and informed public discussion was difficult because of secrecy requirements. In the address quoted above before the Los Angeles County Bar Association, Mr. Levi recounted the efforts to fashion the legislation that was finally enacted in the Carter Administration as the Foreign Intelligence Surveillance Act, which established the Foreign Intelligence Surveillance (FISA) Court. Proposed legislation was introduced early in 1976, and a bill passed both the Senate Judiciary and Intelligence Committees, but there was not time for action by the House of Representatives before the end of the Ford Administration. Mr. Levi stated, "During the course of negotiations between the (Justice) Department and the two Senate Committees and between the Department and the intelligence agencies in the executive branch, several specific concerns were worked out by revision of the bill."

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The legislation later enacted had the same basic provisions as described by Mr. Levi in 1976. He further depicted the operation of the proposed FISA court as follows. "The judge is given the responsibility for determining whether there is probable cause to believe the subject of the surveillance is a foreign power or agent. The appropriate executive official is given the responsibility of certifying that the information sought is foreign intelligence information. This distinction is based upon a regard for whether a judge or an executive branch official with responsibility for foreign relations or foreign intelligence ought to be held accountable for the decision. The bill provides for executive accountability where a judicial determination would be inappropriate, but gives the judge the duty to determine whether executive certification has been given, and it always places upon the judge the determination that there is probable cause to find the existence of the requisite foreign agency." The legislation applied the same principles to terrorism, although that topic received much less focus than it does today.

What is most remarkable about this account is that it is a public discussion of the decision being made jointly and cooperatively by the Congress and the executive branch about how responsibility should be divided between the executive and the judiciary for authorization of electronic surveillance in the field of foreign intelligence. There was no sign of the supposed prerogatives of an Imperial Presidency that we have seen asserted of late.

As befitted a former law professor at and President of the University of Chicago, Mr. Levi's speeches as attorney general served as a tutorial for the American public on the role of law, of law enforcement, and of lawyers in a democratic society. He started by addressing first principles, in particular the foundations of democratic government. At the Boston College Bicentennial Convocation on September 28, 1975, he stated,

> A larger, older nation perhaps can never relive the excitement of its birth. Yet the unity of our diversity is perhaps just as extraordinary and just as difficult to achieve. A free society, a government by discussion, requires mutual respect. It requires mutual understanding. It requires a culture held in common – a culture not unitary but composed of many differences. The base for understanding must be built and rebuilt over time.

Today's stark political divisions in the United States make these sentiments seem almost utopian. Mr. Levi elaborated on this theme at the Conference on the Place of Philosophy in the Life of the American Nation at the Graduate School of the City University of New York on October 8, 1976;

> Our country was founded with a belief in education. Reason was to break the bonds which held mankind back; the sharing of education would make real the participation of the citizenry essential to a republic or a democracy...the faith was that a government by discussion would break the bonds of the ages and set free man's originality...The frequent criticism of democracy was that it would lack the exemplifications of ideals and the vision of excellence. Education was to be the answer – an education which was imbued with and would inculcate a respect for the individual and a conception of higher truth widely shared...The founders of our republic were concerned by the enormous swings and latent hostility in factions which could destroy a government by discussion. On the political side they created a system of checks and balances to recognize these cycles but to curb their corrosiveness. But they also looked forward to a period of enlightenment where the recognition of the dignity of men would make possible the tact and cohesiveness essential for a learning society.

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However, at the Boston College Bicentennial Convocation he added a caution that was prescient for one speaking at the very beginning of the era of electronic information transmission:

> Voltaire once observed that the real scourge of mankind has not been ignorance but rather the "pretense of knowledge." Today there may be more pretense of knowledge, a vice which most of us share, because there are more bits of knowledge widely distributed.

Attorney General Levi also addressed himself to many specific areas of the law, civil and criminal, in which the Department of Justice has responsibilities. With respect to criminal law enforcement, Mr. Levi, who was by no means viewed as being politically liberal, said at his confirmation hearing on January 28, 1975, before the U.S. Senate Committee on the Judiciary:

> In dealing with criminal law enforcement, I must say I think there has to be a combination of determination and, I must say, to some extent a certain kindness. I don't think the enforcement of the criminal laws should be done in a kind of, if one can avoid it, bitter, hostile way. This creates all kinds of repercussions in society.

The rate of serious crime in the United States was higher during Mr. Levi's time in office than it is today, yet it is hard to imagine that kind of statement today. Indeed, American criminal justice is now notable for the harshness of the length of the penalties of imprisonment it imposes and the conditions of incarceration, particularly in comparison to other Western, democratic countries.

Mr. Levi elaborated further on this theme. Speaking before the American Bar Association on August 11, 1976, he observed,

> A legal system that fails to generate the confidence of the people loses one of its most important strengths. If the criminal law is to be effective, individuals must conform their behavior to it voluntarily. This voluntary adherence -- which can and must be supplemented by the deterrence of the criminal law's sanctions but can never be replaced by it -- depends in large measure upon the faith the people have in the efficacy and fairness of the legal process. For this reason it is extremely important that attention be paid to those areas of the system which, for one reason or another and perhaps sometimes incorrectly, are thought to invite or enforce unfairness.

Then, in an address in Milwaukee on February 2, 1976, specifically addressing the importance of rehabilitation, he said:

> Decent treatment of prisoners is itself a kind of rehabilitation, and decency should remain as one of our ideals. Decency can reinforce decency in return just as much as substandard, inhumane conditions of confinement can reinforce a negative effect. Especially with the young, we simply cannot give up on the effort to bring those who have broken the law back into harmony with the society.

Mr. Levi continued,

> Through the criminal justice system (society) imposes on individuals the dramatic loss of liberty that is involved in imprisonment. Society must insist that the system operate with fairness and decency. But its responsibility is much greater. Society must itself be prepared to reunite with the ex-offender if he is to have a chance of succeeding outside the walls.
>
> I have often said that the high crime rate will exist as long as society stands for it. I mean by this more than simply that citizens must cooperate with law enforcement officials in reporting crime and doing their part in the criminal justice process. I mean also that crime rates will continue to be high so long as society does not realize that it cannot treat as outcasts the persons whose liberty it has once curtailed in the name of the law.

Time and again he returned to the theme of the importance of the non-partisan administration and enforcement of the law in a democratic society. In his farewell remarks to the employees of the Department of Justice on January 17, 1977, he stated,

> we have lived in a time of...corrosive skepticism and cynicism concerning the administration of justice. Nothing can more weaken the quality of life or more imperil the realization of the goals we all hold dear than our failure to make clear by words and deed that our law is not an instrument of partisan purpose.

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Of course, during his time as attorney general, Mr. Levi spoke of many other matters, including many aspects of civil law. He was an expert in antitrust law and had been involved early on in the development of the Chicago School of Economics. But his continual theme was that fairness and integrity were essential in the formulation and administration of the law.

Mr. Levi also spoke of the importance lawyers, as well as the law, in American society. At the dedication of the Texas Bar Center in Austin, Texas, on the seminal date of July 4, 1776, he pronounced:

> A nation of law – the phrase commends itself to us as an antidote to tyranny... It is now difficult to see how our complex society could operate without (the law). Perhaps (the nation's) diversity and complexity explain the phenomenon which Tocqueville noticed, and which surely persists today, that most questions of importance in American society end up as legal issues before the courts.

At the same time, Mr. Levi warned on that day,

> when courts assume responsibility this sometimes encourages other political institutions to hold back from making the difficult decisions or taking the unpopular steps which are required of elected officials in a democracy.

Finally, he also discussed the special obligations that lawyers have:

> Without the lawyer as the intermediary our complex society could not function....The bar...becomes the interpreter of the rules and regulations of governance....At a time in which non-governmental social institutions that give us stability have gone into decline, this puts a heavy burden on the law...It is a complicated duty lawyers have; it looks both to the individual client's interests and also to the interests of society, which are the law's. This requires a special honesty and objectivity. Cicero said that if you couldn't state your opponent's case you did not know your own. Beyond that, as every lawyer knows, arguments can be stated in such a way as to mislead or inflame. This is not the road to problem solving which is at the center of the bar's responsibility....Finally, it is essential that the bar hold fast to what we have that is good and strong and wise and valuable – not afraid to be alone in asserting that the value abides – for that is what the American vision 200 years ago was about.

Edward Levi was an attorney general with a remarkable appreciation of the role of the law in American society and the role of the Department of Justice in enforcing the law. And while he did not suffer fools, he was personally considerate. At Mr. Levi's memorial service, Jack Fuller, one of Attorney General Levi's special assistants, who went on to become the editor and then the publisher of the Chicago Tribune, recounted the following incident. When he was asked to be one of the special assistants, he called University of Chicago Law School professor Philip Kurland to ask what he was getting into. Mr. Kurland responded, "You may hear that Edward is cold and calculating. This is not the case. He is warm and calculating."

Mr. Levi died on March 7, 2000.

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My Favorite Year

Clerking for Judge Harlington Wood, Jr.

By James A. McGurk [1]

Harlington Wood, Jr. was nominated as a U.S. District Judge for the Southern District of Illinois, in Springfield, IL on May 11, 1973. He was confirmed by the U.S. Senate on July 13, 1973 and sworn in on July 18, 1973. I started working as one of the Judge's first two law clerks on October 12, 1973, a few months after the Judge was sworn in. My fellow clerk, Philip Azar, Jr., had started two weeks before I arrived in Springfield.

It is a cliche for attorneys to say that law clerk was the best job they ever had. Like many cliches, it is based on reality. My year as the Senior Law Clerk with Judge Wood was a magical one. I've never looked forward to going to work more.

I was called "senior law clerk" because I had graduated from the University of Illinois College of Law in February, 1973 and been admitted to the bar in May of the same year. I also was working at the Chicago law firm of Ross Hardies O'Keefe Babcock & Parsons when I applied for the federal clerkship after Judge Wood was sworn in.

From the day I started, the work was engrossing, and every day was an adventure. I had the opportunity to work for a great Judge on fascinating cases and saw wonderful lawyers every day. The Judge introduced us to a wide range of people, including lawyers for whom I would one day work in the U.S. Attorney's Office in Chicago. I learned so much more about the law and about trying cases. More importantly, I learned values from the most ethical Judge I have ever had the pleasure of knowing.

Judge Wood had just moved back to Springfield from Washington, D.C., where he had served in a number of senior positions in the U.S. Department of Justice, including head of the Executive Office of U.S. Attorneys, and finally as Assistant Attorney General in charge of the Civil Division.

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[1] *Jim McGurk practices in Chicago, Illinois, specializing in federal civil and white collar criminal litigation.*

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While serving at Justice, Judge Wood was charged with coordinating the government's response on many major anti-war demonstrations in Washington during the Nixon administration, including the March on the Pentagon. At the end of his tenure, shortly before he was appointed, the Judge was assigned to handle the incident in the spring of 1973 when 200 armed members of the American Indian Movement (AIM) took over the hamlet of Wounded Knee, S.D., and held 11 residents hostage for three months.

A confrontation with federal officials followed the takeover and federal marshals surrounded the hamlet. When Judge Wood arrived at Wounded Knee to serve as chief negotiator, as many as 5,000 rounds of gun fire a night were being exchanged on the perimeter. The Judge was a strong advocate of a negotiated resolution and is credited with dramatically reducing the tensions which ultimately led to a non-violent resolution of the stand off. The Judge has written his own account of the incident in a law review article captioned, *"Footnote to History: a Personal Account of Wounded Knee 1973 Told for Lauren and Alex"* 1995 U.Ill. L.Rev. 30. (Lauren and Alex are the Judge's grandchildren.)

Promoting the primarily non-violent resolution of the confrontation was an achievement of which the Judge is justifiably proud to this day. The events were still fresh when the Judge told us about the Wounded Knee incident. That year there were even official visits by F.B.I. agents seeking documents for various criminal prosecutions and investigations arising out of the incident. I recall providing one agent with a letter to the Judge from the President thanking him for his service at Wounded Knee. The Judge told us about going to South Dakota when the weather was still very cold and dressing for weather. A number of other officials from Washington, D.C. flew to South Dakota and were not prepared for the bitter cold they encountered. The Judge understood that patience was a virtue much underappreciated by others at the scene. When the Judge spoke about his time at Wounded Knee, we law clerks believed we were in a small way, witnesses to history.

In the summer of 1973, Judge Wood was still moving into his chambers in the U.S. Courthouse and Post Office, a 1930's era building a few blocks from the State Capitol in Springfield, and the same building where he had served as the U.S. Attorney and where he had practiced law.

The Judge's chambers were very distinctive. First of all was the Judge's desk. Throughout his career, the Judge worked on a massive flat desktop set on two pillars of bricks. The space underneath gave the Judge room to stretch his legs. On the desktop was a massive map of the world with a large piece of glass covering map. The Judge, an avid world traveler, had carefully marked his trips around the world. The Judge also brought striking photos he had taken on his trips and many of those were displayed on the walls of his chambers. One of my most vivid recollections of that desk was standing before the Judge when a rare minor earthquake struck Springfield and those two pillars of brick rocked from side to side.

The Judge was always very focused in his work habits, with only the material for the matter he was working on his desk at any one time. That is a trait I have tried unsuccessfully to emulate over the years.

The federal court had a limited library because only a single federal judge sat in Springfield. However, the Illinois Supreme Court Building was only a few blocks away, so we law clerks used its magnificent library in beautiful surroundings to do legal research in those days before Lexis and Westlaw.

In 1973, Harlington Wood, Sr., the Judge's father, a respected retired Sangamon County judge, was still in active practice, as he would be into his late 80's. With two "Judge Woods" in Springfield, we learned to answer the phone "Judge Wood, Jr.'s chambers" to avoid confusion.

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Like his son, Judge Wood, Sr. was a graduate of the University of Illinois, both undergraduate and law, and had been a varsity track and field athlete on the same Illinois track team as Avery Brundage, who later became president of the U.S. Olympic Committee and, for twenty years, president of the International Olympic Committee. After Judge Wood, Sr. passed away, Judge Wood, Jr. kept his father's desk from the old Sangamon County courthouse (now the Old State Capitol in Springfield).

In his new federal post, the Judge was interested in sitting in the various locations around the district. So, at different times, the Judge, his law clerks, a minute clerk and a court reporter would "ride the circuit" and hold court in Quincy and Alton, locations that his predecessor had not visited in years. When the court sat in Alton, we all stayed at the magnificent lodge built in the 1930s by the Civilian Conservation Corps at Pere Marquette State Park in Grafton, along the Illinois River not far from its confluence with the Mississippi.

In those days, the Southern District based in Springfield was located north of the Eastern District which held court in Danville, Marion, and East St. Louis. I was fascinated to learn that the odd configuration of the downstate districts was the result of the decision of a man regarded by many historians as the most powerful speaker of the House of Representatives in U.S. history, Joseph G."Uncle Joe" Cannon of Danville, IL. As speaker from 1903 to 1911, "Uncle Joe" Cannon wanted a district court headquartered in Danville, so in 1905 the Eastern District was created. It was not until 1978, two years after Judge Wood had been elevated to the Seventh Circuit to fill the vacancy created when Justice John Paul Stevens was appointed to the Supreme Court, that the downstate districts were organized in a more rational manner and the "Central District of Illinois" was created with a location in Springfield.

Among the many reasons I loved working for Judge Wood in Springfield was the feeling of being surrounded by history. The Lincoln Herndon Law office and the Old State Capitol were only about one block away from the U.S. Courthouse. Lincoln had practiced law in that office from 1843 until he was elected President. Lincoln's offices were upstairs from what was then the only federal courtroom in Illinois from 1841 to 1855. In the Old State Capitol, Lincoln had not only served as a state legislator, he was instrumental as a young man in having the state capitol move to Springfield in 1837. The Illinois Supreme Court held court in the Old State Capitol and Lincoln had argued more than 400 cases in that court over his career. History, old and new, was literally just down the street in Springfield. A few blocks away was the St. Nicholas Hotel where former Secretary of State Paul Powell had died with the infamous shoe boxes of money stored in a closet.

Judge Wood had many friends in the courthouse dating from his years as the U.S. Attorney and his years in practice in Springfield. The Judge introduced Phil Azar and me to the staff in the U.S. Marshal's office, the Clerk's office, the Probation Office, and the Secret Service, all located on the same floor at the Courthouse and Post Office.

Judge Wood also introduced his law clerks to a legend of the bankruptcy bench and bar whose office and courtroom were one floor above the Judge's chambers, the Hon. Basil H. Coutrakon, a full time "referee in bankruptcy" from 1959 to 1974, when the position was abolished. Judge Coutrakon, then became a Judge of the U.S. Bankruptcy Court when that position was created in 1974. Judge Coutrakon served as a U.S. Bankruptcy Judge until he retired in 1985 and then was recalled on senior status and sat as a Bankruptcy Judge until 2001. Judge Courtrakon served on numerous committees and was instrumental in the creation of the modern bankruptcy court. Judge Courtrakon passed away on November 14, 2007 at the age of 90.

I was struck by the fact that there was a true sense of community in the federal courthouse in those days. Many of the staff in the Clerk's Office had served in the office when Judge Wood had served as the U.S. Attorney years before. Judge Wood's first secretary in Springfield was Shelby Berta who had worked for the Judge and his father and who, at one time, had been the chief secretary for the Federal Bureau of Investigation in Springfield. Many war stories were exchanged, including many related to Judge Wood's early days as an attorney and as a prosecutor. The Judge described a passionate argument in one case when he was a prosecutor citing recent Seventh Circuit authority, when the trial judge responded, "If that is what the Seventh Circuit said, they will have to say it again" and ruled against the Judge.

A number of the Deputy U.S. Marshals had served with the Judge at Wounded Knee and they too shared war stories with the clerks. They told us of the Judge's calm leadership during a very tense confrontation. I was even invited to go to the shooting range with the U.S. Marshal's staff on their annual hand gun and shot gun qualification test. My "trophy" from that day was the paper target assigned to me which I proudly displayed on the back of the door to my office.

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My Favorite Year

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During my year as a law clerk, I learned that Judge Wood was and is a gifted photographer. It was, and still is, his practice to send out Christmas cards based upon one of his striking photos often from his many travels around the world.

The Judge also demonstrated a deep interest in history. As a young lawyer, he joined the Abraham Lincoln Association, a group that promotes and preserves Lincoln scholarship particularly the Abraham Lincoln Legal Papers project. He served as Abraham Lincoln Association President in 1984-1985 and as Chairman of the Abraham Lincoln Legal Papers Project from 1986-1987. The Judge continues as a member of the Association to this day and now enjoys the status of Emeritus Director. Judge Wood and his wife, Cathryn, both have been generous supporters of the Abraham Lincoln Legal Project which has undertaken the herculean task of assembling records on every case Abraham Lincoln handled as an attorney in his years in practice in Springfield. The Judge was also a member of the New Salem Lincoln League, a century old non-profit which is dedicated to preserving the New Salem State Historic Site. He even played the role of Abraham Linclon in more than 100 performances to great critical reviews, during his years in Springfield before he moved to Washington.

Judge Wood once told me that he said a little prayer each time he took the stage as Lincoln because he did not want to disappoint any members of the audience. I asked if he ever said a prayer when he was about to start a trial. He said, "Never."

When I started working for the Judge, I saw that Judge Wood had a varsity letter from the University of Illinois in his chambers, I asked what sport he had played at Illinois. He told me polo. The Judge explained that before World War II, the Big Ten schools had ROTC cavalry units assigned to the schools, and since the schools had horses, those schools would play each other in polo. The Judge was a member of the ROTC and also a member of the polo team. The Judge was a dedicated horseman his whole life and was, at one time, the President of the Illinois Appaloosa Association. For a city boy such as myself who had only seen mounted police officers in Chicago, I found the Judge's knowledge and appreciation for horses, particularly for the Appaloosa, a revelation. To this day, I have a picture of Judge Wood in my office, not wearing his robes of office, but astride a beautiful Appaloosa. The Judge always wore riding gloves during the winter, to have a better grip on the wheel of his car and perhaps to remind him of his great love of horsemanship.

The legal work of the District Court was fascinating to me. I had the great pleasure of seeing a wide range of high profile cases. Because Springfield is the State Capitol and Judge Wood was the only U.S. District Judge sitting for that court, he heard a wide variety of cases involving many agencies of the State of Illinois. As clerks, we got to read and see the work of very fine lawyers from around the state and, in some cases, from around the country.

I had come to work for Judge Wood in Springfield with the idea that I would see "country" trial lawyers from downstate Illinois. However, the biggest trials before Judge Wood involved some nationally known trial lawyers. For example, Thomas P. Sullivan, who was later to be one of the U.S. Attorneys (1977-1981) under whom I served, tried a lengthy major anti-trust highway contract bid rigging case before Judge Wood.

In a major criminal tax prosecution by the Department of Justice, A. Raymond Randolph, now a U.S. Circuit Judge on the U.S. Court of Appeals for the District of Columbia Circuit was one of the attorneys representing the owner of a prominent insurance company in Springfield. That case included trial testimony from James Neal as a witness, who a few months later was to serve as a key Watergate Special Prosecutor and was to try the most significant Watergate case.

In one trial before Judge Wood involving damage to the roof of a public transit service bus garage, counsel for the plaintiff was a young attorney in Springfield who was four years out of law school at Georgetown University, Richard Durbin. One particularly memorable evening for me that year was the annual Sangamon County Bar Association Christmas program where Durbin brought the house down with one of his skits. While working for Judge Wood, he introduced us to Thomas Foran, who as the U.S. Attorney had prosecuted the Chicago Seven Trial, and like the Judge, was an avid horseman. The Judge also introduced us to Samuel K. Skinner, then a senior official in the U.S. Attorney's Office who later became another of the U.S. Attorneys (1975-1977) for the Northern District under whom I later served.

We traveled to the University of Illinois College of Law to participate in a moot court competition in which Judge Wood sat on a panel with U.S. Supreme Court Justice Harry Blackman, and Judge Philip W. Tone of the Seventh Circuit.

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My Favorite Year

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As a graduate of less than a year, my return for that moot court proceeding was a profoundly moving experience. The moot court argument occurred shortly after the Supreme Court decision in *Roe v. Wade* and Justice Blackmun, who was born in Nashville, IL, had warned the University that there could be demonstrators protesting the decision. After the moot court proceedings, there was a formal dinner at the Levis Faculty Center. During the dinner, the sound of a crowd roaring drifted into the dinning room and everyone began to stir. Someone went to the window and reported back that no one should be concerned. Apparently the first "streakers" were running around the campus.

To this day, I have a pair of mounted horns in my office given to me by Judge Wood as a memento of one particularly memorable case. That was the case we called "the bull inquest" case. In *McCreey Angus Farms v. American Angus Association,* 379 F.Supp. 1008 (S.D. Il. 1974), *affirmed* 506 F.2d 1404 (7th Cir. 1974)(unpublished opinion), the plaintiff was an Angus cattle breeder who had been suspended from the association due to his alleged failure to obey association rules relating to blood typing of a prize winning bull. After a lengthy hearing, an injunction was entered prohibiting the suspension of the plaintiff while a hearing was held on the allegations consistent with the rules of the association. After the preliminary injunction was entered, the Judge ordered the parties to agree on a blood test of the prize winning bull to finally determine whether the bull was pure bred or not. After that order was entered, Judge Wood was notified that that the prize winning bull in question had been killed reportedly in a fight with another bull. Thereafter, Judge Wood held what he still calls the "bull inquest" involving expert testimony from cattle breeding experts.

The Judge always took his legal responsibilities very seriously, but never took himself seriously. For example, it was his practice to take the bench without ceremony and start to work immediately, but he always insisted that everyone in the courtroom stand as the jurors entered and left. Of all his duties, Judge Wood approached criminal sentencing as the most serious, no matter how great or small the potential sentence. The Judge studied all of the documentation in each criminal case with great intensity and devoted great effort to reaching a fair sentence. In those days, more than thirteen years before the adoption of the Sentencing Guideline, there was essentially unfettered discretion on the part of the sentencing judge to impose whatever sentence the sentencing judge believed was fair.

Then as now, Judge Wood also brought levity to his work. His sense of humor is legendary. At the conclusion of the first year, the Judge had a photo taken of the "four judge court," with his two law clerks and his secretary Shelby Berta wearing judicial robes while the Judge towered over us. The Judge prevailed upon Circuit Judge Waldo Ackerman, who later succeeded Judge Wood on the U.S. District Court, to loan us his judicial robes for the photo. The Judge even took pride in the fact that the first piece of mail that he received when he moved back to Springfield from Washington after he had been confirmed as a District Court Judge was a letter from the Internal Revenue Service in Springfield notifying the Judge that he was being audited.

One of the most memorable events for me during the Judge's first year on the bench was a simple car ride from Springfield to Champaign on a country highway with little traffic. The Judge somehow folded his 6'4" frame into his vehicle of choice, a Volkswagen Beetle convertible, for the trip. The Judge was hurrying for an appointment in Champaign at the University of Illinois College of Law when he was pulled over by a county sheriff's deputy. The officer asked Judge Wood for his license and then asked what he did. The Judge replied that he worked in the U.S. Post Office building in Springfield, which was true. He never disclosed that he was a U.S. District Judge and promptly received a ticket for speeding, which he paid without hesitation.

To say that Judge Wood has led a life of accomplishment is a vast understatement. He is an athlete, a horseman, a dedicated officer during a World War II, a prominent attorney in private practice, a dedicated prosecutor, a high official of the U.S. Department of Justice and then an influential figure of the U.S. District Court and Court of Appeal bench. At the urging of friends and his family – and with the very active support of Cathryn -- Judge Wood is publishing his memoirs in the first part of 2008. Anyone interested in ordering a copy of the book or in finding out details on date of publication, price and other questions about the book can contact Cathryn Wood at hwoodjr@sbcglobal.net. This will be a great opportunity for students of recent history to learn so much more about this great man.

My year of service as a law clerk for Judge Wood was one of the greatest experiences of my life. That year will always be "my favorite year."

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