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Generalist Judges and Advocates' Jargon

Douglas E. Abrams

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DOUGLAS E. ABRAMS[1]

"THE BEST JOB I EVER HAD."[2]

After decades of public service in all three branches of government, that is how congressman, federal D.C. circuit judge, White House counsel, law professor, and Presidential Medal of Freedom recipient Abner J. Mikva recalled his judicial clerkship with Justice Sherman Minton, his first position after law school.

Usually for a formal year or two, but frequently with informal permanence fortified by lifelong mutual respect, the judge remains the law clerk's true professional mentor. Retired Admiral James G. Stavridis is right: "True instinctive mentors take the responsibility of mentorship seriously and go about it in a systematic and organized way."[3] True mentorship stands the test of time.

Clerking is a privilege. Fresh out of law school and eager to begin their careers, law clerks at any level of the federal or state judiciary covet the opportunity to learn from a judge's reservoir of knowledge. But law clerks who anticipate careers writing as advocates are also well-positioned to learn about something that a judge may *not* know when briefs or other adversary submissions land on the desk.

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That "something" concerns jargon, this article's focus because its use by advocates can impede the court's understanding of a case's facts and law.[4] "Jargon" refers to "special words or expressions that are used by a particular profession or group and are difficult for others to understand."[5] Given the sheer complexity of much contemporary federal and state litigation, judges sometimes find themselves in the "others" category.

"Alien Landscapes"

To specialists who frequently write to other specialists, jargon may come naturally even when non-specialists comprise the audience. Resort to jargon may also seem a convenient shortcut, supplanting the need for fuller explanation. Like many seeming shortcuts, however, an advocate's use of jargon in briefs and other written submissions can end up exacting a heavy price. Jargon can strew hurdles along the path to comprehension that advocates should pave for the court.[6] The advocate (and the client) risk sacrificing an opportunity to persuade, and may also risk having to spend valuable time fielding avoidable questions during a hearing or oral argument.

Courts speak candidly about these hurdles and risks. The 5th Circuit, for example, likens judges to "sophisticated uninitiates" when they grapple with adversary submissions whose technical jargon escapes their understanding.[7] "It is unhelpful," says a federal district court, "when attorneys write briefs that presuppose specialized knowledge on the part of their readers."[8]

"Dropping a judge in the middle of an alien landscape without a map and expecting him to get his bearings from fragments of testimony couched in occupational jargon to which he has not previously been exposed," concludes another federal district court, "is not conducive to informed decisionmaking."[9] Yet another federal district court puts it more bluntly: Briefs "densely written and filled with technical jargon and unexplained . . . terms of art . . . increase the likelihood of misunderstanding and outright error."[10]

A "Symbiotic Relationship"

Two federal district courts acknowledge that judges maintain a "symbiotic relationship"[11] with the advocates, who "educate the Court"[12] with robust argument tailored to the judge's circumstances. Symbiosis and tailoring mean that advocates convey no weakness or disrespect when they write about the facts and law in a professional tone using, as one federal district judge recommends, language "intelligible to everyday speakers of English."[13]

In his latest book, retired 7th Circuit Judge Richard A. Posner confides that "judges do not feel patronized, or condescended to, when a lawyer explains in words of one syllable some scientific, technological, or other arcane feature of a case that is necessary to a full understanding. . . . The judges are happy to be educated by the lawyers in the intricacies of a case."[14] Plain English remains an indispensable vehicle for fulfilling this educative role.

Generalist Judges

Jargon might serve a legal writer's purpose, or at least might not detract much from it, when the audience consists solely of readers who are trained in the writer's specialty. But without this foundation of common understanding, says Judge Posner, "much legal jargon . . . can obscure rather than illuminate a particular case."[15]

"There is nothing wrong with a specialized vocabulary — for use by specialists," he explains. "Federal district and circuit judges, however, . . . are generalists. . . . Lawyers should understand the judges' limited knowledge of specialized fields and choose their vocabulary accordingly."[16]

Judge Posner explains that "[i]ndividual judges often have specialized knowledge of a few fields of law, most commonly criminal law and sentencing, civil and criminal procedure, and federal jurisdiction, because these fields generate issues that frequently recur, but sometimes of other fields as well depending on the judge's career before he became a judge or on special interests developed by him since."[17] These specialization limits, he adds, mean that an advocate "must not count on appellate judges' being intimate with *his* particular legal nook — with its special jargon. . . ."[18]

Judge Posner's antidote for advocates whose jargon risks thwarting effective communication with the court? "Every esoteric term . . . has a counterpart in ordinary English."[19]

In *New Medium LLC v. Barco N.V.,* Judge Posner reinforced his dictum about "ordinary English."[20] Sitting by designation as a trial judge in a complex patent case, he instructed counsel that "[a]ll submissions must be brief and non-technical and eschew patent-law jargon. Since I am neither an electrical engineer nor a patent lawyer, and since this case will be tried to a jury, . . . the parties' lawyers must translate technical and legal jargon into ordinary language."[21]

Administrative Review

Because administrative rules and regulations often weave tangled doctrinal webs, the 5th Circuit specifies that jargon warrants an advocate's close attention when the court reviews an agency decision. The court warns that with the passage of time, agency administrators may acquire "insights and experience denied judges. The subtleties . . . encased in jargon and tucked into interstices of the administrative scheme, may escape us."[22]

"It is the responsibilities of the parties to properly educate the court," adds a federal magistrate judge, "not of the court to improperly defer to an agency decision."[23]

Conclusion: Persuading and Assisting the Court

After grappling with the parties' jargon-laden briefs a few years ago, one judge issued this warning: "If in the future, a party's briefs are as difficult to follow as these, the court may ask the party to rewrite the briefs."[24]

Warning or no, the advocate is "a representative of clients [and] an officer of the legal system" under the ABA Model Rules of Professional Conduct.[25] Counsel fulfill these roles most skillfully with advocacy that heeds the dual aims that retired Judge Hugh R. Jones of the New York Court of Appeals identified on this *Journal's* pages a generation ago. "First you seek to persuade the court of the merit of the client's case, to create an emotional empathy for your position. Then you assist the court to reach a conclusion favorable to the client's interest in terms of the analysis of the law and the procedural posture of the case."[26]

Because oral argument in trial courts and appellate courts may be limited or eliminated, persuasion and assistance may depend heavily or entirely on the advocates' written submissions. Skilled advocates reach generalist judges most effectively with forceful exposition of fact and law, free of undefined jargon and marked by the quartet that characterizes quality legal writing — precision, conciseness, simplicity, and clarity.[27]

Endnotes

1 Douglas E. Abrams, a University of Missouri law professor, has written or co-written six books, which have appeared in a total of 20 editions. Four U.S. Supreme Court decisions have cited his law review articles. His latest book is Effective Legal Writing: A Guide for Students and Practitioners (West Academic Publishing 2016). Thank you to James Sanders (MU Law Class of 2020) for his skilled research on this article.

2 Abner Mikva, *One Case At a Time*, Wash. Monthly, May 1, 1999, at 52 (reviewing Cass Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (1999)).

3 James Stavridis, Sailing True North: Ten Admirals and the Voyage of Character 244 (2019).

4 *See, e.g., Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 79, 987 N.E.2d 1, 17 (Ill. App. Ct. 2013) ("Plaintiff's brief contains a statement of facts that, to put it mildly, provides little to no understanding of the case and instead features rambling medical jargon, argument and confusing statements. . . . The deficiencies of plaintiff's brief are also exhibited in the argument section, which is nearly impossible to follow.").

5 *Jargon*, https://www.bing.com/search?q=jargon+definition&src=IE-SearchBox&FORM=IESR3N.

6 *See generally* Douglas E. Abrams, Effective Legal Writing: A Guide for Students and Practitioners ch. 11 (2016). *See also, e.g., Sinclair v. Donahoe*, 2013 WL 3967703, at *1 (W.D. Ky., July 31, 2013) (criticizing the parties for not having "taken the time to explain some of the technical jargon" that appeared in their respective motion papers).

7 *Dallas Typographical Union v. A.H. Belo Corp.*, 372 F.2d 577, 579 (5th Cir. 1967).

8 *Waddy v. Globus Medical, Inc.*, 2008 WL 3861994 *2 n.4 (S.D. Ga., Aug. 18, 2008).

9 *Langston v. Illinois Bell Telep. Co.*, 1990 WL 129567 *6 n.8 (N.D. Ill., Sept. 3, 1990) (magistrate judge's opinion).

10 *Nomadix, Inc. v. Hosp. Core Servs. LLC*, 2015 WL 3948804, at *3 (C.D. Cal., June 29, 2015).

11 *Walter Oil & Gas Corp. v. Teekay Shipping*, 270 F. Supp.2d 855, 865 (S.D. Tex. 2003).

12 *Shoshone-Bannock Tribes v. Shalala*, 988 F. Supp. 1306, 1318 (D. Or. 1997), *on reconsideration*, 999 F. Supp. 1395 (D. Or. 1998).

13 *Silicon Graphics, Inc. v. ATI Technologies, Inc.*, 2008 WL 4200359 *2 (W.D. Wis., Jan. 30, 2008), *vacated and remanded on other grounds*, 607 F.3d 784 (Fed. Cir. 2010).

14 Richard A. Posner, Divergent Paths 188 (2016), *quoted in* Douglas E. Abrams, *supra* note 6 at 16.

15 *Miller v. Illinois Cent. R.R. Co.*, 474 F.3d 951, 955 (7th Cir. 2007).

16 *Indiana Lumbermen's Mut. Ins. Co. v. Reinsurance Results, Inc.*, 513 F.3d 652, 658 (7th Cir. 2008).

17 *Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. CPC Logistics, Inc.*, 698 F.3d 346, 350 (7th Cir. 2012).

18 *Id.* (emphasis by the court).

19 *Indiana Lumbermen's Mut. Ins. Co., supra* note 16 at 658.

20 2009 WL 1098864 (N.D. Ill., Apr. 15, 2009).

21 *Id.* at *1.

22 *Watts v. Missouri-Kan.-Tex. R.R. Co.*, 383 F.2d 571, 583 (5th Cir. 1967); *accord, Mercury Motor Express, Inc. v. Brinke*, 475 F.2d 1086, 1092 n.9 (5th Cir. 1973).

23 *Shoshone-Bannock Tribes, supra* note 12 at 1318. *See also, e.g., Filarsky v. Life Ins. Co. of N. Am.*, 391 F. Supp.3d 928, 930 (N.D. Cal. 2019) ("the parties' briefs were each replete with undefined medical jargon, shorthand, and notations, making the briefing rather difficult to review" on the "voluminous" administrative record).

24 *Delong v. Colvin*, 2015 WL 3609685, at *1 (W.D. Wis., June 9, 2015).

25 ABA Model Rules of Professional Conduct, Preamble [1].

26 Hugh R. Jones, *Appellate Advocacy, Written and Oral*, 47 J. Mo. Bar 297, 298 (June 1991).

27 Henry Weihofen, Legal Writing Style 8-104 (2d ed. 1980) (discussing the four fundamentals); Antonio Gidi & Henry Weihofen, Legal Writing Style (3d ed. 2018) (same).