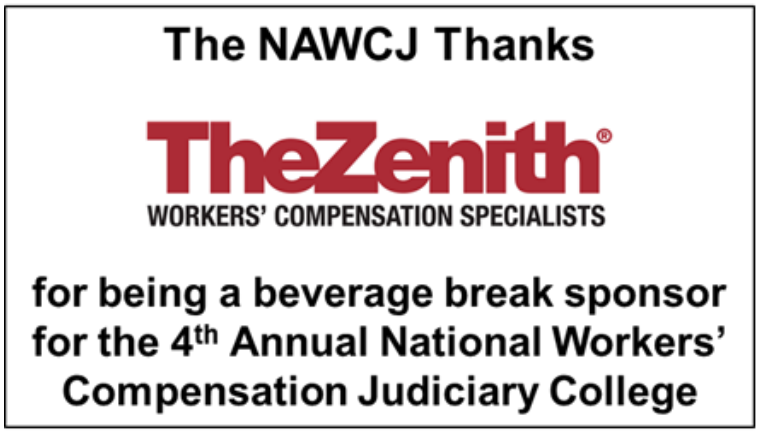
Fourth Annual NAWCJ Judiciary College

August 20-23, 2012



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Effective Judicial Writing

Professor Timothy Terrel – Emory University

Timothy P. Terrell, a former Fulbright Scholar, received another Fulbright grant-in-aid for scholarly research and teaching in England. Before coming to Emory, he practiced with the Atlanta law firm of Kilpatrick & Cody. His works include "Rethinking Professionalism" and "When Duty Calls" both published in the Emory Law Journal (1992); Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing (Clark Boardman Company, 1992); "Transsovereignty: Separating Human Rights from Traditional Sovereignty and the Implications for the Ethics of International Law Practice," Fordham International Law Journal (1994); "A Tour of the Whine Country: The Challenge of Extending the Tenets of Lawyer Professionalism to Law Professors and Law Students," Washburn Law Journal (1994); "Ethics with an Attitude," Law and Contemporary Problems (1996); "Professionalism as Trust: The Unique Internal Legal Role of the Corporate General Counsel," Emory Law Journal (1997) and several articles on legal writing and editing for West Publishing Company's Perspective periodical. Professor Terrell has organized conferences on topics such as "Rethinking Liberalism" and "Human Rights and Human Wrongs: Investigating the Jurisprudential Foundations for a Right to Violence." He is director of the Hugh M. Dorsey Jr. Fund for Professionalism and also has been active in continuing legal education for practicing lawyers, presenting programs around the country for the American Law Institute and the National Practice Institute on legal writing and legal ethics. He served part-time as the director of professional development for the Atlanta law firm of King & Spalding, assisting that firm in developing its associate training program. He also helped produce two videotape-based educational programs on legal ethics, one for prosecutors and criminal defense lawyers, the other involving representation of clients in the healthcare industry. Education: BA, University of Maryland, 1971; JD, Yale University, 1974; Diploma in Law, Oxford University, 1980.

National Workers' Compensation Judiciary College

Orlando, FL

August 20, 2012

OPINION WRITING AND EDITING:

Beyond Logic to Coherence and Strength

By

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Emory University School of Law
Atlanta, GA

of

LAWriters

POWERFUL COMMUNICATION THROUGH SUPERIOR WRITING

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- Theoretical foundation, rather than personal whimsy
- Hierarchy (more important to less important), rather than equality

Legal reasoning analyzes a form of "social guidance," and reveals that it has several distinctive characteristics:

1. **Structure**: Legal propositions are not scattered, random, and independent; they are instead linked and patterned.

2. **Foundation:** Some background theory or set of theories initiates and supports the formation of patterns in the law (*e.g.*, "economic efficiency," or "individual rights essential to a free people," or "personal responsibility for unforced choices").

3. **Hierarchy:** Legal propositions can be divided between those that are fundamental, abstract, competitive, and generally directive ("principles"), and others that are narrow, objective, and specifically directive ("rules").

Writing reasoning analyzes "communicative guidance," and similarly reveals that it has the same distinct characteristics.

1. **Structure:** All writing guidance falls within a comprehensive pattern.

2. **Foundation:** The patterns are based on a theory of communication that seeks to make writing a method of transferring information effectively and efficiently.

3. **Hierarchy:** At every level of document- from overall organization to sentence structure and diction- fundamental "principles" determine the appropriateness of any particular "technique" or writing.

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THINKING LIKE A WRITER:
THE PRINCIPLES OF "SUPER-CLARITY"

To become a good legal writer, most of us must go through two stages of intellectual growth. First, either in law school or through practical experience, we learn that what seems simple to non-lawyers—"the law"—is in fact quite complex. Then—perhaps in law school, but usually much later—we learn that, to communicate about the law, we must turn our new sophistication upside down. We must return to a simplicity based on our mastery of all that complexity. This simplicity has nothing to do with over-simplification. Rather, it results from organizing complex information so that our readers can understand it as easily and clearly as possible.

In the first stage, as we learn to "think like a lawyer," we worry mostly about logic and precision—about having exactly the right information or ideas and putting them in exactly the right order. In the second stage, we realize that logic and precision are not enough. To "think like a writer," we also have to make our logic easy for our readers to see and understand. And, even if we are not writing as an advocate, we have to be persuasive: we must convince readers to accept our judgment about what matters, to believe us when we say that we have a fact or idea worth their attention.

To write clearly and persuasively, therefore, lawyers must master two kinds of clarity. They must impose a rigorous logic on often-recalcitrant material. Then they must make that logic obvious to their readers from the document's start through every page to the end. By training and inclination, most lawyers are expert at the first task. But they are seldom as good at the second. In fact, many never realize that the two are different, that an impeccably logical and precise analysis may still leave readers exhausted, confused, and unpersuaded.

To avoid inflicting this kind of pain, you must do more than create logic and precision in your material—more, that is, than think clearly and choose your words carefully. You also have to create coherence—the perception of focus and organization—in your readers' minds. A coherent document has to be logical, but it also has to be much more.

From logic to coherence:

To create coherence, begin by seeing your document from your readers' perspective. To you, it is a finished product that you can grasp as a whole. For them, as they are reading it, the document as a whole never exists. At any one point, readers will remember only a few sentences, if that, in relatively precise form. What has gone before will have been winnowed and compressed to fit into their memory, and what is to come is largely a mystery.

When you write a document, therefore, you are organizing a complex process: the flow of information through your readers' minds. In fact, they are trying to cope with two flows at once: the page-by-page progression of large-scale themes, ideas, and over-arching syllogisms, and the sentence-by-sentence stream of details. In the face of this onslaught, they do not remain passive. They read actively, although much of the action happens in split seconds and never reaches full consciousness. At each moment, they are deciding how much of what they just read

they need to remember, figuring out how the next sentence connects with the previous ones, and forecasting where the analysis is heading.

To help readers through this process, writers have to create a clarity based not just on logic, but also on how a reader's mind deals with complicated information. This "cognitive" clarity is based on three facts about how people read. In terms of logic alone, none of them matters. In terms of coherence—of clarity in the reader's head at every moment, not just at the document's end—they are critical.

- Because readers have trouble grasping dissociated details, they focus on and remember details better if they fit together with others to form a coherent pattern. Only the pattern—the story, the logic, the theme—enables readers to decide how a detail matters and whether they should bother to remember it. The harder they must work to see the pattern or fit new information into it, the less efficiently they read, and the greater the chance they will misinterpret or forget the details. In a detective story, readers are not supposed to appreciate the significance of the broken watch strap on the corpse's wrist until much later, when they realize how smart the detective has been—and how dumb they were. With good legal writing, in contrast, they should never have trouble understanding the significance of and the relationship among details as they flow past.

- As the information flows past, they want its structure and sequence to match the logical order of the propositions or events it is describing. In other words, they want the document to unfold in step-by-step synchrony with the legal analysis or factual story it conveys, so that its form matches its underlying substance. They don't like it, for example, when your writing follows the wandering path you took in researching an issue, rather than the logic of the analysis you finally uncovered. Nor do they like it if you recite facts chronologically when the key factual issues have nothing to do with the interminable tale of who-did-what-when. They are irritated if a section is divided into five sub-sections that look of equal importance, when the fourth is logically subordinate to the third. And they are annoyed, if only subliminally, when a sentence's structure implies that three details are equally important, although two are just appendages to the other.

- With words as with food, they cannot easily ingest an unbroken flow. At both the large scale (the document as a whole) and the small (paragraphs and sentences), they want writing cut into manageable pieces, so they can pause and begin to digest each before they go on to the next.

From these facts, this program draws three principles that apply at all levels of a document, from its overall organization down to its sentences. In the summary fashion in which they are outlined below, they may seem too abstract to be useful. Properly understood and applied, however, they blossom into a rich, practical, and efficient approach to improving your writing and editing. If you edit or supervise other lawyers' writing, they will also give you concepts and a vocabulary that will enable you to talk about drafts more clearly and effectively (and objectively).

This emphasis on principles is closely analogous to a lawyer's approach to the law itself. "Thinking like a lawyer" does not mean relying on simple rules or clear-cut precedents, for the law is seldom so convenient. It means instead grasping the more abstract legal principles that underlie the rules and provide the context in which they must be understood and applied. Correspondingly, "thinking like a writer" does not mean relying on the familiar lists of writing "tips." It means starting from the principles that lie at the foundation of effective communication.

The Principles

Principle 1. Readers absorb information best if they understand its significance as soon as they see it. They can do so only if you provide an adequate focus or framework before you confront them with details. Therefore:

- **a. Put focus before details.**
- **b. Put familiar information before new information.**
- **c. Make the information's structure explicit.**

Principle 2. Readers absorb sequences of information best if the sequence's order (its "form") is consistent with the information's purpose (its "substance"). Therefore:

- **a. At the "macro" levels of a document:**
  1. **Match the organization of your information to the logic of your analysis.**
  2. **Pay attention to the difference between how you initially encountered and understood complex information (its "superficial" order) and how you later analyzed and assessed that information (its "deep structure"). You communicate more confidently by using the latter as your organizing guide.**
- **b. At the sentence level, link the sentence's grammatical form (its "syntactical core") to the focus or theme of your information. You communicate more clearly and efficiently by telling your story through the subjects, verbs, and objects of your sentences.**

Principle 3. Readers absorb information best if they can absorb it in relatively short pieces.

- **a. Break information into segments.**
- **b. Put the most important information into the most emphatic segments.**
- **c. Make the segments concise.**

Although all these principles apply at all levels of a document, their order here is significant: They are listed in the basic order of an effective and efficient edit. Principle 1 and 2(a) are more about the "command" you have over your information—the message you want to preach—while 2(b) and 3 are more about the "control" you have over the details that comprise the message. Both levels, of course, are important to a good document. But this program is organized to emphasize the former first and the latter second. It will begin by focusing primarily on large-scale organization, for two reasons: First, contrary to what most editors believe instinctively, structural elements are more crucial than syntactical polishing to the success of any document. Second, in contrast, to the years of training writers have endured about elegant sentences, few have ever been given any practical guidance about structuring complex documents.

Part II: Implementing the Principles

IMPLEMENTING PRINCIPLE 1:
THE IMPORTANCE OF "META-INFORMATION"

The three corollaries to Principle 1 reflect some bad news: To be an effective communicator, you must provide your reader with two different kinds of information. One is obvious, although a challenge all by itself to grasp and organize—the law or facts that form the substance of your argument or analysis. The other, however, is far less obvious and a separate challenge. For your reader to appreciate your substantive information, you must also provide information *about* your information, information that prepares your reader's mind to absorb your substance. This critical preliminary perspective we call "meta-information," and the corollaries capture the methods for presenting it to your reader most effectively and efficiently.

Principle 1, Corollary a:

PUT FOCUS BEFORE DETAILS

Unless they have photographic memories, readers cannot absorb and remember complicated information if they don't know why the details matter and which ones matter most. If they can't grasp the significance of the details, they will balk at reading them. As a result, before you dump data on readers, you must provide a context. The context's job is to make them smart enough to understand why the details matter, which will be most important, and how they are organized.

ILLUSTRATING THE PRINCIPLES

FOCUS BEFORE DETAILS: EXAMPLE #1

Before:

MOTION TO SUPPRESS AND EXCLUDE EVIDENCE
UNLAWFUL SEARCH AND SEIZURE

At approximately 4:00 p.m. on December 7, 1981, West Carolina State Troopers Charles Jones, Ronald Brown and David Green, accompanied by Assistant State's Attorney Frank Smith, went to Torrance's home located at 1819 Fawn Way, Centerville, West Carolina. A search of the premises was conducted resulting in the seizure of a brown calendar book and a red notebook from Torrance's bedroom. Torrance attempts to suppress these items.

Torrance had developed as a prime suspect in a homicide that occurred during the afternoon of December 7, 1981. That fact led the troopers to his residence. At trial, Troopers Jones and Brown and Torrance's father testified about what happened in the Torrance residence.

Jones stated that Brown was in charge, and that upon arriving at the front door, they were greeted by Torrance's mother. Brown asked permission to search the house for Torrance. She allowed them to enter the house, but asked that they wait for the arrival of her husband. Brown's version of the initial contact is similar. There is no question that the purpose of the troopers was to determine if Torrance was in the house. Brown also told her that Torrance was a suspect in the homicide case and that the police wanted to search the home for Torrance. The troopers and Mrs. Torrance waited in the kitchen for the arrival of Mr. Torrance, a wait of some fifteen to twenty minutes. During the wait two events took place. First, Brown testified that while they waited they observed and listened for the signs of any movement in the house. Second, as a result of a conversation between Brown and Mrs. Torrance about a gun missing from the
……..

After (insert before the original first paragraph):

Torrance attempts to suppress evidence seized from a drawer in his bedroom by the state troopers who searched his parents' home, where he lived. They conducted the search after Torrance's father had signed a form permitting them "to search my home . . . in an attempt to locate my son ... and to seize and take any letter, papers, materials or other property that they may require for use in their investigation." The troopers did not clearly explain the form to the father, however, and stated explicitly that they were searching only for Torrance himself. The evidence they seized is therefore inadmissible.

At approximately 4:00 p.m. on.....

FOCUS BEFORE DETAILS: EXAMPLE #2

Before:

This is an appeal from a dismissal of a suit to enforce a compromise settlement and judgment rendered pursuant to the settlement.

Appellant filed a claim with the Industrial Accident Board (IAB) for a work-related injury that he had sustained on October 10, 1970. Dissatisfied with the outcome of that proceeding, and in a timely manner, he filed suit in the district court of Hightop County, West Carolina, to set aside the award of the IAB. On March 17, 1972, the parties entered into a compromise settlement whereby an agreed judgment was rendered in favor of the appellant, setting aside the IAB award and granting him $6,000. Further, as a part of the agreed judgment, the appellee agreed to provide necessary future medical treatment and other related services incurred within two years of the date of judgment.

During that two-year period, appellant made a request for further medical treatment, which was refused by the appellee. Appellant then filed suit in district court on the agreed judgment alleging that appellee's refusal to provide the requested service was wrongful and in fraud of his rights. Appellee answered the suit…….

After (substitute for first paragraph):

Appellant, an injured worker, sued in district court to enforce a settlement of a claim before the Industrial Accident Board (IAB), and a judgment based on that settlement. The court dismissed the case because jurisdiction remained with the IAB. We reverse, finding the court had jurisdiction because the case before it was not an extension of the original claim, but instead arose from the wrongful refusal to fulfill a contract.

Appellant filed a claim…….

Principle 1, Corollary b:

PUT OLD INFORMATION BEFORE NEW INFORMATION

One way of putting context before details is to put "old" information before "new" information. To apply this principle, you should recognize that old information comes in a variety of forms. Some of it is information you are certain your audience possesses before it begins to read. This can range from the very basic, like the meaning of "case law," to the more particular, like the methods by which courts interpret statutes, to the very specific, like the law of fraudulent conveyance. The other large block of old material is the information you give them as they read, so that they approach each new paragraph (and sentence) with a constantly increasing stock of old information.

OLD INFORMATION BEFORE NEW: EXAMPLE #1

Before:

The Fourth Amendment protects citizens of the United States against unreasonable searches by the government. The Supreme Court applies a reasonableness test to determine whether a citizen's rights have been violated in unreasonable search cases. The test balances the citizen's privacy interests against the government's interests that are furthered by the search.

After:

The Fourth Amendment protects citizens of the United States against unreasonable searches by the government. To determine whether a citizen's rights have been violated in a search, the Supreme Court applies a reasonableness test. This test balances the citizen's privacy interests against the government's interests that are furthered by the search.

OLD INFORMATION BEFORE NEW: EXAMPLE #2

Before:

This case is not so much a contest between the United States Department of Justice and the two defendant companies as a skirmish in a broader battle over the direction American economic life will take in the coming years. The concept of the conglomerate corporation -- not a particularly new idea, but one that lately has gained great momentum -- is at the center of this struggle. The attempt of companies to expand through acquisition of other firms, while avoiding the antitrust problems of vertical or horizontal mergers, is one reason for the recent popularity of this concept. The resulting corporations have had none of the earmarks of the traditional trust situation, but they have presented new problems of their own. Although the market shares of the several component firms within their individual markets remain unchanged in conglomerate mergers, their capital resources become pooled -- that is, concentrated into ever fewer hands. Economic concentration is economic power, and the government is concerned that this trend, if left unchecked, will pose new hazards to the already much-battered competitive system in the United States.

After:

This case is not so much a contest between the United States Department of Justice and the two defendant companies as a skirmish in a broader battle over the direction American economic life will take in the coming years. At the center of this struggle is the concept of the conglomerate corporation -- not a particularly new idea, but one that lately has gained great momentum. One reason for its recent popularity is the attempt of companies to expand through acquisition of other firms, while avoiding the antitrust problems of vertical or horizontal mergers. The resulting corporations have had none of the earmarks of the traditional trust situation, but they have presented new problems of their own. In these conglomerate mergers, although the market shares of the several component firms within their individual markets remain unchanged, their capital resources become pooled -- that is, concentrated into ever fewer hands. Economic concentration is economic power, and the government is concerned that this trend, if left unchecked, will pose new hazards to the already much-battered competitive system in the United States.

Principle 1, Corollary c:

MAKE THE STRUCTURE EXPLICIT

Here's bad news: It's not enough for your writing to be organized logically. The organization also has to be obvious to the reader, from the start and at each step along the way.

MAKE THE STRUCTURE EXPLICIT: EXAMPLE #1

Before:

The reason that funded programs have been less utilized than unfunded programs is that under the tax law if employees are given a non-forfeitable interest in a non-qualified trust they will experience immediate taxation on the amounts set aside for them. Furthermore, the complex and onerous requirements of Title I of ERISA would normally apply to a funded program.

After:

Funded programs have been used less than often than unfunded ones for two reasons. First, they have tax disadvantages: If an employee is given a non-forfeitable interest in a non-qualified trust, he will be taxed immediately on the amounts set aside for him. Second, they have administrative disadvantages: They are normally subject to the complex and onerous requirements of Title I of ERISA.

or

Funded programs have been less used than unfunded programs because they have both tax and administrative disadvantages. In funded programs, because employees are given a non-forfeitable interest in a non-qualified trust, they are immediately taxed on the amounts set aside for them. Furthermore, funded programs are normally subject to the complex and onerous requirements of Title I of ERISA.

MAKE THE STRUCTURE EXPLICIT: EXAMPLE #2

Before:

You have asked me to research whether our client, a corporation seeking to interview a former employee suspected of wrongdoing, has a duty under the penal laws of Ohio or of the United States to report any criminal activity it becomes aware of during the interview. In addition, you have asked me whether under the penal laws of Ohio or of the United States, the corporation may agree, prior to the interview, not to divulge information regarding criminal activity in exchange for restitution to the corporation.

After:

Our client, a corporation, seeks to interview a former employee suspected of wrongdoing. You have asked whether, under the penal laws of Ohio or the United States, our client:

1. has a duty to report any criminal activity it becomes aware of during the interview, and

2. may agree, prior to the interview, not to divulge information regarding criminal activity in exchange for restitution to the corporation.

MAKE THE STRUCTURE EXPLICIT: CREATING ROADMAPS

Example #1:

This case raises two hearsay issues, one relating to the business records exception and one relating to out-of-court admissions. We will consider each in turn.

* * * * * *

Example #2:

The Division's claim raises three issues. Was an overpayment made? If so, does W.C.S.A. 44:10-4(a), and the case law interpreting it, authorize a client to recover the money? If not, can the Division rely on W.C. Reg. 44:10(4), which purports to authorize a lien despite the lack of direct statutory authorization?

* * * * * *

COMBINING FOCUS, FLOW, AND STRUCTURE

Before:

The amendment thus explains the circumstances under which a lender who has acquired something more than its initial security interest in a property will be categorized as an "owner or operator" for environmental liability purposes. This is achieved by setting out the requirements that must be met before liability will be imposed.

First, the lender in this position must take actual "possession" of the vessel or facility. This requirement is open to interpretation, as the term "possession" is not defined. Under one reading, "possession" calls for something more than the lender taking simple title or acquiring one of the additional interests set out above. It also calls for some tangible presence on the property. This might consist of anything from putting up a protective fence to assuming and continuing the facility's ongoing operations. Under an alternative reading, taking "possession" may not be an additional requirement where possession necessarily results from taking title or ownership, as in the case of foreclosure. It would represent an additional requirement only where the lender has acquired "operation, management, or control" without acquiring ownership. Under this construction, the legislature's inclusion of the term often would appear superfluous. Reading the plain language of the amendment, then, the first interpretation makes more sense, as the "possession" requirement clearly has been set apart in the amendment as a separate criterion. For these purposes, it is important to note the fact that this amendment was enacted to achieve clarity and provide lenders with a more precise idea of what activities they may undertake within the exemption. Thus, it should be construed narrowly, with ambiguous terms construed in favor of lender protection.

The second prong of the amendment's two-part test for liability is whether the lender exercises "actual, ….

After (changes in italics):

The amendment thus explains the circumstances under which a lender who has acquired something more than its initial security interest in a property will be categorized as an "owner or operator" for environmental liability purposes. *Before liability will be imposed, two requirements must be met: the lender must take actual possession of the property and must exercise actual control over it.*

1. Actual possession. First, the lender must take actual "possession" of the vessel of facility. Because the amendment does not define the term "possession," this requirement is open to *two possible* interpretations:

Under the first *and more likely* reading, "possession" calls for something more than the lender taking simple title or acquiring one of the additional interests set out above. It also calls for some tangible presence on the property. This might consist of anything from putting up a protective fence to assuming and continuing the facility's ongoing operations.

Under an alternative reading, taking "possession" may not be an additional requirement where possession necessarily results from taking title or ownership, as in the case of foreclosure. It would represent an additional requirement only where the lender has acquired "operation, management, or control" without acquiring ownership. Under this construction, the legislature's inclusion of the term often would appear superfluous.

Reading the plain language of the amendment, then, the first interpretation makes more sense, as the "possession" requirement clearly has been set apart in the amendment as a separate criterion. It is important to note that this amendment was enacted to achieve clarity and provide lenders with a more precise idea of what activities they may undertake within the exemption. Thus, it should be construed narrowly, with ambiguous terms construed in favor of lender protection.

2. Managerial control. The second prong of the amendment's two-part test for liability is whether the lender exercises "actual, ….

STRONG INTRODUCTIONS

There is a difference between starting an opinion and introducing it. A start simply takes hold of a loose end of string, most often one point in the case's history. A true introduction, on the other hand, is much more ambitious and useful to both the author and the reader: it makes the reader smart enough to cope with the complexities that follow; it grabs the reader's attention; and it gains the reader's respect. Here are the basic ingredients for accomplishing these goals.

SMART—provide information about your information.

1. Label: What is the topic? How can it be described so that it triggers a reader's "old" information—the knowledge he or she brings to the document?

2. Map: What is the opinion's structure? Does the reader get a map of the opinion's conceptual structure?

3. Point: What should the reader look for or think about as she or he reads? What is the crux or legal significance of the opinion?

Even if your introduction does a superb job of making the reader smart, it may still fail unless it also answers three other sets of questions that every reader brings to every document:

ATTENTIVE—specify the information's relationship to the reader.

A. *"Bottom line" or practical point:* How does this information relate to me? Why should I care? How will this help me—in concrete, practical terms?

B. *Efficiency:* Will you waste my time?

RESPECT—establish common ground.

C. *Character and Language:* What is our relationship? Master and servant? Do we speak the same language? Share the same assumptions? Want the same things? Or are we from different planets?

POTENTIONAL INGREDIENTS FOR AN INTRODUCTION

I.	Nature of the case, parties and necessary Procedural history including results below.	[LABEL]
II.	Who wants what?	[LABEL; POINT]
III.	Specific issues: what questions do you ultimately have to answer?	[POINT; MAP]
IV.	Decision, and reason for it.	[PRACTICAL POINT; EFFICIENCY; CHARACTER AND LANGUAGE]
V.	"Road map."	[MAP; EFFICIENCY]
VI.	Controlling legal principle (burden of proof, summary judgment standard, etc.)	[PRACTICAL POINT; CHARACTER AND LANGUAGE]

The following pages provide examples of introductions that combine some or all of these ingredients with varying degree of success. The first two examples are in fact unsuccessful. The first just starts. The second offers what looks like an introduction, but it leaves us in the dark about the substance of the case.

As you read Examples 3-11, ask two questions: First, do they give you the crux of the dispute: what legal or factual issues must be resolved at this stage of the case? Second, do you now feel confident that you know enough to read the facts intelligently?

STARTING WITHOUT AN INTRODUCTION #1

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 812460
	)	
JOHN THOMAS FLOWER,	)	
	)	
Defendant.	)	
	)	

On or about October 25, 1969, the appellant, John Thomas Flower, Peace Education Secretary of the American Friends Service Committee for Texas, Oklahoma, and Arkansas, received a properly prepared and executed order of debarment (Appendix "A") from the Deputy Commander of Fort Sam Houston located in San Antonio, Texas. In the order Flower was told that his re-entry upon the reservation would result in his arrest and prosecution under the provision of 18 U.S.C. § 1882 (Appendix "B"). This order was issued because information had been received at headquarters that on or about October 22, 1969, the appellant had participated in an attempt to distribute an unauthorized publication contrary to Fort Sam Houston Regulation 210-6 dated June 12, 1969 (Appendix "C"). This regulation governed the distribution and dissemination of publications on Fort Sam Houston and was promulgated under the authority of Army Regulation 210-10 issued by the Secretary of the Army pursuant to 10 U.S.C. § 3012(b)(1) (Appendix "D").

On December 11, 1969, the appellant re-entered Fort Sam Houston in defiance of the order dated October 24, 1969. At the time of his arrest, he was in the vicinity of the post library distributing leaflets advertising a "Town Meeting on the Vietnam War" which was to be held at Trinity University. …

STARTING WITHOUT AN INTRODUCTION #2

STEPHEN KELLY, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 812460
	)	
PAN-AMERICAN LIFE INSURANCE COMPANY, ET AL.,	)	
	)	
	)	
Defendant.	)	
	)	

ORDER

Before this Court is the motion to dismiss of defendants Pan-American Life Insurance Company ("Pan American") and National Insurance Services, Inc. ("National"). Defendant Babel-Peak Agency, Inc. ("Babel-Peak") moves separately to dismiss and joins in Pan-American and National's suggestions in support. For the following reasons, Pan-American and National's motion to dismiss will be granted in part and denied in part. Babel-Peak's motion to dismiss will be denied.

Facts

Plaintiffs Stephen and Lana Kelly are husband and wife. ….

#3 Underlying Action (type of case, parties who wants what): pending motion.

MARTIN BROWN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 812460
	)	
CRANDALL BOARD OF EDUCATION	)	
	)	
	)	
Defendant.	)	
	)	

Plaintiff, an employee of defendant Board of Education ("Board"), commenced this civil rights action pursuant to 42 U.S.C. §§ 1983, 1985 and 1986 challenging defendants' refusal to grant him tenure as a day high school principal. He seeks damages, back pay, declaratory judgment that he is a tenured principal, and an order directing defendants to expunge from his records an adverse report and recommendation and to amend his records to reflect his tenured status. The action is before the court on defendants' motion for summary judgment.

#4 Underlying action: nature of a pending motion: emphasis on issues related in the motion.

MICHAEL H. COTE, KATHY J. COTE, and DAVID COTE, ppa KATHY COTE Plaintiffs, v. DURHAM LIFE INSURANCE COMPANY and UNITED PLANS, INC., Defendants.	)	No. 812460

This action arose from defendants' cancellation of plaintiffs' medical insurance. Plaintiffs sued in Connecticut Superior Court, alleging breach of contract, bad faith, unfair insurance practices, unfair trade practices, and intentional infliction of emotional distress. The case was removed by defendants to this court on the grounds of diversity. Defendant now move for summary judgment, arguing that all claims relate to an employee benefit plan covered by ERISA, and thus that these state claims are preempted by Section 514 of ERISA. Plaintiffs contend that their insurance coverage was not an ERISA plan. Even if it were such a plan, they also contend, ERISA does not preempt their claims under the Connecticut Unfair Trade Practices Act and The Connecticut Unfair Insurance Practices Act.

#5 Underlying action: pending motions: results briefly stated.

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 812460
	)	
ROGER EDMONDS,	)	
	)	
Defendant.	)	
	)	

Roger Edmonds was convicted on three criminal counts involving conspiracy to distribute cocaine base. Pursuant to Federal Rule of Criminal Procedure 29(c), Edmonds now renews his motion for a judgment of acquittal. In the alternative, Edmonds requests a new trial, pursuant to Federal Rule of Criminal Procedure 33, based on the insufficiency of the evidence. For the reasons stated below, both motions are denied.

#6 Underlying action: history of the case: emphasis on results.

VERNON B. PRESSLEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 812460
	)	
ROBERT BROWN, JR., ET AL.,	)	
	)	
Defendants.	)	
	)	

This is a 42 U.S.C. § 1983 action filed pro se by plaintiff Vernon B. Pressley, an inmate at Marquette Branch Prison, against the director of the Michigan Department of Corrections and the warden of the prison. Pressley claims that exercise restrictions have been unconstitutionally imposed on him, in violation of the eighth and fourteenth amendments, whils he was in punitive segregation. On September 28, 1990, U.S. Magistrate Timothy P. Greeley issued a report and recommendation granting defendants' motion for summary judgment. After reviewing Pressley's timely objections de novo as required by 28 U.S.C. § 636(b)(1), the court grants summary judgment as to the fourteenth amendment claim. It denies summary judgment as to the eighth amendment claim, however, because the defendants have failed to show the absence of a genuine issue of material fact regarding whether the lack of exercise, which Pressley claims has resulted in physical and psychological problems, constitutes cruel and unusual punishment.

#7 Underlying action: pending motion: issues raised by the motion: result: judge's map of the analysis.

PENN CENTRAL NATIONAL BANK ET AL. Plaintiff, v. CONNECTICUT GENERAL LIFE INSURANCE COMPANY Defendant.	)	No. 812460

In this civil action for breach of contract, plaintiffs seek damages for money allegedly owed them under a medical insurance policy. Presently before the court is defendant's motion for summary judgment, which shall be granted for the reasons that follow.

Defendant Connecticut General contends that a "General Limitation" policy provision that excludes coverage for expenses reimbursable under a no-fault policy is valid. Therefore, it argues, it properly refused to pay plaintiffs costs that had already been reimbursed by a no-fault policy. Plaintiffs assert that the General Limitation clause is contrary to the law of both the Commonwealth of Pennsylvania and the state of Michigan.

There are two issues to be resolved. The threshold issue is a conflicts of law question: whether, under Pennsylvania choice-of-law rules, Michigan or Pennsylvania law applies. The second issue is whether, under the relevant state law, the General Limitation clause is valid.

#8 Underlying action: pending motion and issues: judge's map of the analysis: results.

MARK BUTLER AND BRENDA BUTLER	)	
Plaintiffs,	)	
v.	)	No. 812460
AQUA WATER SHOWS, INC. ET AL.,	)	
Defendants.	)	

This case involves the validity of a release signed by Mark Butler, who was killed while performing in a waterski show sponsored by Aqua Water Shows, Inc., a nonprofit corporation. Butler's widow, Brenda Butler, both as personal representative of his estate and in her own capacity, sued the corporation's officers and various participants in the show and their personal liability insurers. Both sides have moved for summary judgment. The defendants contend that Butler had released all other participants from liability for negligence in connection with the performance, and Brenda Butler contends that the release was invalid on public policy and other grounds.

The issues are: (1) whether the release signed by Butler prior to the show should be held unenforceable for reasons of public policy; and (2) if the release is valid, does it reach (a) Brenda Butler's separate claim for her husband's wrongful death and loss of his society and companionship and (b) the claim against the driver of the boat, which may involve reckless conduct?

We conclude that the release is not void on public policy grounds, and that it bars Brenda Butler's action in all respects except for her claim for loss of consortium and any claim based on reckless conduct by the driver of the boat.

#9 Starting with the facts.

DORIS FLING and JACK FLING	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 812460
	)	
HOLLYWOOD TRAVEL AND TOURS ET AL.,	)	
	)	
	)	
Defendants.	)	
	)	

On December 5, 1987, during a vacation in Freeport, Grand Bahamas, plaintiff Doris Fling was shot in the shoulder by a gunman after she, her husband Jack Fling and two other companions were robbed at gunpoint approximately 200 yards from their hotel, the Emerald Star. The attack occurred at approximately 10:00 p.m. as the group walked back to their hotel from a casino located one to two blocks away.

In this diversity action, plaintiffs allege that defendants arranged a hotel located in what plaintiffs claim was a known high crime area without providing adequate warning of the possibility of attacks by criminals.

Before the Court is defendants' motion for summary judgment. Defendant argue that as travel agents or tour operators, the law does not make them insurers of plaintiffs' safety. Defendants deny any duty to warn plaintiffs of allegedly hazardous conditions and, if such a duty is imposed, disclaim an knowledge that the Emerald Star was located in an allegedly unsafe area.

For the following reasons, the defendants' motion for summary judgment is granted.

#10 Starting with the facts:

STATE OF WEST DAKOTA	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 812460
	)	
DONNA YAKLICH	)	
	)	
Defendant.	)	
	)	

On December 12, 1985, Charles and Eddie Greenwell shot and killed Donna Yaklich's husband in the driveway of his home as he stepped out of his truck. She was inside the house asleep.

After her husband's death, Yaklich received payment under his three life insurance policies, and she admitted that she paid the Greenwells $4,200 in several installments for murdering her husband. Consequently, she was brought to trial on charge of first-degree murder and conspiracy to murder, under a theory that she had arranged her husband's death to obtain the insurance money.

The defense, however, maintained that Yaklich suffered from the "battered woman syndrome" and that her actions were therefore justifiable acts of self-defense committed under duress resulting from years of physical and psychological battering by her husband.

The central issue on appeal is whether a woman who has hired a third party to kill her abuser but who presents evidence that she suffered from the battered woman syndrome is entitled to a self-defense instruction. We hold that a self-defense instruction is not available in a contract-for-hire situation, even though the accused presents credible evidence that she is a victim of the battered woman syndrome. Accordingly, we disapprove the trial court's ruling on the issue.

#11 Focusing on the issue and the result

XYZ ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 812460
	)	
STATE OF CALIFORNIA ET AL.,	)	
	)	
Defendants.	)	
	)	

We are called upon to determine whether the California public school financing system, with its substantial dependence on local property taxes and resultant wide disparities in school revenue, violates the equal protection clause of the Fourteenth Amendment. We have determined that this funding scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors. Recognizing as we must that the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth, we can discern no compelling state purpose necessitating the present method of financing. We have concluded, therefore, that such a system cannot withstand constitutional challenge and must fall before the equal protection clause.

From the "1995 Appellate Judges Seminar" materials developed by Stephen V. Armstrong

WRITING INTRODUCTIONS

There is a difference between starting an opinion and introducing it. A start simply takes hold of a loose end of string, most often one point in the case's history. A true introduction, on the other hand, goes for the jugular: it focuses on the crux of the opinion. It should also perform two other functions: it should make the reader smart enough to grasp the significance of what follows the introduction (usually the facts or procedural history), and it should provide a map of the opinion's conceptual structure.

In the following examples, the first just starts. The next three—written by Justice William Bablitch of the Wisconsin Supreme Court and included in materials he gives his law clerks—provide true introductions.

INTRODUCTIONS: EXAMPLE #1

In 1990, the defendant was convicted of uttering and publishing forged Treasury checks and obstruction of the mails, in violation of U.S.C. §510 and §1702, respectively. He was sentenced to fourteen months imprisonment and three years of supervised release. Later, he violated the special conditions of his supervised release by eluding a police officer, submitting an untruthful monthly report to his probation officer, and associating with known criminals.

Under §7b1.4 of the Sentencing Guidelines, the range of imprisonment applicable upon revocation under the circumstances of this case is a sentence of 6-12 months. However, the district court sentenced the defendant to a period of two years upon revocation of supervised release. For the reasons stated herein, we AFFIRM.

The convictions in 1990 were for Class C (uttering and publishing forged Treasury checks) or Class D (obstruction of the mail) felonies. Thus, the authorized term of supervised release for those violations was for not more than three years, 18 U.S.C. §3583(b)(2), which was followed in the original sentence. Then, upon revocation, the defendant may not be required to serve more than two years imprisonment if the original offense was a Class C or D felony. 18 U.S.C. §3583(e)(3). Therefore, at the time of revocation of supervised release, the district court adhered to the restrictions in the statute.

The parties herein agree that the conduct of the defendant was a Grade B violation, set out in §7B.1 (a)(2) of the Guidelines. Moreover, the court was required to revoke supervised release, pursuant to §7B1.3(a)(1). Then, the range of imprisonment which was applicable upon revocation for a Grade B violation by a person in Criminal History II was 6-12 months. Guidelines §7B1.4(a).

INTRODUCTIONS: EXAMPLES #2-4

The issue before us is whether the flight of an individual upon sighting the police can provide reasonable suspicion justifying a temporary investigative stop. We conclude that the totality of the circumstances here led the officer to reasonably suspect that David William Jackson was committing, was bout to commit, or had committed a crime. Accordingly, the officer was justified in temporarily stopping Jackson, thereby freezing the situation in order to further investigate.

******

The plaintiff, Donald Lee Spitler, filed this intentional tort claim ore than two years after he was injured, but less that two years after he discovered the identity of the alleged tortfeasor. He requests this court to extend the "discovery rule" adopted in Hansen v. A.H. Robins, Inc., 113 Wisc.2d 550, 335 N.W.2d 578 (1983), to hold that a tort claim accrues only when the plaintiff discovers, or with reasonable diligence should have discovered, the identity of the alleged tortfeasor. We agree, and remand to the trial court to determine whether reasonable diligence was exercised in attempting to discover the identity of the defendant.

******

The plaintiff, State of Wisconsin, seeks review of a court of appeals decision which reversed the conviction of Steven A. Gove. Gove was convicted of first-degree sexual assault of a five-year old girl (T.S.). The court of appeals concluded that Gove's right to confrontation was violated when the trial court declared T.S. was unavailable as a witness and allowed certain out-of-court statements to be introduced against Gove at trial. We conclude that Gove, by failing to object, waived any challenge to the trial court's unavailability finding. We further conclude that consideration of the issue would be contrary to the interests of justice because Gove actively contributed to what he now claims was trial court error. Accordingly, we reverse the court of appeals and remand for reinstatement of the conviction.

SAMPLE INTRODUCTIONS

Some of these examples are taken from 77-79 of Ruggero J. Aldisert's Opinion Writing (West, 1990) and pages 94-102 of B.E. Witkin's Manual on Appellate Court Opinions (West, 1977).

A. Focus on factual context of the dispute.

#1

The defendant steamship company appeals from a judgement recovered by the plaintiff for injuries incurred while he was employed by the company. Plaintiff suffered the injuries while in a shoreside café, allegedly as a result of the negligent failure of the ship's captain to warn him of the existence of an open trap-door through which he fell. On appeal, defendant contends that the trial court's holdings of negligence and derivative liability were unjustified.

******

#2

This litigation arises out of an installment contract for the sale of quantities of batter lead by a Canadian seller to a Pennsylvania buyer. The seller sued for the price of a carload of lead delivered but not paid for. The buyer counterclaimed for damages caused by the seller's failure to deliver the remaining installments covered by the contract. The district court sitting without a jury allowed recovery on both claim and counterclaim. This is an appeal by the seller from the judgment against him on the counterclaim. The ultimate question is whether the buyer had committed such a breach of contract as constituted a repudiation justifying rescission by the seller.

B. Focus on issues.

#3

We are called upon to determine whether "attempted assault" is a crime in the State of California. We conclude that it is not.

******

#4

The City of East Humboldt charged the defendant with violating City Ordinance 305 by failing to obtain a business license for rental property he owns. He was found not guilty by the East Humboldt Municipal Court, which concluded that the ordinance was unconstitutional.

In this appeal by the city, we have two basic questions to consider:

1. Does Ordinance 305 impose an excise tax, which the City is empowered to collect, or does it impose an income or property tax, which it may not collect?
2. Does the ordinance deny the defendant equal protection of the law because it applies only to those who own or operate three or more properties?

******

#5

The question in these consolidated cases is whether a state prosecutor may seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving Miranda warnings at the time of his arrest. We conclude that use of the defendant's post-arrest silence in this manner violates due process, and therefore reverse the convictions of both petitioners.

******

#6

Appellant Richard Young, a firefighter, was seriously injured while saving the life of appellee Brownie Sprouse by attempting to catch Sprouse as he fell fifty feet from a bridge. Young appeals from the trial court's order granting summary judgment for all appellees in Young's personal injury action. Young's arguments concern the "professional rescuer doctrine" this court adopted in Gillespie v. Washington, 395 A.2d 18 (D.C. 1978). He contends, first, that because his rescue attempt was outside the scope of his normal duties, the professional rescuer doctrine should not bar his claim. For reasons set forth below, we reject this argument. In the alternative, Young argues that we should adopt two exceptions to that doctrine that would allow him to recover damages: one for "wanton or willful" conduct, and another for "independent acts of negligence." We decline to adopt the former and conclude the latter would not help Young, even if applicable. Accordingly, Young's claim is barred by the professional rescuer doctrine and we must affirm.

#7

This is a summary judgment case involving the validity of a release signed by Mark Butler, who was killed while performing in a waterski show. Butler's widow, Brewnda Butler, both as personal representative of his estate and in her own capacity, sued the show's organizers, various participants in it, and their personal liability insurers. Both sides moved for summary judgment. The defendants sought dismissal of the action on grounds that Butler had released all other participants from liability for negligence in connection with the performance, and Brenda Butler sought a ruling that the release was invalid on public policy and other grounds. The defendants appeal and Brenda Butler cross-appeals the trial court's denial of the motions.

The issues are: (1) whether the release signed by Butler prior to the show should be held unenforceable for reasons of public policy; and (2) if not, whether the trial court otherwise erred in denying the defendants' motion for summary judgment. The latter issue raises two ancillary questions: If the release is valid, does it reach (a) Brenda Butler's separate claim for her husband's wrongful death and loss of his society and companionship and (b) the claim against the driver of the boat, which may involve reckless conduct?

We conclude that the release is not void on public policy grounds, and that it bars Brenda Butler's action in all respects except for her claim for loss of consortium and any claim based on reckless conduct by the driver of the boat. We therefore affirm in part and reverse in part and remand for further proceedings with respect to the latter claims.

C. Focus on issue and reason for result.

#8

The sole issue presented by this appeal from the Industrial Commission is whether a claimant's withdrawal of an "Application for Hearing" also serves to withdraw the claim. The Commission held that it did, and as a consequence ruled that when the claimant filed a second "Application for Hearing," the claim was barred by the two-year limitation of Code § 65.1-87. The facts do not how, however, that the claimant withdrew his claim or that the Commission dismissed it. Accordingly, we reverse the Commission's holding that it lacked jurisdiction and remand the claim for further hearings.

D. Focus on result.

#9

In this appeal, we decide that a defendant should not be required to defend two criminal charges in the same trial simply because they arose out of factually similar events. The trial court denied the defendant's motion to sever the trial of two robbery and two use-of-a-firearm offenses which, though factually similar, were not part of a common plan. We reverse the convictions and remand the proceedings for new trials.

******

#10

In these consolidated cases, we are called upon to review the constitutionality of the procedures (Pen. Code, §1367 et seq.) for the commitment to, and release from, state hospital of defendants in criminal cases who have been found to lack sufficient mental competence to stand trial. Although we have concluded that petitioners' initial commitments were proper, we acknowledge that some provision must be made to assure that petitioners do not face an indefinite commitment without regard to the likelihood that they will eventually regain their competence, for such an indefinite commitment has been held to offend constitutional principles of equal protection and due process. (Jackson v. Indiana, 406 U.S. 715 [32 L.E.2d 4351 92 S.Ct. 1845].) Accordingly, we adopt the rule of the Jackson case that no person charged with a criminal offense and committed to a state hospital solely on account of his incapacity to proceed to trial may be so confined more than a reasonable period of time necessary to determine whether there is a substantial likelihood that he will recover that capacity in the foreseeable future. Unless such a showing of probably recover is made within this period, defendant must either be released or recommitted under alternative commitment procedures.

IMPLEMENTING PRINCIPLE 2:

AVOIDING DEFAULT ORGANIZATIONS

Our minds are stocked with ready-made organizing patterns that we use more often than we should, especially when we're tired, bored or in a hurry. For example, when we write about facts we turn instinctively to chronology. When we respond to someone else's argument, we're tempted to adopt its structure as our own. When we write about a complicated analysis, it's easiest just to retrace the path we took in thinking through the issue. None of these organizing patterns is necessarily inadequate. But they are overused, and a good writer learns to regard them with suspicion.

ORGANIZING A DISCUSSION OF THE LAW:

THE PROBLEM OF "DEFAULT" (OR "READY-MADE") ORGANIZATIONS

The most common traps:

- Chronology (Example #1)
- History of your research or thinking (Example #2)
- Someone else's analysis

The basic choice:

Show the reader how you thought through the problem

or

write a clear report of the results of your thinking.

Avoiding the default:

Impose an organization that matches the logic of your analysis, as you look backwards from your conclusion:

- Write a good introduction before each section of the analysis.
- If necessary, reorganize the sequence of topics or authorities.

ORGANIZING A DISCUSSION OF THE LAW: EXAMPLE #1

Before:

Several recent decisions have considered the obligations of a so-called "successor employer" under collective bargaining agreements. None deals with our specific question: under what circumstances is a employer bound by his predecessor's agreement to contribute and subscribe to employee trust funds? But these decisions provide useful guidance.

In the first of these decisions, John Smith v. Jones, the Supreme Court held ….

In NLRP v. Acme Manufacturing, Acme had succeeded Superior ……

Acme was followed by Clover Valley Packaging Co. v. NLRB, holding ….

Finally, in Comfort Hotels v. Hotel Employees, the Court….

In concluding that under the circumstances of the case, the successor employer had no duty to arbitrate, the Court in a footnote made the following illuminating statement: ….

After:

Although several recent decisions have considered the obligations of a so-called "successor employer" under collective bargaining agreements, none has dealt with our specific question: under what circumstances is a employer bound by his predecessor's agreement to contribute and subscribe to employee trust funds? In the absence of direct authority, we must draw guidance from decisions dealing with collective bargaining agreements in general.

As these cases show, the question cannot be answered by deciding whether the new employer satisfies a definition of "successor employer" that always entails the assumption of certain obligations. "There is, and can be, no single definition of 'successor' which is applicable in every legal context." [Citation.] A decision about which obligations a new employer has assumed must rest on the facts of each case.

In the first two decisions discussed below, the facts showed a substantial continuity of identity between the business enterprises of the predecessor and successor employers. As a result, the courts held that the new employers had to assume the obligations at issue. In the other two decisions, there was less continuity, and the courts reached the opposite result.

In NLRB v. Acme Manufacturing, ….

In Comfort Hotels v. Hotel Employees, ….

In John Smith v. Jones, ….

In Clover Valley Packaging Co. v. NLRB, ….

ORGANIZING A DISCUSSION OF THE LAW: EXAMPLE #2

Before:

The complaint alleges jurisdiction under 28 U.S.C. § 1333 and 46 U.S.C. § 740, which vest the District Court with admiralty and maritime jurisdiction. Callahan argues that admiralty and maritime jurisdiction does not extend to accidents, like this one, that involve purely pleasure craft with no connection to commerce or shipping.

Callahan bases his complain primarily on Executive Jet Aviation, Inc. v. City of Cleveland. In that case, the plaintiff, whose jet aircraft sank in Lake Erie ….

Callahan suggests that Executive Jet requires a significant relationship to traditional maritime activity in all cases, not just those involving aircraft. Several Courts of Appeal have taken this view. ….

In Edynak v. Atlantic Shipping, Inc., however, the Third Circuit, assuming that Executive Jet could be read ….

Callahan argues that this discussion to Edynak signals an adoption by the Third Circuit of the "locality plus" test for admiralty jurisdiction ….

After:

The complaint alleges jurisdiction under 28 U.S.C. § 1333 and 46 U.S.C. § 740, which vest the District Court with admiralty and maritime jurisdiction. Callahan argues that admiralty and maritime jurisdiction does not extend to accidents, like this one, that involve purely pleasure craft with no connection to commerce or shipping.

Callahan bases his argument primarily on Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 93 S. Ct. 493, 34 L.Ed.2d 454 (1972). In that case, the Supreme Court held that admiralty jurisdiction does not extend to claims arising from airplane accidents unless they bear "a significant relationship to traditional maritime activity." Callahan argues that this test must be applied to all accidents that would otherwise fall within admiralty jurisdiction, and that accidents involving pleasure craft fail to meet the test. We disagree. Executive Jet's "locality-plus" test applies only to aircraft accidents. Even if it were to apply more broadly, an accident involving pleasure craft meets the test.

In Executive Jet, the plaintiff, whose jet aircraft sank in Lake Erie ….

ORGANIZING A DISCUSSION OF THE LAW: EXAMPLE #3

Before:

ASSESSMENT OF COSTS

Appellant admits that the assessment of costs is a discretionary matter for the trial judge but asserts that, under the particular facts, the trial court abused its discretion.

Appellant relies upon E. L. Gholar, et al. v. Security Insurance Co., et al., 366 So. 2d 1015 (La. App. 1st Cir. 1978). The court there reversed the trial court and relieved the defendant from paying costs where he was not found negligent and had not prolonged the trial. The court held that:

C.C.P. Art. 1920 gives the court discretion to assess costs but limits this discretion. The general rule is that ….

After:

ASSESSMENT OF COSTS

Appellant admits that the assessment of costs is a discretionary matter for the trial judge but asserts that, under the particular facts, the trial court abused its discretion. As the court's opinion demonstrates, however, the court correctly based its assessment on the principle that costs must be assessed on the basis of the results at trial.

This principle arises from LSA-C.C.P. Article 1920:

….

The principle is stated even more explicitly in Comment (b) to Article 1920:

….

Although appellant rightly points to E.L. Gholar, et al. v. Security Insurance Co., et al., 366 So. 2d 1015 (La. App. 1st Cir. 1978) as an authoritative application of Article 1920, he ignores crucial differences between the facts of that case and of the present situation. ….

ORGANIZING A DISCUSSION OF THE LAW: EXAMPLE #4

B. The Purported Lease Restrictions Were Not Referred to in the Non-Disturbance Agreement, Nor Does the Amended Complaint Allege Facts Sufficient To Show That Defendants Had Actual Knowledge of These Restrictions

Before:

In an effort to rebut the absence of factual allegations showing actual knowledge, Mitsubishi argues that it "has clearly alleged that Capital Group knew of the Notes, the Mortgages and the Lease Assignments and/or of their material terms . . . ." Mitsubishi Mem., p. 55 (emphasis supplied). Mitsubishi reaches this conclusion by alleging that the Non-Disturbance Agreement between Mitsubishi and Capital Group refers to the existence of a mortgage in favor of Mitsubishi covering the subject premises. As a result, the argument continues, Mitsubishi has pled facts sufficient to establish that Capital Group and one of its former officers, as well as an officer of First Boston, who was not even involved in the execution of that agreement, had "actual knowledge" of certain lease restrictions purportedly imposed upon Bailey Tarrytown.

Mitsubishi ignores, however, the fact that the Non-Disturbance-Disturbance Agreement does not refer to restrictions imposed upon Bailey Tarrytown's right to amend or terminate its lease with Capital Group or any other tenant of the Christiana Building. Nor does the Amended Complaint otherwise allege facts sufficient to establish that the defendants had actual knowledge of these restrictions. Mitsubishi has at best alleged facts as to which most commercial tenants have "knowledge"….

After:

As a prerequisite to a tortious interference claim, Mitsubishi must allege that defendants had actual knowledge of the lease restrictions at issue. Instead of alleging facts that would show actual knowledge, however, Mitsubishi adopts two tactics: (1) it attempts to establish such knowledge on the basis of inferences drawn illegitimately from the Non-Disturbance Agreement, which does not refer to the restrictions, and (2) it mischaracterizes the kind of knowledge required.

1. The Content of the Non-Disturbance Agreement

Mitsubishi alleges that the Non-Disturbance Agreement between Mitsubishi and Capital Group refers to the existence of a mortgage….

ORGANIZING FACTS

The Methods:

1. Chronology
2. Main actor or other character
3. Geography
4. Issues
5. Witnesses or other sources of information

The Danger:

Relying solely on a chronological organization when some of the facts don't fit into the chronology.

ORGANIZING FACTS: EXAMPLE #1

By Chronology & Protagonist:

J. entered first grade ….

In 1981, he was placed in ….

Two years later, he was moved to ….

By issue:

Starting in 1980, J. began to exhibit behavior that …. As a result of this behavior, by 1983 school authorities concluded that ….

By Witness:

On the question of whether his present non-residential program has resulted in significant educational progress, Dr. Jones stated that ….

Mr. Smith, on the other hand, stated that ….

ORGANIZING FACTS: EXAMPLE #2

Before:

On August 4, 1983, Jessica Hall was involved in a motor vehicle accident at the intersection of routes 6 and 25 and the spur from exit 9 of I-84 in Newtown. Jessica was a passenger in a pickup truck driven by her mother, Wendy Hall. Wendy Hall left exit 9 of I-84 and proceeded eastbound on the exit spur to routes 6 and 25. At this point, routes 6 and 25 overlap into one road. When she approached the intersection of the spur and routes 6 and 25, she attempted to turn left to go north on routes 6 and 25. She testified that because her vision was obstructed by brush, she could not see traffic traveling south on routes 6 and 25 so she inched her way onto the highway to obtain a view. At that point, a tractor trailer driven by John Jones was driving southbound on routes 6 and 25. Wendy Hall did not see the tractor trailer until it was suddenly upon her vehicle. Jones attempted to avoid a collision by braking and swerving to the left but was unable to do so and struck Wendy Hall's truck, severely injuring Jessica Hall.

After:

[FIRST, THE CONTEXTUAL FACTS] Jessica Hall was severely injured when a pickup truck driven by her mother, Wendy Hall, collided with a tractor trailer driven by John Jones.

[NEXT, THE GEOGRAPHY] The accident occurred at the intersection of exit 9 from I-84 with routes 6 and 25. At this point, routes 6 and 25 merge into one road as they are joined by the exit spur. According to Wendy Hall's testimony, the view from the exit spur is obstructed by brush, so that drivers leaving the exit cannot see traffic traveling south on routes 6 and 25.

[FINALLY, THE NARRATIVE] Wendy Hall left I-84 and proceeded east on the exit spur to routes 6 and 25. When she approached the intersection, she attempted to turn left to go onto the highway to obtain a view. She did not see Jones' tractor trailer until it was suddenly upon her vehicle. Jones attempted to avoid a collision by braking and swerving to the left, but was unable to do so and struck Wendy Hall's truck.

ORGANIZING FACTS: EXAMPLE #3

Appellant Hann was convicted of criminal trespass after taxiing his airplane from a hangar across part of an airport which the complaining witness, Hyde, leased and had posted with "no trespassing" signs. Appellant argues that two agreements signed as the airport changed ownership over the years constituted effective consent to his crossing of the property, or at least created reasonable doubt about his guilt.

Before:

The Aero-Valley Airport was constructed around 1970 by Edna Gardner Whyte on thirty-four acres of her land. She later bought more land northeast of the original tract and made additional improvements, including extensions to the runway and taxiways.

In 1980, Whyte sold to Gene Varner the runway and taxiways together with a portion of the land, including the portion where the transient area is located. Part of the purchase price was carried by a note from Varner to Whyte and secured by a vendor's lien and deed of trust. In the deed to Varner, Whyte reserved certain easements and rights for access to the runway from her property located in the northeast corner of the airport. In 1982, Hyde-Way, Inc., owned by Hyde, acquired all of Varner's interest and assumed the note owed by Varner to Whyte.

Sometime prior to October 19, 1983, Hyde's corporation purchased 119 acres located west of the runway and referred to as the Northwest Development Addition. Misunderstandings and disputes arose between Whyte and Hyde concerning obligations, rights, and other matters pertaining to the airport. On October 19, 1983, a settlement agreement was entered into between Whyte and Hyde-Way, Inc. and Glen Hyde, individually, and by which Hyde agreed to convey to Whyte certain real property located on the Northwest Development Addition. This conveyance was apparently in payment of the balance owed to Whyte under the 1980 note from Varner. This conveyance also included ten hangars located on the land, one of which was being used by appellant as a tenant of Whyte at the time of his arrest. Whyte was then still the owner of the hangar and told the appellant that he had access to the runway across the transient area under the terms of the settlement agreement between Whyte and Hyde.

Under that agreement, Whyte agreed to quit claim to Hyde all rights and reservations saved and excepted in her deed to Varner:

> [E]xcept that Whyte shall have the right to convey easements to persons who are tenants or heirs or assigns of land she presently owns or will own in the future within the confines of the Aero-Valley Airport as it now exists, including the residential lots in the Northeast corner of said airport. Whyte agrees, however, that on the sale of any of the hangars granted to her in their agreement or purchased by her in the Northwest Development Addition she or her buyers will execute the Runway License Agreement now required by Hyde from purchasers in the Northwest Development Addition.

On February 5, 1987, Hyde sold whatever property he owned, including the transient area, to a Nevada mining corporation. At the time appellant was arrested for trespassing, on April 20, 1987, Hyde owned only a month-to-month tenancy under a verbal lease from the mining company.

The testimony shows that there has been a long history of disputes between Whyte and Hyde over their airport transactions, and that they had been in civil litigation for over two years before appellant was convicted in this case. This litigation apparently did not involve the interpretation of the above quoted language from the settlement agreement insofar as it was determinative of appellant's right to cross the transient area on April 20, 1987. Appellant urges that as Whyte's tenant he had access across the transient area on that date by virtue of the easement rights which Whyte retained in her agreement with Varner and which she was authorized to convey under the settlement agreement with Hyde.

After:

[FIRST, THE CONTEXT]

The Aero-Valley Airport was constructed around 1970 by Edna Gardner Whyte on her land. Over the years, parts of it changed hands several times. Throughout these changes, Whyte retained part of the property, some of which she leased to tenants such as Hann.

[NEXT, THE BACKGROUND NARRATIVE]

In 1980, Whyte sold to Gene Varner the runway and taxiways together with a portion of the land, including the portion on which appellant allegedly trespassed. Part of the purchase price was carried by a note from Varner to Whyte.

In 1982, all of Varner's interest was acquired by Hyde- Way, Inc., owned by Hyde. Hyde-Way also assumed the note. Sometime thereafter, it purchased more land located west of the runway and referred to as the Northwest Development Addition.

On October 19, 1983, Hyde- Way, Inc., and Hyde individually entered into an agreement with Whyte in which, among other matters, Hyde agreed to convey to Whyte certain real property in the Northwest Development Addition, in payment of the balance owed under the 1980 note. This conveyance included ten hangars, including the hangar that appellant was renting at the time of his arrest.

On February 5, 1987, several weeks before the arrest, Hyde sold his airport property to a Nevada mining corporation. On the day of the arrest, he owned only a month-to-month tenancy under an oral lease from the mining company.

The testimony shows that there has been a long history of disputes between Whyte and Hyde. The 1983 agreement between them was intended to settle these disputes, but they had been in civil litigation for over tow years before appellant was convicted in this case. The litigation, however, did not address the issues raised by this appeal.

[NEXT, THE FACTS ON WHICH THE CASE TURNS]

Appellant relies on the terms of Whyte's 1980 sale of the airport to Varner, Hyde's predecessor, and of Whyte's 1983 agreement with Hyde. Based on those agreements, appellant argues, there is sufficient reason to believe that he had effective consent to enter Hyde's property so that the trial court could not have found him guilty beyond a reasonable doubt.

In 1980, when Whyte sold part of her land to Varner, the deed reserved to Whyte certain easements and rights for access to the runway from hjer property. In relevant part, the deed states:

[NOTE: IN THIS FORM OF ORGANIZATION,M IT BECOMES CLEARER THAT A CRUCIAL ITEM—THE RELEVANT LANGAUGES FROM THE 1980 DEED—IS MISSING.]

Under Whyte's 1983 agreement with Hyde, Whyte agreed to quit claim to Hyde all rights and reservations saved and excepted in her deed to Varner, with the following exceptions:

Whyte shall have the right to convey easements to persons who are tenants or heirs or assigns of land she presently owns or will own in the future within the confines of the Aero-Valley Airport as it now exists, including the residential lots in the Northeast corner of said airport.

ORGANIZING FACTS: EXAMPLE #4

MORISSETTE v. UNITED STATES, 342 U.S. 246, 72 S. Ct. 240 (1952)
OPINION: MR. JUSTICE JACKSON delivered the opinion of the Court.

This would have remained a profoundly insignificant case to all except its immediate parties had it not been so tried and submitted to the jury as to raise questions both fundamental and far-reaching in federal criminal law, for which reason we granted certiorari.

On a large tract of uninhabited and untilled land in a wooded and sparsely populated area of Michigan, the Government established a practice bombing range over which the Air Force dropped simulated bombs at ground targets. These bombs consisted of a metal cylinder about forty inches long and eight inches across, filled with sand and enough black powder to cause a smoke puff by which the strike could be located. At various places about the range signs read "Danger -- Keep Out -- Bombing Range." Nevertheless, the range was known as good deer country and was extensively hunted.

Spent bomb casings were cleared from the targets and thrown into piles "so that they will be out of the way." They were not stacked or piled in any order but were dumped in heaps, some of which had been accumulating for four years or upwards, were exposed to the weather and rusting away.

Morissette, in December of 1948, went hunting in this area but did not get a deer. He thought to meet expenses of the trip by salvaging some of these casings. He loaded three tons of them on his truck and took them to a nearby farm, where they were flattened by driving a tractor over them. After expending this labor and trucking them to market in Flint, he realized $84.

Morissette, by occupation, is a fruit stand operator in summer and a trucker and scrap iron collector in winter. An honorably discharged veteran of World War II, he enjoys a good name among his neighbors and has had no blemish on his record more disreputable than a conviction for reckless driving.

The loading, crushing and transporting of these casings were all in broad daylight, in full view of passers-by, without the slightest effort at concealment. When an investigation was started, Morissette voluntarily, promptly and candidly told the whole story to the authorities, saying that he had no intention of stealing but thought the property was abandoned, unwanted and considered of no value to the Government. He was indicted, however, on the charge that he "did unlawfully, wilfully and knowingly steal and convert" property of the United States of the value of $ 84, in violation of 18 U. S. C. Sec. 641, which provides that "whoever embezzles, steals, purloins, or knowingly converts" government property is punishable by fine and imprisonment. Morissette was convicted and sentenced to imprisonment for two months or to pay a fine of $ 200. The Court of Appeals affirmed, one judge dissenting.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF _____

WENDY SUE (KINSKY) MARSHALL,
Plaintiff,
V

FILE NO: 97-033804-DM

NICK KINSKY,
Defendant.

FINDINGS, DECISION AND ORDER ON CHANGE OF DOMICILE

At a session of said Court held in the City of _____ this 23rd day of _____

PRESENT: THE HONORABLE _____, CIRCUIT JUDGE

The parties are the parents of Jacob Patrick Kinsky, age 12, DOB 1/20/95. The parents were divorced by judgment of divorce of this court entered October 27, 1998. Under the judgment, both parents share joint decision-making custody for the minor child, with Jacob residing in the primary care and physical custody of his mother, subject to reasonable parenting time for his father. Both parties were residing in Marquette County when the judgment was entered. On February 27, 2007, Plaintiff Wendy Marshall corresponded with the Marquette County Friend of the Court requesting court authorization to change the legal residency and domicile of the minor child from Marquette County to Northeast Wisconsin in the Green Bay/Appleton area. On March 7, 2007, the Defendant father filed an objection to the change of domicile.

The request for change of legal residence and domicile of the minor child was heard by the court, with both parents testifying, on April 10, 2007.

The Plaintiff mother moved to DePere, Wisconsin for better employment. She was formerly working for a local public accounting firm in Marquette County, earning $33,000 annually. Plaintiff completed her accountancy degree and her CPA status, and was offered employment as a senior accountant CPA for a DePere, Wisconsin accounting firm starting at $47,000 annually with reasonable prospect for advancement in salary within the first three months, and more after that. The Wisconsin employment

also offered a better overall medical package and retirement package. Plaintiff accepted this employment position and as of the hearing date was, in fact, employed at the Wisconsin firm.

Although the parents differ somewhat, Plaintiff's proposed moved to Wisconsin was not a total surprise to Defendant. Although Defendant has a long established residency in Marquette County, he is originally from that area in Wisconsin and continues to have family in that area.

Both Plaintiff and Defendant attended Northern Michigan University, getting their degrees in accounting. As early as the summer of 2005, Plaintiff talked with Defendant about the possibility of relocating to Northeastern Wisconsin. Plaintiff testified these discussions continued and were renewed in the summer 2006. Then, when she obtained her CPA license in November 2006, according to the Plaintiff, the parents talked again and the Defendant father was supportive of the move. According to Plaintiff, Defendant even testified that he would possible relocate as well. Relying on these statements and the job offer, Plaintiff accepted employment in DePere, sold her home in the Marquette area, made arrangements for Jake to continue living with his father for the remainder of this school year with the understanding that Jake would go to Wisconsin after this school year. Plaintiff testified that as late as one week before her relocation to Wisconsin, Defendant never expressed objection directly to her, with Defendant's objection arising only after she made the move.

In his testimony, the Defendant father acknowledges the parties discussed a possible relocation during the summer 2005. At that time, Defendant had just completed his degree and was unable to find work in his field. He preferred to remain in this area, but unless he obtained employment, he, too, would consider relocation. Contrary to Plaintiff's testimony, Defendant testified there were no further discussions about a possible relocation after the summer of 2005 and the first he heard of Plaintiff's renewed proposal to relocate was in January 2007. Defendant testified, even then at that late date, he may have expressed some approval of the move because he was under the assumption Plaintiff and her current spouse were not getting along, separated, and may be getting a divorce. Defendant concluded that under those circumstances, a relocating "might be good for Plaintiff." Defendant further testified,

however, that there was no further agreement on the relocation and that some time after the first of the year, Plaintiff simply "announced" she was quitting her local employment and moving to Wisconsin. Defendant testified he did not immediately object because he was uncertain of his legal grounds for objecting, but following review of the divorce judgment, understood the move had to occur either with his consent or court order following hearing.

In the discrepancy in the testimony of when and under what circumstances the prospective move was discussed, the court finds Plaintiff's recollection and recitation of events to be credible when she testified that she provided information and notice to Defendant each step in the process of relocating to Wisconsin, including the initial discussions in the summer of 2005, renewed discussions on completing her CPA license in November 2006, sale of her house, acceptance of employment in Wisconsin, and then the actual move occurring. Plaintiff's February 27, 2007 letter to the Friend of the Court, before this matter became a court issue, is consistent with her testimony.
The court also find Plaintiff's decision to seek employment, accept employment, and sell her home—all a series of steps—to be also consistent with the testimony that she provided information to Defendant of this process. Defendant was familiar with that area, has relatives in that area, and too expressed some thought of relocating to that area in the summer of 2005.

However, although the court accepts Plaintiff's testimony on this point, that is not dispositive of the move being granted because in the end, with Defendant's objection, he did not consent to the move.

On disagreement of the parents as legal custodians, the court must judge the proposed move and objections to the move under the standards set out in the statute, MCL 722.31 (4):

text

There is no dispute in the record as to some of the above standards issue: factors (b), (d), and (e) are not, in this court's judgment, in dispute.

The hearing record establishes that the Defendant father has complied with and utilized his time with Jake under the existing court order for parenting time and Plaintiff has complied with the order in facilitating Defendant's parenting time. This level of

utilization of parenting time and cooperation is evidenced by the existing agreement in light of Plaintiff's move to let Jake live with his father until the end of the school year. Further, there is no evidence in the record that Plaintiff's plan to change the child's legal residence was in any way inspired by Plaintiff's desire to decrease the Defendant's parenting time. Nor is there any evidence in the record that Defendant's opposition to the move is motivated by any desire to secure a financial advantage with respect to a support obligation.

Although touched in brief, there is no evidence of current domestic violence between the parties, or directed by either parent towards the child, which would in any effect the move.

Defendant testified that Jake does not get along with his stepfather and that on one occasion, the stepfather had knocked a stool out from under Jake; however, the court does not find any of this testimony rising to the level of domestic violence relating to this move.

The key issues in this case is whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent and the degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that provides an adequate basis for preserving and fostering the parental relationship between the child and both parents, and whether the parents are likely to comply with any such modification.

Consideration of the issues is to be made "with the child as the primary focus in the court's deliberations."

Even though the statute directs the court to weigh the factors with the minor child as the primary focus, factor (a) "the capacity of the move to improve the quality of life for both the child and the relocating parent" does require to consider the move as to both the child and the relocating parent. There is no significant factual dispute in the record that the move from Marquette to DePere, Wisconsin has capacity to improve the quality of life for the relocating parent, Plaintiff Wendy Marshall. She is going from a job earning $33,000 annually, to which she testified without any dispute in the record is pretty much tapped out without significant opportunity for advancement. Her new employment is at

a starting salary of $47,000 annually with a three month increase, and reasonable prospects for advancement and increase after that three month period. Plaintiff also testified that the overall employee benefits and retirement package was superior to her situation in Marquette.

Note the statute does not require the court to consider whether the change will, in fact, guarantee improvement of the quality of life of the parent and child; rather, the inquiry is to whether the move has the "capacity" or "potential" to improve the quality of life for the child and relocating parent.

The court next considers whether the move has the capacity to improve the quality of life for the minor child, Jacob P. Kinsky. Jacob is age 12, in middle school at Bothwell Middle School in the Marquette Area Public School district. By account of both parents, he is a very good student, generally drawing A's in his classes. He has a well-rounded, positive peer group, with friends both in school, the Marquette community, and on his ice hockey teams—summer and winter.

Jacob has juvenile diabetes and asthma. He's been diagnosed with juvenile diabetes since age four. In addition to following with his local physicians, he meets quarterly with a pediatric endocrinologist specialist from Children's Hospital in Detroit who travels to Marquette every three months to meet with juvenile diabetes patients. There is no juvenile diabetes specialist in the Marquette area. Plaintiff Wendy Marshall that the medical community in the Fox River Valley area of Green Bay/DePere does have a comprehensive juvenile diabetes clinic which approaches juvenile diabetes on a multi-disciplinary basis, including a pediatric endocrinologist. Plaintiff testified she is concerned with the record of blood sugar elevation of Jacob since he has been in the care and custody of his father on the temporary living arrangement. The Defendant father testified that he monitors diet, blood sugar levels, and Jacob is capable of self-treating for his diabetes.

Jacob has experience with the Marquette Junior Hockey program, playing both winter ice hockey and summer ice hockey. He's also signed up for Little League Baseball and after school wrestling. The DePere, Wisconsin area has a similar junior hockey program—both summer and winter—as well as baseball and wrestling.

Plaintiff Wendy Marshall testified that before deciding to move, she did investigate the DePere school system, finding it highly ranked and indicates the DePere school district is a better system than the Marquette Area Public Schools. Other potential changes in Jacob's quality of life with the move include greater opportunity for retail shopping and goods, and greater opportunity for travel given Plaintiffs increased earning capacity.

After the divorce, Plaintiff married and Jacob now has an eight-year-old half sister with whom he is close. If the move is not authorized and Plaintiff resides in DePere with her spouse and eight-year-old daughter, this would sever or at least reduce the relationship between Jacob and his younger sister.

As to factor (c), the court is asked to consider whether "if the move is granted, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent, and whether each parent is likely to comply with the modification."

As to the latter issue, there is no dispute in the record that both parents will likely comply with any modification. In general, since the divorce, the parents have been compliant with court orders and generally cooperative relating to issues involving Jacob.

The existing judgment of divorce placed Jacob in the primary physical custody of his mother, subject to reasonable parenting time with his father.

Plaintiff Wendy Marshall testified that should the move be granted, she proposes a traditional parenting time schedule of Jacob being with his father every other weekend, with a mid-point exchange, perhaps Cedar River, Michigan and Jacob being with his father at least one-half the summer and shared or alternating holidays. Plaintiff would still have extended family in the Marquette County area and on return visits to this area, Jacob would be free to spend time with his father as well. Plaintiff thinks this proposal would be consistent with existing parenting relationship, would not constitute a significant change in schedule, and would serve to preserve and foster Jacob's relationship with his father.

Defendant Nick Kinsky testified that he has a very close relationship with Jacob. Defendant testified that although he formerly worked as a truck driver with

Rhinehart Foods, making more money, he left that employment and took an accounting position with Superior Spectrum in June 2005, earning less money but having a more predictable and traditional work schedule and more time to spend with his son. The Defendant father testified he generally attends Jacob's hockey practice during the winter, Monday and Wednesday evenings, and in general, the parenting relationship between the parties has been worked out so that the time with Jacob has been very liberal. He testified this arrangement has worked well. Currently, he has at least every other day contact with Jacob, even though they may not be overnight. Generally, Jacob stays with him at a minimum every other weekend, and occasionally up to three or four weekends per month. Activities between Defendant and his son include fishing, camping, tennis, chess, and other board games. Fishing includes impromptu, after work fishing trips on Lake Superior. Defendant describes his relationship with Jacob as being "very close." Even though he describes Jacob at age 12 as having signs of "growing up," nonetheless he still, as a small child, gives his father hugs.

Under the current temporary operating agreement with Plaintiff living in DePere and Jacob with his father through the end of the school year, Defendant has noted no significant behavioral changes with Jacob.

Factor (c) asks the court to inquire the degree to which it is satisfied that if the move is permitted, it is possible to order a modification of the parenting time schedule and other arrangements "in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent." The inquiry contemplates that if the move is permitted, a "modification" will occur. Although that may seem to be a "given," this part of the statute recognizes that change and modifications in one's life is normal. Intact families consisting of a mother and father and children move. When those moves occur, there are always modifications in the lives of that family. If either parent moves away, either the custodial parent or the non-custodial parent, there will be changes in the life of this divorced family and their son. The question, therefore, is whether there can be a "modification" of the parenting arrangements. Modification to do what? To "provide an adequate basis for preserving and fostering the parental relationship between the child and each parent." The statutory test is not an "ideal" or "perfect" basis, but rather, an "adequate" basis. The

statute also requires the court to inquire whether the modification can preserve and foster the relationship between the child and each parent, not just the parent who is not relocating. Webster's New World College Dictionary defines "adequate" as

> 1 enough or good enough for what is required or needed; sufficient; suitable. **2** barely satisfactory; acceptable but not remarkable.

Applying that test to these facts, the court finds the proposed parenting arrangement, if the move is approved, of Jacob with his father at least every other weekend, the summer, alternating or split school vacations and holidays, plus additional time when Plaintiff returns to the Marquette area and halfway meeting point for exchanging Jacob to be a modification that is "adequate" for preserving and fostering Jacob's relationship with both his father and his mother. In a similar case, Rittershaus v Rittershaus, _____Mich App _____(COA No. 269052) (January 4, 2007), the Plaintiff mother proposed a relocation from Michigan to Texas. As to factor (c), the Court of Appeals agreed with the trial court findings on preservation of the parent-child relationship:

> We agree with the trial court that is "possible to order a modification of the parenting time schedule" in this case and adequately "preserve and foster" the parent-child relationship. MCL 722.31 (4)(c) It is true that the change in domicile from Michigan to Texas will seriously impact Defendant's ability to see his children several times a week as he now does. However, the children will come to Michigan for two extended visits each year—for one school holiday break and for half the summer vacation. Defendant has been awarded unlimited parenting time with his children whenever he visits Texas. Furthermore, the separation can be diminished by use of modern communication technology. Defendant will be able to e-mail his children and share photographs over the internet. Defendant will see his children's faces while they communicate using a webcam and Defendant and the children can telephone each other on a daily basis.

A move, in the case at hand, is not from Michigan to Texas but from Marquette to DePere, a distance of approximately 3-3 ½ hours to an area with which Defendant is familiar, an area Defendant at one time had considered relocating to, and where he has

family. Although not specifically proposed in Plaintiff's modified parenting arrangement should the move be approved, the court would reasonably expect that like the non-relocating parent in the Rittershaus case, that Defendant would essentially have unlimited time with Jacob at any time Defendant chooses to travel to the Fox Valley area on business, vacation, shopping or another need. This is a very common travel destination from the Marquette County area.

Finally, does the move have the capacity to improve the quality of life for the child? The test under the statute is "capacity to improve." As used in the context of this statute, "capacity" is defined in Webster's New World College Dictionary is:

> **6** the quality of being adaptive (for something) or susceptible (of something); capability; potentiality...

Thus, does the move have the potential of improving the child's quality of life? Things lost would be daily contact with his positive peer group, a city, school district, and community with which he is familiar, successful performance in school. Things gained include maintenance of his relationship with his younger half-sister, the benefits any child receives from a parent with a greater earning capacity; not only immediate things, but future security, college education and expenses, travel, and in Jacob's case, somewhat more immediate access to a specialized juvenile diabetes clinic.

Although Plaintiff testified her research indicated the DePere school district was superior to the Marquette Area Public Schools, there was not direct evidence offered. Without specific evidence on the DePere school system, this court does take a degree of judicial notice as to the Marquette Area Public Schools and public data on the Marquette school system. In general, Marquette schools—elementary, intermediate, middle, and high school—exceed state of Michigan averages on standardized testing. The Marquette schools have a high graduation rate and placement in colleges and universities throughout the United States. The Marquette school system also has an advanced placement curriculum and the possibility of high school students accumulating college credit with dual enrollment at both Marquette Senior High School and Northern Michigan University if they are academically qualified. Although there is no evidence on which the court can compare and judge the Marquette and DePere school systems, given the general performance of the Marquette Area Public Schools

coupled with Jacob's familiarity with it and the school system's familiarity with Jacob and his above-average academic standing, leads the court to conclude there is no significant advantage for Jacob in the DePere schools over continued attendance in the Marquette Area Public Schools.

On balance, the move has some capacity to improve Jacob's life, specifically continuing in the primary care and custody of the parent with whom he has lived since the divorce, continued residency with his half-sister, closer access to a juvenile diabetes clinic, and substantially increased earnings and benefits of one of his parents, inuring to the benefit of the family.

In Brown v Loveman, 260 Mich App 576 (2004), the Court of Appeals concluded a significant economic advantage by moving to a better job supports a finding of improvement in quality of life of the minor child:

> With regard to the first D'Onofrio factor (corresponding to MCL 722.41 [4][a]), the trial court found that Defendant's job opportunity and move to New York had the potential to improve both Marley's and Defendant's quality of life. Plaintiff argues that the only positive evidence regarding an opportunity for improvement related to Defendant's higher earnings and the opportunities available in New York, and that there was no testimony demonstrating how the move had the capacity to improve Marley's life. But this Court has held that a substantial increase in income that will elevate the quality of life of the relocating parent and child supports a finding that a party has met its burden of proof under the first D'Onofrio factor. See Bielawski, supra. at 593, 358 NW2d, 383. Moreover, the burden of proof by a preponderance of the evidence `recognizes the increasingly legitimate mobility of our society.' Henry, supra. at 324, 326 NW2d, 497.

Rittershaus, supra. is consistent: "It is well-established that the relocating parent's increased earning potential may improve a child's quality of life..."

The burden of proof for a change of residence, change of domicile case is a preponderance of the evidence, Brown, supra.

The change of legal residence statute, MCL 722.31 (4), contains a list of five factors the court is to "consider." The statute provides not quantitative analysis other than consideration of each of the factors under the preponderance of evidence standard. Based on the foregoing analysis, this court concludes the proposed legal

residence change has capacity to improve the quality of life for the relocating Plaintiff and a lesser capacity to improve the quality of life for Jacob, but the capacity nonetheless is present for Jacob. The court is satisfied that the parents have complied with and utilized the existing court orders of custody and parenting time and the court also concludes Plaintiffs proposed change is not inspired by Plaintiffs motivation to defeat or frustrate Defendant's parenting time. The court is also satisfied that Plaintiff's proposed modification of the parenting arrangements provides an "adequate" basis for preserving and fostering the minor child's relationship with both parents, and the court also concludes both parents will likely comply with the modification. There is no evidence that Defendant's opposition to the change is motivated by any desire to secure a financial advantage, and domestic violence is not a factor in this case.

The statutory test for change of legal residence does not include making findings on where the best interest of the minor child lie:

> We find that the trial court properly determined at the outset that the D'Onofrio factors, now provided in MCL 722.31, were the appropriate inquiry when ruling on Defendant's petition for change of domicile, as opposed to the best interest factors that are appropriate to consider in ruling on a request for a change of custody. Because it is possible to have a domicile change that is more than 100 miles away from the original residence without having a change in the established custodial environment, the trial court did not err in solely applying the D'Onofrio factors to the change of domicile issue. Brown v Loveman, supra., pg. 590-591.

The appellate courts go on, however, to instruct the trial courts if permission is granted to remove the minor child from the state, to consider whether the proposed parenting arrangement is a change in the established custodial environment, then in that event, the court is required to engage in an analysis of the best interest factors under the Child Custody Act, MCL 722.23.

Under the divorce judgment and the testimony of both parents, Jacob's established custodial environment is in the primary care and custody of his mother, subject to reasonable and liberal parenting time with his father, including weekends (sometimes more than three per month, but not always), holidays, school breaks, summer vacation, and other frequent although short contacts. The proposed move of

approximately 3 hours distance (about 175 miles) allows Defendant to have frequent weekends with the minor child, significant time during the summer and other school breaks, coupled with daily contact via telephone, Internet, instant messaging, etc. Any time Defendant chooses to travel the three hours to the Fox Valley area for personal, shopping, employment, or simply to visit with Jacob, that is to have unlimited and unfettered time with Jacob. Although the loss of occasional daily contact, such as attending hockey practices and impromptu fishing time on Lake Superior after work is not insignificant, this change does not amount to a change in the established custodial environment. Therefore, the court will go no further on inquiry into the best interest factors under the Michigan Child Custody Act.

The change of legal residence is GRANTED. Jacob is to remain with his father for the remainder of the school year. The parenting plan, schedule and arrangements proposed by Plaintiff are to be included in the order allowing the change of domicile to be prepared by Plaintiff's attorney, including the qualifiers that Defendant is to have unlimited and unfettered time with Jacob any time Defendant chooses to travel to DePere area.

Plaintiff's attorney is requested to prepare an order consistent with this decision and file it on notice and presentment.

SO ORDERED.

_____

_____,
Circuit Judge

Cc: _____, Attorney for Plaintiff
_____, Attorney for Defendant

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF _____

WENDY SUE (KINSKY) MARSHALL, Plaintiff,

V FILE NO: 97-033804-DM

NICK KINSKY, Defendant

FINDINGS, DECISION AND ORDER ON CHANGE OF DOMICILE

At a session of said Court held in the City of _____ this 26th day of April 2007

PRESENT: THE HONORABLE _____, CIRCUIT JUDGE

Jacob Kinsky's parents, Wendy Marshall and Nick Kinsky, disagree over whether Jacob should move to DePere, Wisconsin with his mother. Wendy Marshall, Jacob Kinsky's mother, asked for approval for moving with Jacob from Marquette, Michigan to DePere, Wisconsin. His father, Nick Kinsky, objects to the move.

Question/Issue

The hearing before the court on April 10, 2007 raises two questions for the court's decision. In considering the questions, the court is to focus primarily on Jacob, MCL 722.31(4). The two main questions raised at hearing are these: 1) does the move have the capacity to improve the quality of life for both Jacob and his mother, the relocating parent and 2) to what degree is the court satisfied that if the move is permitted, it is possible to modify the parenting arrangements and schedule in a manner that provides an adequate basis for preserving and fostering the relationship between Jacob and each parent?

Roadmap

Question #1

Jacob is a twelve-year-old boy. He is excelling in school, and active in sports, including ice hockey, summer and winter. He has a positive peer group, both on the ice, in school, and his community. Jacob lives in a community with which he is familiar and that is familiar with him. He now has ready access to both parents and his eightyear-old half-sister. Jacob has a good brother/sister relationship with his sister, born after Ms. Marshall remarried following her divorce

Question #2

Facts now focus on issues of "quality of life" and "relationships"

from Jacob's father. Jacob also has juvenile diabetes and asthma.

The parents divorced in 1998. Jacob was then almost age four. Following the divorce and for the past eight years, he has lived primarily with his mother, but with frequent overnight time and sometimes daily contact with his father. He enjoys a good relationship with both parents and his half-sister.

Wendy Marshall, her husband, and Jacob's sister have already moved to DePere, Wisconsin. By agreement of his parents, Jacob remains with his father in Marquette to finish this school year.

By moving about 175 miles (3.5 hours drive time) from Marquette, Michigan to DePere, Wisconsin, **Jacob's mother has improved her employment and income**, going from a job at which she was maxed out at $33,000 annually to starting a new job in her field at $47,000 annually (a 42% increase) with better benefits, including health care and pension, as well as prospect for future raises and advancement. DePere, Wisconsin is not an area unfamiliar to Nick Kolinsky. He has family there, and at one time, lived in that area. Even after the divorce, as late as 2005, both of Jacob's parents talked about the possibility of moving to the DePere or Fox Valley area of Northeast Wisconsin for better employment prospects. At the time of the 2005 discussion, Nick Kolinsky had completed his accountancy degree at NMU and was still looking for employment. He later found employment and is now not inclined to relocate.

DePere schools and Marquette schools are comparable, both academically and in extracurricular activity offerings. Although Plaintiff offered some testimony that her research showed the DePere school system to be superior to Marquette schools, there was no direct evidence offered. Published data for both school districts indicate both districts are exceeding state averages on student performance standardized testing, both districts have similar student-teacher ratios, both districts offer advanced placement courses and vocational education courses in their high school curriculum, and both districts place graduates in colleges and universities throughout the United States.

Both districts have school nurses. The Marquette schools and staff are familiar with Jacob's juvenile diabetes. The DePere staff would have to be introduced to and learn about Jacob. In DePere, Jacob would have access to a multi-disciplinary juvenile diabetes clinic located in the Fox Valley that has on staff both a

pediatric endocrinologist and other disciplines. Currently, the Marquette area is not served by a local pediatric endocrinologist or any juvenile diabetes specialist. Jacob now sees a visiting physician from the Detroit area approximately every three months.

In considering the first question, the record clearly establishes the move has the capacity to improve the quality of life for Jacob's mother. She will both see an immediate increase in earnings of approximately 42%, coupled with better present and future benefits, and prospects for future employment advancement. Capacity of the move to improve Jacob's quality of life is not as clear. Contact with his Marquette friends will be reduced (but not entirely eliminated); although this may be balanced with establishment of a new and broader range of friends in the DePere area. He will be going from a community with which he is familiar to an unfamiliar community. He will have similar opportunities for extracurricular activity and athletics in DePere. Jacob would be able to continue summer ice hockey in the Marquette area. Schools are likely comparable.

Addressing Q #1

The Michigan Court of Appeals has held that improvement of the financial circumstances of a child's parent is recognized as a one of the elements of quality of life of a child under the statute. Brown v Loveman, 260 Mich App 576 (2004) so holds:

Introduction to quote

> With regard to the first D'Onofrio factor (corresponding to MCL 722.41 [4][a]), the trial court found that Defendant's job opportunity and move to New York had the potential to improve both Marley's and Defendant's quality of life. Plaintiff argues that the only positive evidence regarding an opportunity for improvement related to Defendant's higher earnings and the opportunities available in New York, and that there was no testimony demonstrating how the move had the capacity to improve Marley's life. But this Court has held that a substantial increase in income that will elevate the quality of life of the relocating parent and child supports a finding that a party has met its burden of proof under the first D'Onofrio factor. See Bielawski, supra. at 593, 358 NW2d, 383. Moreover, the burden of proof by a preponderance of the evidence `recognizes the increasingly legitimate mobility of our society.' Henry, supra. at 324, 326 NW2d, 497.

Under this test, although the proposed move has both positives and negatives for Jacob, on balance, the court finds the move has some capacity, although limited,

to improve Jacob's quality of life as well. The statutory test is one of "capacity" to improve quality of life. It does not require such improvement to be guaranteed or assured. As used in the context of the statute, "capacity" is defined in Webster's New World College Dictionary as:

> **6** the quality of being adaptive (for something) or susceptible (of something); capability; potentiality...

Addressing Q #2

Next, if the move is approved, to what degree is the court satisfied that it is possible to modify the parenting arrangements and schedule in a manner that provides an adequate basis for preserving and fostering the relationship between the child and each parent?

Focused Facts

Since the divorce, Jacob has lived primarily with his mother, but has maintained a good and close relationship with his father. Jacob's father, Nick Kinsky, described a very close relationship with Jacob. He testified that although he formerly worked as a truck driver earning higher wages, he left that employment and took an accounting position in June 2005, earning less money but giving him a more predictable schedule and time with Jacob. His father attends Jacob's hockey practices and games when he is able to, and sees him at practices at least every Monday and Wednesday evening during the winter. In general, the parenting relationship between both parents and Jacob has been worked out so that Nick Kinsky's time with Jacob has been very liberal. Both parents agree that this arrangement has worked well. Currently, Jacob often has daily contact with his father, even though it may not be overnight. He is with his father overnight at a minimum at least every other weekend, and occasionally up to three or four weekends per month, and extended time during the summer. Father/son activities include impromptu fishing trips on Lake Superior, camping, tennis, chess, board games, and just hanging out together. Nick Kinsky describes his relationship with Jacob as being very close and recognizes that even at age twelve, although he shows signs of maturing and "growing up," he still recognizes a small child in Jacob.

Wendy Marshall proposes that should the move be granted, a traditional parenting time schedule be ordered having Jacob with his father at least every other weekend

(with a mid-point exchange, perhaps in Cedar River, Michigan) as well as at least half

(or more) of the summer and shared or alternating holidays and school breaks. Wendy Marshall continues to have extended family in the Marquette County area and on return visits, Jacob would be free to spend time with his father as well. DePere is approximately 3 ½ hours from Marquette. This is an area that people from the Central Upper Peninsula and Marquette frequently travel to for recreation, shopping, cultural enrichment, and family ties. If the move is approved, the court would expect Nick Kinsky to have unfettered time with Jacob any time he is in the Fox River Valley area.

Rule to be applied

The statute asks the court to consider the degree to which the court is satisfied that if the move is permitted, it is possible to order a modification of the schedule and other arrangements "in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent." The inquiry contemplates that if the move is permitted, a modification will occur. The statute recognizes that change in family life is normal. Intact families consisting of two married parents and children move for employment purposes. When these moves occur, there are changes in the lives of that family and each member of the family. In the case of divorced parents, if either parent moves away for employment purposes, there will be changes in the life of that divorced family and the children of those parents. The question of the statute is not whether there will be a change, or no change, rather the question is, can the change occur and yet "provide an adequate basis for preserving and fostering the parental relationship between the child and each parent." The statutory test is not whether an ideal or perfect basis can be maintained, but whether there is an "adequate" basis for preserving the relationship. Also, the statute requires the court to inquire whether the change can preserve and foster the relationship between the child and each parent, not just the parent who is not relocating. Thus, in answering this inquiry, the court is to consider Jacob's relationship with both his mother, the relocating parent, and his father, the non-relocating parent. Webster's New World College Dictionary defines "adequate" as:

> 1 enough or good enough for what is required or needed; sufficient; suitable. **2** barely satisfactory; acceptable but not remarkable.

Rule applied

Applying this test, in the words used by the Legislature, the court finds the proposed arrangements and schedule, if the move is approved, to be "adequate" for

preserving and fostering Jacob's relationship with both his father and mother. In a similar case, Rittershaus v Rittershaus, _____ Mich App_____(COA No. 269052)(January 4, 2007), the Plaintiff mother proposed a relocation from Michigan to Texas. As to the question of preservation of the parent-child relationship, the Court of Appeals held:

> We agree with the trial court that is "possible to order a modification of the parenting time schedule" in this case and adequately "preserve and foster" the parent-child relationship. MCL 722.31 (4)(c). It is true that the change in domicile from Michigan to Texas will seriously impact Defendant's ability to see his children several times a week as he now does. However, the children will come to Michigan for two extended visits each year—for one school holiday break and for half the summer vacation. Defendant has been awarded unlimited parenting time with his children whenever he visits Texas. Furthermore, the separation can be diminished by use of modern communication technology. Defendant will be able to e-mail his children and share photographs over the internet. Defendant will see his children's faces while they communicate using a webcam and Defendant and the children can telephone each other on a daily basis.

The move, in this case, is not from Michigan to Texas but from Marquette, Michigan to DePere, Wisconsin, a distance of approximately 3 $^{1}/_{2}$ hours to an area with which both parents are familiar, and an area that Defendant at one time had considered relocating to himself, and where he has some family ties.

The burden of proof for a change of residence or change of domicile is by a preponderance of the evidence, Brown, supra. The statute, MCL 722.31(4) contains a list of five factors the court is to consider. The statute is not one of a quantitative analysis, totaling up the factors that favor relocation against those that don't, but rather asks the court to consider each of the factors under the preponderance of evidence standard. Applying that burden of proof to consideration of each factor, the court concludes the proposed change has clear capacity to improve the quality of life for the relocating Plaintiff and a lesser capacity to improve the quality of life for Jacob. The court is also satisfied that Wendy Marshall's proposed modification of parenting arrangements and schedule provides an "adequate" basis for preserving and fostering Jacob's relationship with both parents.

Additional details in the rules

Other considerations in the statute were not contested or significantly at issue during the hearing. Both parents have complied with the existing custody and parenting time order, and Nick Kinsky has utilized all of his time under the existing plan. Wendy Mallo's proposed move is not inspired by any intent to defeat or frustrate Nick Kinsky's relationship with Jacob. Based on the record, the court concludes both parents will comply with any modification ordered. Nick Kinsky's opposition to the move is not motivated by a desire to secure a financial advantage. The court does not find domestic violence in either household directed against or witnesses by the child.

Plaintiff Wendy Marshall has carried her burden of securing court authorization for the change of legal residence and domicile of Jacob under the statutory requirements of MCL 722.31.

The statutory test for change of legal residence does not include findings on where the best interests of the child lie:

> We find that the trial court properly determined at the outset that the D'Onofrio factors, now provided in MCL 722.31, were the appropriate inquiry when ruling on Defendant's petition for change of domicile, as opposed to the best interest factors that are appropriate to consider in ruling on a request for a change of custody. Because it is possible to have a domicile change that is more than 100 miles away from the original residence without having a change in the established custodial environment, the trial court did not err in solely applying the D'Onofrio factors to the change of domicile issue. Brown v Loveman, supra., pg. 590-591.

The appellate courts go on, however, to instruct the trial courts if permission is granted to remove the minor child from the state, to consider whether the proposed parenting arrangement is a change in the established custodial environment, then in that event, the court is required to engage in an analysis of the best interest factors under the Child Custody Act, MCL 722.23.

More rule details

Jacob's established custodial environment is in the primary care and custody of his mother, subject to reasonable and liberal parenting time with his father, includingweekends (sometimes more than three per month), holidays, school breaks, summer vacation, and other frequent although short contacts. The proposed move of approximately 3 ½ hours distance (about 175 miles) allows Defendant to have

Focused facts

frequent weekends with the minor child, significant time during the summer and other school breaks, coupled with daily contact via telephone, internet, instant messaging, etc. Any time Defendant chooses to travel to the Fox Valley area for personal, shopping, employment reasons, or to simply visit with Jacob, he is to have unlimited and unfettered time with Jacob. Although the loss of occasional daily contact, such as attending hockey practices and impromptu fishing time on Lake Superior after work is not insignificant, this change does not amount to a change in the established custodial environment. Therefore, the court will go no further on inquiry into the best interest factors under the Michigan Child Custody Act.

Decision

The change of legal residence is GRANTED. Jacob is to remain with his father for the remainder of the school year. The parenting plan, schedule and arrangements proposed by Plaintiff are to be included in the order allowing the change of domicile to be prepared by Plaintiff's attorney, including the qualifiers that Defendant is to have unlimited and unfettered time with Jacob any time Defendant chooses to travel to DePere area.

Plaintiff's attorney is requested to prepare an order consistent with this decision and file it on notice and presentment.

SO ORDERED.

_____
_____,
Circuit Judge

Cc: _____, Attorney for Plaintiff
_____, Attorney for Defendant

Organizing Clear Opinions:

Beyond Logic to Coherence and Character

By Timothy P. Terrell

I start from a premise with which I believe all judges (trial and appellate) would agree: that opinions—whatever else they might seek to accomplish—should at least strive to be "clear." But this merely initiates the debate: Clear about what'? The result? The reasoning? In other words, clear meaning "certain;" or clear meaning "credible"? And clear to whom? The litigants? The lawyers? Appellate courts? Posterity? Whatever your approach to these jurisprudential questions, the questions themselves demonstrate that clarity *in judging* is a serious enough challenge. But the situation is worse. Clarity *in writing about that judging* will be even more daunting.[1]

Unfortunately, judges consistently underestimate the difficulties they face in drafting their opinions. Clarity is often assumed to be a function of carefully chosen words and phrases, or a carefully chosen path of thought. These features, however, while certainly important, are only a small part of a much larger picture. To be understood properly, judicial clarity must be put into a context that contains (among others) two key dimensions that are regularly overlooked or underestimated because both come into play at a point when most writers do not even recognize that writing choices are being made. That point is the very beginning of the opinion, when the writer establishes, often unconsciously, the opinion's structure and its professional attitude.

Examining an opinion's organization reveals that clarity is not simply a function of logic, but requires attention to the separate psychological phenomenon of coherence. Any writer, including any judge, must understand that a document is not written for the writer. It is written for readers of various sorts. Hence, clarity is assessed not simply by the internal standards of the law, but by the perspectives brought to the

Illustration by Tim Lee

Many writers mistakenly assume that organization is synonymous simply with logic.

document by its human processors. This dimension will be developed further below.

The structure of an opinion is also relevant to the even more subtle dimension of professional attitude. No opinion ever seeks only to be clear. Examining its organization also therefore reveals implicit, but nevertheless very important, information about something much deeper: the writer's sense of the appropriate role of judges within both our system of law and our society more generally. This observation, however, may seem not only grandiose but too abstract to be meaningful. Yet a recent debate demonstrates its pertinence very nicely. In a recent volume of the *University of Chicago Law Review*, Judges Richard Posner[2] and Patricia Wald[3] engaged in a sharp exchange on the elements of judicial opinion writing. What began ostensibly as comments on drafting techniques and writing style quickly became a more fundamental debate about appropriate forms of judicial reasoning, the nature of the judicial role, and even the nature of law itself. While this article will not try to match the scope of their conversation, its second part will use their dialogue to link the uncontroversial idea of an opinion's clarity to the quite controversial and illusive stylistic dimension of the opinion's "character."

Author's Note: *I must emphasize that although this article is largely my own, it is not completely so. My co-author on the text noted in the first endnote, Stephen V. Armstrong, who has also co-authored other articles on legal writing with me, played an instrumental role in getting this particular effort off the ground. I would also like to thank Judge Ann Young for her thoughtful comments on earlier drafts. Neither can be blamed, however, for any defects the article will inevitably contain.*

Organizational Coherence

The problems that most often afflict judicial opinions are not the usual targets: verbosity, jargon, convoluted syntax. They are instead organizational problems of the special kind noted above, when choices are made unconsciously. The problems result from a dilemma that confronts all writers who set out to explain how they reached a reasoned conclusion.

Beyond Logic. In an analytical document, writers and readers share an implicit assumption: Although our minds might not be capacious and disciplined enough to "see" all of the analysis at one time, to look down on it as if we were seeing the grid of Manhattan laid out beneath us from the observation deck of the Empire State Building, nevertheless the logic in the document in fact exists "whole," like a geometric proof. This is not a proposition about the nature of logic, however, a morass into which I do not propose to venture. It is a statement about analytic writing generally, about the expectations that join writer and reader as they come together in a document that purports to capture a process of reasoning. A judicial opinion differs from a personal essay or a memoir because we expect that, if we wanted to, we could look back from the conclusion, draw the propositions that led to it into a visible structure, and test the solidity of this edifice.

But reading is temporal, not spatial. We are led to and through the edifice step by step. Sometimes, in fact, we are required to travel extensively through the grounds before we are even given a glimpse of the front door. And writers have choices about the paths they ask us to take, and about how much of a tour guide to be. Do they let the edifice unfold gradually so that we come to appreciate the elegance of its design like worshipful supplicants? Or do they give us a map at the start, like a fellow traveler, making it easier for us to find our way—although by doing so, rule out some of the pleasures (or pains) of the unexpected along the way?

Many writers mistakenly assume that organization is synonymous simply with logic: a clear organization results from logical thinking, a confusing one from murky thinking. But getting ideas in the correct order is only a necessary condition for a clear organization, not a sufficient one. Clarity also depends upon *coherent* organization, which comes instead from strategies that are founded on cognitive psychology.

The Psychology of Coherent Organization: Labels, Structure, and Purpose. Logic, Aristotle would insist, is a neutral, objective quality, an external standard that can be applied consistently to any and every argument, like mathematical theorems to a bridge design. It focuses entirely on the argument, not the arguers. Coherence, on the other hand, involves an inquiry into the arguers - the human *processors* of the syllogisms. The steps of the proof may be there, but do the readers see

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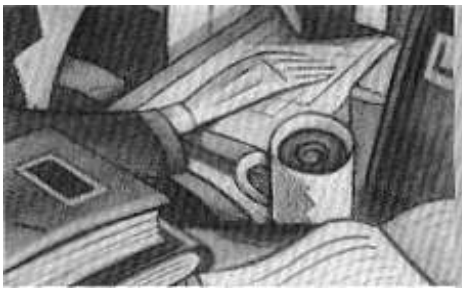


Choices about styles of writing actually reflect fundamental choices about styles of judging.

and appreciate them? And *when* do the readers see them? Immediately, or after they have reread the opinion half a dozen times? Cognitive psychology —the study of how the human mind processes information—teaches some straightforward lessons about the coherence of documents at the organizational level. To summarize those points very briefly[4], coherence is a function of three primary factors: labeling, structure, and purpose (or "point"). Each focuses—ever more acutely—the mind of *both* the reader and the writer. The reader is able to receive and process data more efficiently, and the writer wastes less and less effort in producing the desired message. Rather than overwhelm the reader with details and data, cognitive psychology tells us that difficult information can only be absorbed usefully if these three contextual factors are satisfied first.

Labeling simply tells the reader the general informational context of the document—for a judicial opinion, the areas or issues of law at stake. To return to our earlier metaphor, the reader now has some understanding of the edifice he or she will be viewing—bungalow, mansion, monument, and so on. This allows the reader to disengage those parts of his or her legal memory that are irrelevant, and fully engage those parts that are. The reader's mind is now not simply a passive recipient of information—and therefore easily distracted and impatient—but instead a more focused and active participant in a dialogue with the writer.

Structure engages the reader's mind even further by announcing the analytical steps he or she can anticipate. Now the reader knows not only what kind of edifice he or she will see, but the steps along the tour as well. If that journey is basically familiar, the reader is also more comfortable with, and confident in, the writer's ability to conclude the tour satisfactorily. If the journey is unfamiliar or controversial, at least the reader is better prepared to deal with the rigors of the trek across difficult terrain.

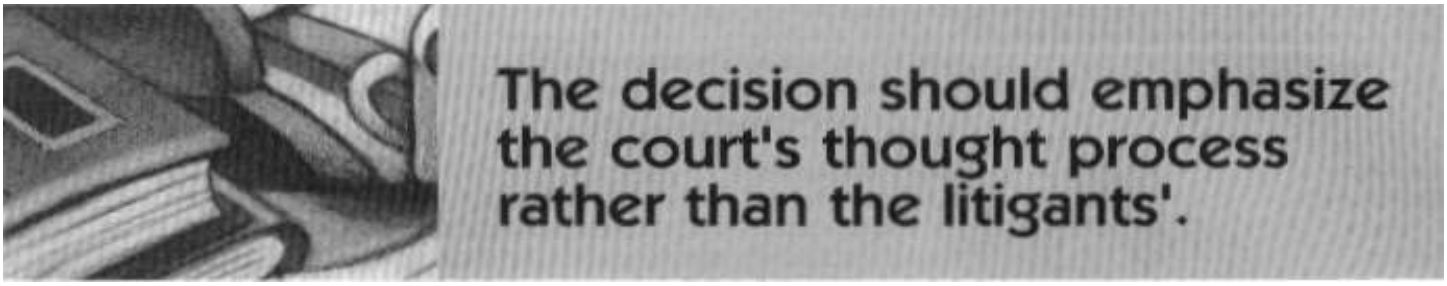
Purpose, or "point," focuses the reader's mind acutely. Now the reason for the journey—why we are where we are, and why the rest of the journey will be worthwhile—becomes evident. Now the reader has an identifiable, substantive job to do with the information the writer provides, and the reader's sense of connection with the writer and the project are more complete. This purpose of the reading endeavor can be presented either in the form of a question that the opinion will answer, or the answer itself that the opinion will defend.

Although this short article is certainly not the appropriate place to explore each of these factors in detail and demonstrate fully their relevance to improved introductions to judicial opinions, we can nevertheless illustrate the impact of these factors in a few examples. Each of the organizational openings below display all of the factors of coherence to one degree or another, and that variation itself emphasizes that there is no single, correct method of combining and reflecting these factors. Nevertheless, by stressing coherence, each presents the image of a confident judicial writer:

> Appellant, an injured worker, sued in district court to enforce a settlement of a claim before the Industrial Accident Board (IAB), and a judgment based on that settlement. The court dismissed the case because jurisdiction remained with the IAB. We reverse, finding the court has jurisdiction because the case before it was not an extension of the original claim, but instead arose from the wrongful refusal to fulfill a contract.
>
> * * *
>
> Torrance attempts to suppress evidence seized from a drawer in his bedroom by the state troopers who searched his parents' home, where he lived. They conducted the search after Torrance's father had signed a form permitting them "to search my home . . . in an attempt to locate my son . . . and to seize and take any letter, papers, materials or other property that they may require for use in their investigation:' The troopers did not clearly explain the form to the father, however, and stated explicitly that they were searching only for Torrance himself. The evidence they seized is therefore inadmissible.
>
> * * *
>
> This action arose from defendants' cancellation of plaintiffs' medical insurance. Plaintiffs sued in Euphoria Superior Court, alleging breach of contract, bad faith, unfair insurance practices, unfair trade practices, and intentional infliction of emotional distress. The case was removed by defendants to this court on the grounds of diversity. Defendants now move for summary judgment, arguing that all the claims relate to an employee benefit plan covered by ERISA, and thus that these state claims are preempted by Section 514 of ERISA. Plaintiffs contend that their insurance coverage was not an ERISA plan. Even if it were such a plan, they also contend, ERISA does not preempt their claims under the Euphoria Unfair Trade Practices Act and the Euphoria Unfair Insurance Practices Act.

Organizational Character

Clarity through coherence, however, is not the only organizational choice a judge faces. Even a writer who aspires to be only objective and impersonal has to recognize, and face up to, some trickier organizational choices—choices at the heart of the debate between Judges Posner and



Wald. Here the idea of "style" comes into play, but, as noted at the beginning of this article, not in a superficial sense. Instead, choices about styles of writing actually reflect fundamental choices about styles of judging,[5] choices that will not only shade or color an opinion, but perhaps overwhelm the reasoning it offers.

The complex concept of writing style can be defined adequately for present purposes, much as Judge Posner does, as the equivalent of the "voice" or "persona" of the writer.[6] More accurately, perhaps, style can be understood as the writer's projection to the reader of the writer's image of his or her professional *character*.[7] In this rhetorical sense, style has to do with the relationship of writer to reader, a relationship that can be, for example, authoritarian or collegial or deferential. Correspondingly, the organizational tone of an opinion can be one that depends for its legitimacy on autocratic claims to professional authority, or, less arrogantly, on invocations of reasoned discourse, or, even more familiarly, on appeals to simple humanity or fundamental values. As Judge Posner notes, however, these choices are not literary flourishes—they can in fact facilitate or retard the search for meaning in a judicial opinion.[8]

The two subsections that follow seek to put some flesh on this abstract debate. First, I will describe a few practical examples of opinion organization or organizational elements that reflect the writer's subtle messages or assumptions about appropriate judicial roles. Second, Judge Posner's analysis of style—particularly of Judge Wald's style—will be brought more directly into focus to allow his views on writing to provide possible information about *his* character.

Examples of Character in Organization. For judges, all writing choices are heavily freighted. Unlike an essayist, every choice by a judge is more than personal. It implicitly defines the writer's understanding of the judicial function. But it is also therefore always personal as well. Different judges will come to different conclusions about the nature of judicial decision making and about the appropriate judicial persona, and these conclusions should be reflected in how they write their opinions. These writing choices can also be variable rather than fixed. The choice the judge makes in these difficult areas may change depending on the case, for the style of reasoning and character that suits one case may not suit another.

The choices in opinion organization that seem most often to be handled unreflectively in the sense meant here are the three developed below—again, very briefly for the sake of the context of this article. Each is difficult to spot because each structure *can* produce an opinion that is logical, as opposed to chaotic, and basically clear to the reader, as opposed to nonsensical or impenetrable. But the opinion's logic and clarity will often be unnecessarily burdened and labored, and ultimately unsatisfactory, because these organizational choices are not fully under the writer's control.

Results: Finding versus reporting. Implicit in each of the examples presented in the previous section is the judicial writer's belief that the job of the judge is not to demonstrate personal professional angst in the form of a search through the law for an answer. Instead, the writer apparently believes that the opinion is a place to report a result and then *defend* it. That defense should of course be thorough, but note that its length and breadth will not be dictated by the actual series of steps—and missteps—the judge took to reach the analytical end. The presentation of reasoning will instead be a function of 20/20 *hindsight*, which reveals the steps *necessary* to the conclusion. The opinion in this latter form is usually much less chatty in tone, and perhaps even a bit austere, for the writer imagines himself or herself delivering information efficiently rather than discursively. The author's own struggle with the material is therefore far less relevant, while delivering the substantive "bottom line" seems much more appropriate for the early paragraphs of the opinion.

Foundations: Regurgitating versus sifting. A similar implicit choice will be made by every judge after whatever opening is presented. Opinions are always based on the application of law to facts, but now the questions become how many facts and how much law must be included in the decision. If the judge pays little attention to this important choice, the opinion is usually encumbered with loads of detail—every fact presented seems to find its way into the court's description of the background of the legal dispute, and every element of law that arose during argument or research is faithfully recited. Although the urge behind overinclusion is the defendable one of thoroughness, a truly controlled presentation is also *focused*. That impression requires a writer to sift the material of the document rather than simply reproduce all of it and then try to make sense of it all.

Reasoning: Reacting versus dominating. Again, closely related to the first two structural choices is a third into which judges will often lapse unconsciously. A quick, and therefore seductively attractive, way to organize any opinion is to let the *parties* supply its pieces and order. The judge, in

The writing style of the opinion matters quite directly to the adequacy of the enterprise.

other words, can simply react to the arguments presented rather than determine independently whether that structure makes the best sense in the larger scheme of things. Reasoning by reacting *could* be effective in certain circumstances, but more often it is a sign of judicial despair or fatigue. Some judges seem to believe that this form of organization is the only method for the court to demonstrate appropriate respect for the arguments of the litigants, carefully responding in turn to each side's points. But respect of this sort does not require the judge to concede the structure of his or her opinion to the parties. Respect is owed not just to the parties, but to the court as well. For a judge to demonstrate appropriate professional control of any case, the decision should emphasize the *court's* thought process rather than the litigants'. That thought process can indeed ultimately contain a response to each point raised by each party, if necessary, but the order and method of response should clearly be under the judge's control.

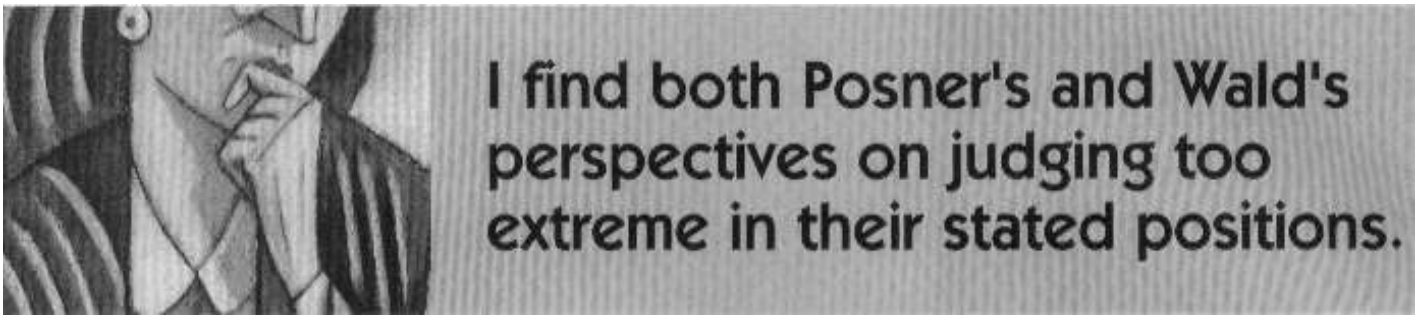
Each of the organizational non-strategies discussed above has an unfortunate implication for any opinion writer. At its core, unreflective structure suggests that the judge is a *victim* of the litigation process, suffering along with everyone else in the struggle to resolve the dispute. Although this egalitarian picture may often be accurate, and indeed to some judges attractive, I would argue to the contrary that the judge's more appropriate role is to *dominate* the opinion just the way any good trial judge dominates his or her courtroom. By this I do not mean aggressive authoritarianism—instead, the rule of law depends on respect for the law, which in turn necessarily entails respect for the work of judges. The kind of coherence in organization for which I have been arguing here generates, I believe, the kind of respect the law deserves.

Posner and Wald: Stance and Substance. When style *does* become conscious in judicial opinions, important issues concerning the judicial function rise to the surface, and occasionally provoke disagreements like the exchange between Judges Posner and Wald noted earlier. Their articles did not start out as a debate, however. They were each contributing to a small symposium on the general topic of opinion writing, with Judge Wald commenting primarily on the mechanics of producing opinions in a complex environment, and Judge Posner choosing instead to use the opportunity to delve more deeply into assessing the *worth* of various forms of judicial writing to the law itself. At the end of his analysis, however, Judge Posner used an opinion by Judge Wald[9] to illustrate what he believed to be an inadequate technique of judging, a technique that was not up to the analytical standards he believed our system of law deserved. Judge Wald reacted predictably to this rather harsh assessment—indeed, something of an ambush—by a fellow member of the bench, adding a somewhat heated reply to the symposium.

The essence of Judge Posner's criticism of opinions like the one of Judge Wald he chose to analyze is, first and foremost, that the writing style of the opinion matters quite directly to the adequacy of the enterprise. The "stance" of the judge, if you will, in terms of his or her implicit voice or character, necessarily impacts the *substance* of the decision, or the content of the judge's work that supports whatever stance is chosen. Judge Posner identified two fundamental analytical styles as characterizing the bulk of judicial opinions: what he termed "pure" and "impure" approaches.[10] By "pure" he meant traditional, doctrinal, generally unimaginative decisions that depended basically on the supposed neutrality and objectivity of the law for their legitimacy. Such opinions were often characterized, interestingly enough, by statements of the judge's conclusion at the beginning of the opinion rather than the end, an element of style that I earlier praised as promoting coherence and reflecting confidence. "Impure" decisions, in contrast, were more openly communicative about the writer's struggles through the relevant legal material, and much more willing to view theoretical perspectives on the law as part of that material.

Judge Posner strongly preferred the latter, more discursive and dramatic style, linking it to the deeper jurisprudential category of "pragmatism."[11] Impure judicial thinkers, he argued, were much more likely to pay serious attention to the consequences of their decisions in society. Pure thinkers, on the other hand, were probably jurisprudential "formalists,"[12] and thus given to logical, canonical, detached attitudes.

His criticism of Judge Wald's opinion, then, was that it was unnecessarily "pure" by being mired in the details of the holdings of prior cases. The reasoning should instead have searched more openly for the broader legal and social contexts that the issue implicated. Much of the precedent that occupied Judge Wald could then have been ignored as beside the real "point" of the case. Perhaps harshest of all, Judge Posner contended that approaches like Judge Wald's used words not to enable thought, but to substitute for it:[13]



> The pure style is an anodyne for thought. The impure style forces—well, invites—the writer to dig below the verbal surface to the doctrines that he is interpreting and applying. What he may find is merely his own emotions. . . . But if the judge is lucky, he may find, when he digs beneath the verbal surface of legal doctrine, the deep springs of the law.[14]

Judge Wald's response to Judge Posner's "impure pragmatism" was blunt, emphasizing the danger and arrogance implicit in his review of the work of other judges:

> Judge Posner is criticizing a style of judging, not a style of writing, as if, in every opinion, every principle of law or interpretation were up for grabs, a happy hunting ground for the creative judge-explorer. He finds the simple marshaling of facts and their placement in a line of precedent unworthy of the talents of the truly intellectual judge. The incremental growth of the law through such opinions is apparently for lesser judges.[15]

Consistent with this harsh assessment of Posnerian ambition, Judge Wald identified the much more humble values of credibility and consistency as the foundation for the legitimacy of judging within the legal system.[16] Likewise, her sense of audience was quite different from Posner's. Rather than worry about academic perspectives, she would focus on "the litigants and lawyers . . . who look to . . . opinions for the law they must follow."[17] With them in mind, she rejected Judge Posner's discursive writing style that develops toward a conclusion rather than announcing it:

> [O]pinions are more user-friendly if they state the outcome right off. They are not just "storytelling" exercises seeking to create dramatic tension. Real lives and fortunes are at stake.[18]

For Judge Wald, then, the relationship of stance and substance is apparently more arm's-length than it is for Judge Posner. While he would see a merging of the two in the best opinions, she would insist on more self--conscious separation of these elements, with the latter dominating the former.

The outcome of this debate, however, for present purposes can only be a stalemate. Both of these judicial perspectives can, in the hands of judges as capable as these two, yield decisions that are reached with "integrity," to borrow a description urged by the legal theorist Ronald Dworkin.[19] The point of this summary of the Posner-Wald debate is not to resolve it, but to return us to the opening theme of this article: demonstrating just how controversial and challenging the seemingly straightforward expectation of "clarity" in judicial opinions can actually be. Invoking the topic of "writing style" is now anything but superficial. Within it lurks fundamental substantive legal disagreement. For Judge Posner, the goal of the best judges is apparently to be "clearly deep" in every opinion, pushing legal analysis to its institutional limits. Judge Wald, on the other hand, would strive for "clear practical guidance" in her work, emphasizing the human rather than theoretical elements within the law. Neither is wrong.

But neither is necessarily right as well. I find both these perspectives on judging too extreme in their stated forms. Judge Posner's urge to be discursive in searching for the underground currents of the law strikes me as an approach that runs the danger of becoming self-indulgent unless it is carefully controlled. Judge Posner is not merely suggesting that judges show "their minds at work" on the page; instead, he seems to be endorsing a style that unabashedly proclaims "this is *my* mind at work."[20] It is a writing strategy that can slip easily and unconsciously into a professional egotism that would not, I believe, be consistent with our usual understanding of the rule of law.

Yet if this kind of style might lack a sense of judicial humility, the approach defended by Judge Wald seems to overlook the inevitable relevance of judicial character to a judge's opinion—not just to its substance, but also to the respect it will be given by others.[21] To be more oriented toward the practical "bottom line," rather than more forthrightly concerned with broader legal policy, is a judicial choice in each case, and indeed regarding each *part* of a case. And it is a choice not between two extremes, but among a range of possibilities framed by these extremes. The point here, again, is not that one model or the other is clearly and usually right or wrong, but that the character of the decision is a choice that must be confronted directly, not by default.

Conclusion

In the context of judicial opinions, clarity and style are not separate topics. Nor are they necessarily antagonists. At the "macro" level of documents, when basic organizational choices are being made, the two should actually serve and enhance each other. Coherent and confident writing helps make a legal analysis and its result seem inevitable,[22] rather than forced or strained. That sense of irresistibility serves our legal system well, even when the law is not as certain as we might like it to be.

Notes

[1] Much of the background and perspective on legal writing that is contained in this article can be found in S. ARMSTRONG & T. TERRELL, THINKING LIKE A WRITER: A LAWYER'S GUIDE TO WRITING AND EDITING (1992).

[2] R. Posner, *Judges' Writing Styles (And Do They Matter)?* 62 U. CHI. L. REV. 1421 (1995) [hereinafter *Writing Styles*].

[3] P. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371 (1995) [hereinafter *Rhetoric of Results*]; P. Wald, *A Reply to Judge Posner*, 62 U. CHI. L. REV. 1451 (1995) [hereinafter *Reply*].

[4] As noted earlier, a more complete discussion of these opinions is contained in THINKING LIKE A WRITER, *supra note* 1, at 3-1 to 3-28 & 10-14 to 10-22.

[5] See text accompanying note 14, *infra*.

[6] *Writing Styles*, *supra* note 2, at 1425.

[7] *See* THINKING LIKE A WRITER, *supra* note 1, at 8-5 through 8-10.

[8] *Writing Styles*, *supra* note 2, at 1424 & 1442.

[9] United States v. Morris, 977 F.2d 617 (D.C. Cir. 1992).

[10] *Writing Styles*, *supra* note 2, at 1426–32.

[11] *Id.* at 1432.

[12] *Id.*

[13] *Id.* at 1447.

[14] *Id.*

[15] *Reply*, *supra* note 3, at 1452–53.

[16] *Rhetoric of Results*, *supra* note 3, at 1373.

[17] *Reply*, *supra* note 3, at 1453.

[18] *Id.*

[19] R. DWORKIN, LAW'S EMPIRE 223–75 (1986).

[20] I do not mean to suggest that Judge Posner is endorsing a personal, cathartic style of presentation. He specifically notes the dangers and illegitimacy of such an approach to judging. *See Writing Styles*, *supra* note 2, at 1435. But one need not be emotional to be self-indulgent. One can certainly be carefully analytic and nevertheless revel in one's own acuteness.

[21] In her lead article for the symposium, Judge Wald has a full section devoted to "Style and Personality," but even this section does not delve into the issue of judicial character in the form developed here. *Rhetoric of Results*, *supra* note 3, at 1415–18.

[22] *Writing Styles*, *supra* note 2, at 1430.