

How *Not* to Impress a Judge with Your Writing*

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As a 30-year litigator and frequent author, I'm often asked for advice on how to write to make the best impression on judges. While a lot depends on the facts and law at issue in each case, I can offer some pointers on how *not* to write — thanks to the bad impressions made by lawyers in the following cautionary tales.

It's a pleading, not a screenplay.

Lawyers are frequently reminded that their complaints or petitions need to tell a story. While that's true, it's also wise to remember that your audience is a judge rather than a bunch of Hollywood studio executives. Massachusetts lawyer Ilya Liviz will probably remember that wisdom next time, after being threatened with Rule 11 sanctions by U.S. District Judge Indira Talwani for filing a complaint in the form of a screenplay.¹

Liviz chose the unusual format to draw attention to his civil-rights lawsuit against Massachusetts' highest state court on behalf of an elderly grandmother whose driver's license had been suspended for allegedly misusing her husband's handicapped-parking placard. Liviz labeled the pleading a "Legal Code Jurist production," included a "plot" summary, and divided the complaint into six acts, complete with stage directions, characters, and descrip-

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¹ Mem. & Order Den. Pl.'s Appl. Proceed Without Fees or Costs 1, 2–3, Dec. 3, 2018, No. 18-12059-IT (found at <https://www.abajournal.com/files/LlivizJudgeRule11Reminder.pdf>).

tions like this: “Slight shadow appears as the officer approaches the unsuspecting Grandma, with his vehicle blocking her in, and the lights fully flashing.”²

According to Liviz, he filed the 18-page complaint in screenplay form because he “needed to get attention to the real issue here, . . . the fact that people’s rights are being deprived by the judiciary.”³ Judge Talwani, however, was not amused, and entered an order warning Liviz that his creative pleading didn’t satisfy federal procedural requirements for a “short and plain statement” showing grounds for relief.⁴ So it’s doubtful that Liviz’s next pleading will begin with “Coming soon to a theater near you.”

It’s a brief, not a comic book.

In 2012, attorney Bob Kohn was in a quandary. He had been invited to submit an amicus brief in a landmark antitrust case brought by the Department of Justice against book publishers like Apple for e-book price-fixing.⁵ But U.S. District Judge Denise Cote of the Southern District of New York had rejected his initial 25-page document. Faced with a five-page limit imposed by Judge Cote, Kohn decided on a (graphic) novel approach: he submitted his brief in comic-book form.⁶

² Pat Murphy, “Screenplay” Filed in Federal Court Pits Grandma Against State High Court, Det. Legal News (Dec. 3, 2018), <http://www.legalnews.com/detroit/1467370/>.

³ Debra Cassens Weiss, *Federal Judge Warns of Possible Sanctions After Lawyer Files Complaint in Screenplay Format*, ABA J. (Dec. 12, 2018), https://www.abajournal.com/news/article/federal_judge_warns_lawyer_of_possible_sanction_after_he_files_complaint_in.

⁴ Mem. & Order at 2.

⁵ *United States v. Apple, Inc.*, 889 F. Supp. 2d 623, 630 (S.D.N.Y. 2012).

⁶ Debra Cassens Weiss, *Faced with a Five-Page Limit, Lawyer Files Cartoon Amicus Brief with Proper Font Size*, ABA J. (Sept. 5, 2012), <https://www>

Working with an illustrator who was attending Harvard with Kohn's daughter, the music-licensing lawyer relied on pictures and word bubbles to explain illegal downloading and how traditional notions of supply and demand might not apply to e-books.⁷ *Publishers Weekly* called Kohn's cartoon brief "brilliant," a "not so subtle jab at the court for limiting such a complicated case to five page briefs," and "widely digestible for the general public."⁸ Judge Cote, alas, was not persuaded; just a day after Kohn submitted his brief, she entered a judgment approving the DOJ settlement that Kohn was opposing.⁹

The moral of the story: judges might say that they want you to draw them a picture, but don't take it literally.

It's a brief, not a chance to show off your pop-culture knowledge.

Reed Smith partner Eric Dubelier recently learned that U.S. District Judge Dabney Friedrich didn't share his fondness for pop culture. Dubelier was representing Concord Management and Consulting, one of a number of Russian entities and nationals accused of trying to influence the 2016 presidential election.

In a brief questioning the special counsel's trustworthiness, Dubelier invoked lines from *Tweety Bird*¹⁰ and from the 1978 movie *Animal House*, analogizing the special counsel's argument

.abajournal.com/news/article/faced_with_a_five-page_limit_lawyer_files
_cartoon_amicus_brief_with_proper_.

⁷ *Id.*

⁸ Andrew Albanese, *A Work of Art: Bob Kohn Submits DoJ Amicus Brief as Comic Strip*, *Publishers Weekly* (Sept. 4, 2012), <https://www.publishersweekly.com/pw/by-topic/digital/content-and-e-books/article/53819-a-work-of-art-bob-kohn-submits-doj-amicus-brief-as-comic-strip.html>.

⁹ *Apple*, 889 F. Supp. 2d at 626.

¹⁰ Def.'s Resp. to Supp. Br. Opp. Mot. Dismiss 1, Oct. 25, 2018, No. 1:18-cr-00032-2-DLF (found at <https://assets.documentcloud.org/documents/5676858/10-25-18-Concord-Response-Govt-Supplemental.pdf>).

to Otter's advice to Flounder: "You f***ed up . . . you trusted us."¹¹ Judge Friedrich told Dubelier that he needed to "knock it off" with his colorful briefs, describing them as "unprofessional, inappropriate, and ineffective."¹²

Judge Friedrich is hardly the only jurist to find some pop-culture references tone-deaf. In 2010, the Montana Supreme Court took exception with the choice of movie quotations selected by the appellate counsel for Duane Belanus, who was appealing a rape conviction. Belanus's brief on appeal opened with "an expletive-laden quote from former boxer Mike Tyson in the 2009 film *The Hangover*."¹³ The court called it "a peculiar choice for this case, given Tyson's conviction for raping an 18-year-old girl in Indiana in 1992, where his defense (like Belanus' here) was that the sex was consensual."¹⁴ The court observed that Belanus's attempt to channel the Tyson quotation to excuse "outrageous acts committed while extremely intoxicated" gave "pulp fiction a bad name."¹⁵ Belanus's story, the court remarked, was "as delusional as it is unbelievable, and it is not surprising that the jury didn't buy it."¹⁶

¹¹ Def.'s Reply in Supp. Mot. Compel Disc. 1, Jan. 4, 2019, No. 1:18-cr-00032-2-DLF (found at <https://assets.documentcloud.org/documents/5676753/1-4-19-Concord-Reply.pdf>).

¹² Debra Cassens Weiss, *Reed Smith Partner Cites "Animal House" and Tweety Bird, Leading to Scolding by Federal Judge*, ABA J. (Jan. 8, 2019), <https://www.abajournal.com/news/article/reed-smith-partner-cites-animal-house-and-tweety-bird-leading-to-scolding-by-federal-judge>; see also Spencer S. Hsu, *Russian Firm Indicted in Mueller Probe Accuses Trump-Appointed Judge of "Bias"*, Wash. Post (Jan. 7, 2019), https://www.washingtonpost.com/local/legal-issues/russian-firm-indicted-in-mueller-probe-accuses-trump-appointed-judge-of-bias/2019/01/07/194a79e0-129f-11e9-803c-4ef28312c8b9_story.html.

¹³ *State v. Belanus*, 240 P.3d 1021, 1022 (Mont. 2010).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*