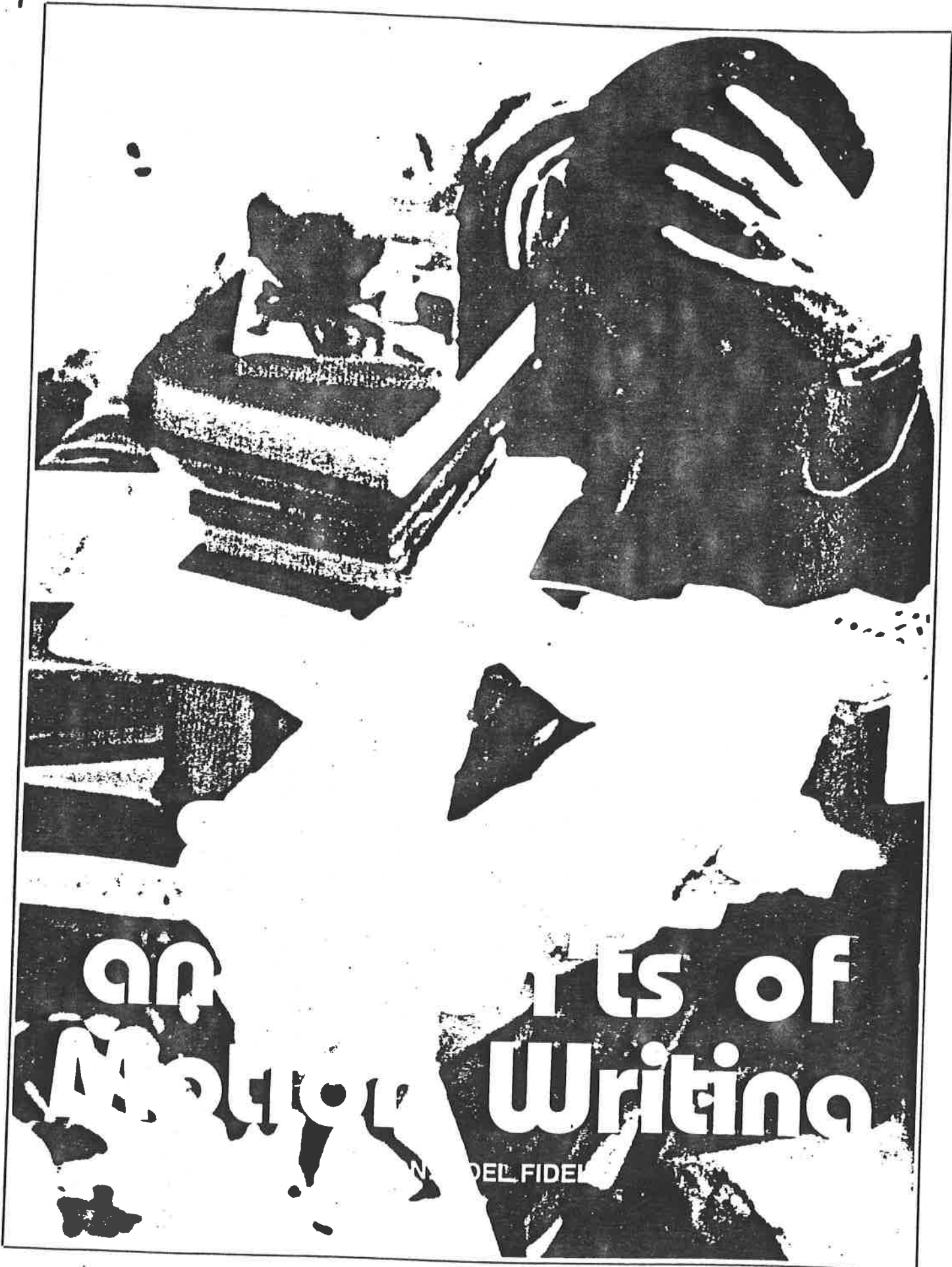


Some Do's and Don't's of Motion Writing

*From 8/83 Arizona Bar Journal
(the State Bar magazine now called Arizona Attorney)*



an Arts of Writing

IN DEL FIDEL

What follows are reflections on motion writing by a trial judge of fairly recent vintage. They are offered to assist and to encourage busy lawyers to become more persuasive in written arguments to busy judges. Much could be deduced by any lawyer who gave a moment's thought to the hectic schedule of the trial judge. Yet from common practice it appears that such a moment's thought is rarely given. To those who charge that the author, when in practice, was a frequent violator of these precepts, I reply, it is not without precedent that a reformed sinner should take to preaching.

The Trial Judge Has No Time On His Hands Consider the trial judge. Not surprisingly, he spends much of his time in the court room conducting trials. Apart from the trial of cases and associated duties, the judge must conduct a motion calendar. On the Superior Court in Maricopa County the flood of motions is nearly overwhelming. Each nook and cranny of a judge's calendar may be booked for argument as much as two months in advance. He lacks the time enjoyed by the appellate judge to read, think, confer, research, and test his thought by circulation of opinion. Nor does he have his appellate colleague's research staff. Yet for motion after motion he must make the time to read, prepare for argument, check pertinent cases, and think through his result.

The starting point for motion practice is to assume that the trial judge has *no* time to read your memorandum. That does not mean that he will not make time; but he has none, and you had best conduct your trial court motion practice with that essential fact in mind.

Know Your Audience

It would be helpful to each lawyer who commenced to draft a legal memorandum to keep this picture in his mind: Imagine that the judge has found no time to read your memo in the course of a working day. It is now the

evening or weekend before argument or very early that same morning. The judge is grumpy. If it's morning he hasn't had his coffee. If it's evening he'd rather read a book. If it's a weekend he would rather do anything, even mow his lawn or clip his hedges. Skeptical and impatient, he hefts your brief in all its ponderous bulk. He opens it. As he reels backward from the first burst of your prose, a shrill voice whispers in his ear, "You're not getting paid enough for this!"

How do you tame this dragon? How do you catch his eye and hold it? Some thoughts follow.

A Plea To Brevity

If brevity is the soul of wit, it is the sinew of persuasion. In legal writing the McLuhanesque principle -- more is less -- is particularly apt. Some judges refuse to read memos of more than ten pages. Others, not entirely in jest, espouse the quarter-inch rule of summary judgment: if the thickness of the proponent's combined briefs exceeds a quarter inch, there must be an issue of fact in there somewhere. The longer your memo, the more likely that it will be skimmed. All your subtlety, all nuance, the climactic points which you saved for last may sink without a trace. Pare ruthlessly, state the essence, be concise. For each page after ten, ask yourself, "Is the point I'm making so important that it justifies the increased risk that the judge will ignore or only superficially review

my entire brief?" If the answer is yes, your next question should be, "What point have I already made that I can eliminate or more succinctly state?"

Throw Out the Canned Goods

A trial judge does not need three pages of case law to establish that an issue of material fact makes summary judgment inappropriate. If you start your memo with some such canned passage that your firm has used since territorial days, the judge will conclude that you are wasting his time and milking your client's dollar.

Statement of Facts with Recorded Source

In memoranda concerning summary judgment, essential facts are too often neglected or diffused within the body of the motion or response. You know, or should know before you start to write, which facts are pertinent to your point. Don't simply incorporate by reference the depositions and interrogatories and assume that the judge will ferret out their essence for you. He won't. Provide a statement of facts, include within it the essential facts, and provide a record source for each. The formal rules of motion pleading may not require it, but the judge will like it, and your memo will be



Announcing the end of the isolated employee.

People have always worked better when they could communicate. So why should they have to put up with work stations that are isolated?

Compucorp doesn't think they should. That's why Compucorp invented OmegaNet®. It's a local area network that allows you to connect your information processing work stations together in a single system. What goes in one terminal can come out another. Your work stations can share information from common files. And they can share common resources, such as printers.

OmegaNet® can utilize Compucorp's own Data Base Management System, one of the most sophisticated software systems ever developed. You can find individual records in a flash - even if there are tens of thousands of them. It makes very complex tasks very simple to achieve. And with our communication packages, you can connect your work stations to most brands of main-frame computers.

Compucorp's 745 diskless workstation - specifically designed for OmegaNet® - is less costly than many other workstations. And all

OmegaNet' from Compucorp

Compucorp information processors can operate as part of OmegaNet.®

Compucorp was rated Number One in the National Datapro survey of word processor users in both 1981 and 1982. Now the people at Compucorp have applied their award-winning technology to their network. For more information about OmegaNet®, send in the coupon today.

Send to:

Compucorp/Arizona
2701 E. Thomas Rd., Unit B
Phoenix, Arizona 85016 (602) 956-4934

Please have a
Compucorp Representative
call me to discuss
OmegaNet

Please send
me more
information

name _____
title _____
company name _____
street address _____
city _____ state _____
zip _____ area code _____ telephone _____

ATTORNEY NAVAJO NATION

The Navajo Nation Department of Justice seeks to hire an attorney to advise and assist the Navajo Tax Commission in administering the recently created Tribal Tax Program. Should be knowledgeable in administrative law, as well as tax law. Other responsibilities will include advising the Tribe in federal and state tax matters. This is a 20-attorney department. Salary to be negotiated. Send resume and writing sample to:

The Navajo Nation Dept. of Personnel Services
PO Box 308, Window Rock, AZ 86515



HON. NOEL FIDEL

The Honorable Noel Fidel, Judge Superior Court of Arizona in Maricopa County has written two articles which have appeared in *Trial Magazine* and *Proofs of Facts*. He graduated from Dartmouth College in 1966 with a B.A. and Harvard Law School with a J.D. in 1969. He was a member of the firm of Langerman, Begam, Lewis and Marks, P.A. from 1973 to 1982 before becoming a Superior Court judge.

clearer and better for having done it.

Clarity

A legal memorandum is not a mystery story. Its element is not suspense. State your point at the outset of each argument and confine each argument to the point. To a busy trial judge you are most likely to be persuasive if your memo is slim. If your style is simple and declarative, if you have trimmed out all the excess, and if your structure is so transparent that the outline of your arguments and essential points will be obvious even if the judge lapses into skimming rather than reading line by line.

Site Cases to Effect or Don't Cite Them at All

The unadorned reference to a case is not enough to send the judge scurrying to the bookshelf. You must tell him more. On the other hand, you need not quote at epic length. Indeed, a sure way to induce skimming is the back-to-back employment of two quotes of more than ten lines each. There is a middle ground. Dust off your old law school study practice of abstracting cases. Describe (always briefly) the essential facts, the pertinent issue, and the holding. Select a short helpful quote, and show its application to your case. Give enough to make your point but not so much as to sink your

brief from excess weight. If the case is not an Arizona case, attach it to the judge's copy, and highlight the pertinent passage. Every time saver helps.

Be Certain of Your Cites

Don't permit yourself to be so rushed as to overlook shepardizing. And don't rely on headnotes without checking the text. The judge may catch you in an erroneous reference. If he doesn't your opponent might. If your opponent doesn't, the appellate court might. However you are caught in reference to weakened or abandoned case law, your reputation will suffer. The judge may conclude that you are careless at best or deliberately misleading at worst.

The Proofreader's Route to Style

Does no one proofread anymore? Lawyers routinely file documents in court so poor in spelling and in grammar that an eighth grader would be ashamed to sign them. It was not by chance that I earlier wrote of commencing to *draft* your brief.

The dictating machine is a wondrous tool, which permits a lawyer in the solitude of his office to take full pleasure in the sound of his own voice. Yet one must pay the piper when the music stops: one must edit. Most of us speak less succinctly and grammatically than we write. When a lawyer has dictated and signed a brief without reading the transcription, his lack of regard for the reader shows. His thoughts lack crispness and his words are dull. If the brief drips with careless spelling and uncertain grammar, the impression is poor and abiding.

Of course, every judge is aware of the poltergeist which appears in the still of night to plague even the most careful proofreader by changing "plumber" to "plummer" or "principle" to "principal" in his final draft. (Any errors in this article, I assure you, are the work of such an imp.) With due allowance for such errors, however, assume that the spelling, punctuation, grammar, and style of your writing are not your secretary's responsibility; they are yours. If you put your

name on it, make it right.

A practical suggestion in this regard: if you harbor the secret thought that your grammar has grown rusty and your style could be improved, relieve yourself. Go out and buy Strunk and White's "The Elements of Style." It is only 76 pages long. Read it tonight, or if you will be busy, read it tomorrow morning at the latest. Then put a note on your calendar a month from now to read it again. There is no way that you can spend your time that will be more beneficial to your practice.

Conclusion

These points are elementary in their simplicity. Yet check your recent work product, the memo which awaits your signature at this moment. Does it meet these simple criteria? Is it the product of a lawyer's craft? Do you take pride in it? If you do not take pride in it, will you put your name to it? You are a wordsmith. Are you making your words count? The purpose of motion advocacy, as of all advocacy, is persuasion. As judges we say, "Come and persuade us. We love it when you do it well."



Unless you are immune to Errors & Omissions, call today for an Application and/or more detailed information about any of our Lawyer or General Insurance Programs.

We are the Agency-Representative for American Home Assurance Company whose programs are Endorsed and Recommended by the State Bar of Arizona. The Company has amended policy and rates to add new and broader coverage at less cost. Special programs have been designed to fit specific needs of the beginner or established attorney, partnership or large law firm. We are Agents-Brokers for a full-line of insurance coverages and services. We welcome your inquiry and invite you to call us today for information on:

Full-Time or Part-Time Attorney Policy
Optional Loss Payment Only Deductible Endorsement
Public Official Professional Liability Endorsement
Outside Directorship Policy
Special Fidelity Policy Includes Dishonest Acts of Partners
Business Office Packages-Fidelity and Surety Bonds

Professional Liability Limits from \$100,000 to \$10 Million'-Premium Financing Available

O'MALLEY INSURANCE COMPANY, INC.

Agents and Brokers

2303 North Central Avenue
Phoenix 85004

Phone: (602) 252-3957

Post Office Box 25108
Phoenix 85002