



EX ANTE

BASHMAN AND THE JUDGES

During 2003-04, Howard Bashman of *How Appealing* conducted a series of interviews called “20 Questions for the Appellate Judge” (howappealing.law.com/20q/). Ten years later they are still worth reading – from the first interview, with Judge Jerry Smith of the U.S. Court of Appeals for the Fifth Circuit (*e.g.*, “in answer to the question I wish you had asked, Pete Rose should not be admitted into the Hall of Fame, ever or under any circumstances. But if the All-Star Game can end in a tie because the players are ‘tired,’ I guess anything can happen.”), to the last, with Chief Justice Shirley Abrahamson of the Wisconsin Supreme Court (*e.g.*, “I favor [judicial] elections because I favor transparent government. Too much of what goes on in the appointment and confirmation process is kept behind closed doors; the public does not have an opportunity for meaningful participation in the process. Ideally, the elective system can also be an educational experience for both the judges and the electorate.”).

One of our favorite moments is this exchange with Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit:

Bashman: Your opinions tend to be a pleasure to read, which is something that I cannot honestly say of the opinions written by the vast majority of your colleagues on the U.S. Courts of Appeals. Why, in your view, do not more of your colleagues endeavor to write opinions that are interesting and accessible? And perhaps you would be so kind as to list no more than a handful of your opinions that qualify as your all-time favorites.

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Easterbrook: Writing good opinions is hard work and cannot be delegated. Opinions (like briefs, see the next question) should be simple, direct, and addressed to intelligent generalists. I learned these skills from many teachers, primarily my reviewers and colleagues in the SG's Office. I have had a long time to practice, which is why opinions by my own hand are better than those drafted by law clerks, for they have the pallor of institutional products. Judges can be direct and even venturesome; clerks can't. They cover all bases; qualify all utterances; pile on the jargon, vogue phrases, euphemisms, and acronyms; confuse nouns with adjectives (Fowler called the disease "noun plague"); suppose that intensifying adverbs make propositions stronger; and often assume that whatever is novel to them is novel to everyone else. These collectively give opinions the consistency of bread pudding.

Every year I reread Strunk & White's *Elements of Style* and Bryan Garner's *Elements of Legal Style* to guard against backsliding. I don't agree with all of their recommendations, but at least I know when a recommendation is being spurned and have reasons for striking off independently. Lawyers tend to be wretched writers, which is odd given that the written word is their stock in trade. Perhaps the problem comes from reading principally the work of other lawyers. Judges and other lawyers should spend more time with books and magazines, where exposition is at a higher level. If all lawyers would read Strunk & White and Garner even once, the world would be a better place. A turn through Ambrose Bierce's *Devil's Dictionary* wouldn't hurt, either.

A "handful" of opinions would be ten to twenty (by the counting conventions mentioned in answer to Question 2), but I'll cite only seven. All are more than a decade old, which avoids entanglement with contemporary disputes. I've selected them for a combination of substantive and stylistic reasons. See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *affirmed summarily*, 475 U.S. 1001 (1986); *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986); *In re Erickson*, 815 F.2d 1090 (7th Cir. 1987); *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989); *United States v. Van Fossan*, 899 F.2d 636 (7th Cir. 1990); *Miller v. South Bend*, 904 F.2d 1081 (7th Cir. 1990) (en banc) (dissenting), *reversed*, 501 U.S. 560 (1991); *United States v. Marshall*, 908 F.2d 1312 (7th Cir. 1990) (en banc), *affirmed under the name Chapman v. United States*, 500 U.S. 453 (1991).

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And here is another gem, from the “20 Questions” with Justice Kay B. Cobb of the Supreme Court of Mississippi:

Bashman: I see that before you became a Justice you served in the Mississippi State Senate. How if at all does having served in the legislative branch influence you in your work as a judge?

Cobb: It helps to have been a part of the law-making process; to have a thorough understanding of that process. It certainly makes it easier to understand why some statutes are so unclear and imprecise. Occasionally I have “flashbacks” to arguments on the floor of the senate when a convoluted bill was passed, and the chairman of a committee would say something to the effect of “don’t worry about the details . . . we’ll let those lawyers and judges figure them out.” However, in the pure sense of the word “influence,” I believe that it has very little effect on my work as a judge. Because our state has very scant records of legislative matters, we basically do not get into the discussion of legislative intent in our opinions construing statutes. Having been in that body, and realizing the misinterpretations which could all too easily be made, I am comfortable with our system.

There is a lot more. Maybe Bashman should put out a best-of book.

THE BREYER TRIVIA QUIZ

At O’Melveny & Myers LLP (the *Green Bag’s* bobbleheadquarters in Washington, DC), *Bag* editor Greg Jacob occasionally engages in some bobblehead-related fun and games. Here is an example – the quiz he administered for some of his colleagues to celebrate the release of our Justice Stephen Breyer bobblehead (do not peek at the answers, which are on page 376):

Breyers Ice Cream

- 1) What city – which won the 1960 NFL Championship but has never won the Super Bowl – gave birth to Breyers Ice Cream?
- 2) What are the first three ingredients for Breyers Natural Vanilla ice cream?
- 3) Breyers offers flavors paired with what two popular Girl Scout cookie brands?