The "Best of" Series

Choose an Approach That Will Appeal to the Court's Conscience

Kenneth F. Oettle

In *The Unforgiven*, Clint Eastwood has the drop on Gene Hackman and is about to discharge his Henry rifle at a range of one foot when Hackman says, plaintively, "I don't deserve this." Eastwood replies, "Deserve's got nothin' to do with it."

In litigation, "deserve" has everything to do with it. Courts feel more comfortable taking something from a litigant (for instance, when assessing damages for breach of contract) if the facts show that the litigant took something from someone else. That way, the books are balanced. Courts don't like to inflict pain gratuitously. If they must select a loser, they prefer that the person deserves to lose.

Suppose, for example, that in the dead of night, a drunken man breaks through a locked fence enclosing a construction site, climbs onto a bulldozer, and falls off, suffering serious injuries. Would a court grant summary judgment to the contractor because the trespasser got what he deserved? Probably. The court would think the plaintiff brought it on himself. He deserved to lose.

Generally, we believe that people who are careless deserve to lose. People who break promises or deceive others deserve to lose. Even people who fail to make an effort to protect themselves deserve to lose. Almost any moral failing can create the impression that a person deserves to lose.

This moral element is one reason that litigation sometimes deteriorates into mudslinging. In trying to show that the other side deserves to lose, advocates shamelessly seek to portray the opposing party as a bad person, whether the party's alleged bad acts are relevant to the matter at issue or not.

Regrettably, the tactic sometimes works; that's why lawyers keep using it. But it can also backfire. The court may see through it, be sensitized by it, and realize that the balance of the relevant equities tips decidedly against the mudslinger.

Novice litigators' devotion to precedent — their compulsion to try to fit their case within the four corners of a reported opinion — can divert them from the essential task of finding the fact or facts that show where "deserve" lies. (Sooner or later every litigator needs to realize, whether gradually or through an epiphany, that the facts control the law, not vice versa.) The facts are the weights that sit on the scales of justice. If well presented, they show how the balance tips — they show what's "fair."

Incidentally, the argument that something is "fair" or "unfair" is, by itself, conclusory. Don't use the word *fair* or *unfair* until you have laid out facts that would persuade a trier of fact how the balance should tip. Even then, be careful that you aren't just tapping your gut sense of equity — which may be skewed by your loyalties — instead of doing the hard work of analysis.

Experienced lawyers build their arguments around "deserve." Even when the fight isn't over winning or losing per se but over valuing and dividing up assets, as in a divorce, advocates try to portray their side as deserving more, and the other side as deserving less.

To shape an argument, particularly in head-to-head litigation under the common law, where the focus is more personal than institutional, look for a fact or a fact scenario that purports to elevate the moral standing of your client over that of the other side, giving your client the white hat, the high ground.

Show the adverse party to have engaged in morally challenged behavior, such as violence, promise-breaking, deception, delay, self-indulgence, laziness, or lack of care. If the moral offense goes to (is within the confines of) the issue in the case (and sometimes even if

it is not — but be careful there), you will give yourself a good chance to persuade the court that your client deserves to win and the other side deserves to lose.

Suppose that Developers A and B are competing for limited sewage capacity. Developer A invokes a ten-year-old contract with the local sewage authority that reserves most of the available capacity for Developer A in return for a contribution to constructing the sewage-treatment plant.

This apparent lock on capacity purports to block construction of a shopping center for which Developer B is ready to break ground. Developer B sues to free up the sewage capacity, contending that Developer A doesn't need the capacity because it doesn't even have a timetable for breaking ground.

Developer A invokes the sanctity of the contract: "a promise is a promise." Developer B argues that hoarding sewage capacity harms other developers and the community. Because Developer A isn't ready to build, its right to sewage capacity, though explicit, hasn't "ripened."

Developer B's dominant equity — the fact intended to persuade the reader — is "hoarding." Hoarding offends, and because it offends, it may persuade. "Hasn't ripened" is the legal hook on which the court can hang its hat. It's important to the argument, but courts don't hang their hats unless and until the dominant equity (the dominant moral element) makes them feel welcome.

Sometimes the dominant equity may be collateral to the factual core, as in a contract-interpretation case where the key clause is so unclear that it is truly opaque to interpretation. The court may then ask whose "fault" it was that the clause wasn't clear. One way or another, the court wants to know who's at fault and therefore who deserves to lose.

Readers react adversely to morally substandard behavior because they identify with the persons who were harmed by it. They

imagine themselves being hurt, and they perceive a threat. This is why readers feel that immoral actors deserve what they get: readers don't like people who do immoral things.

A court's moral views should not be a mystery. If something seems wrong to you, it probably seems wrong to the court. You and the judge were probably exposed to similar religious training, similar school curriculums, and similar print and electronic media, all espousing a relatively homogeneous moral code. The court's conscience is likely to be congruent with yours.

The court's conscience is also likely to be congruent with the law. After all, morality is the code of conduct that people generally agree on, and what people agree on becomes law in a country under the rule of law.

Consequently, when you present the law (what courts did in prior cases), you are usually just confirming what the court already knows instinctively from its sense of right and wrong. The law strengthens the court's resolve and removes any lingering doubt.

In sum, the ultimate arbiter in litigation before a court is the court's conscience — its sense of right and wrong. Judges trust their sense of right and wrong to dictate a result congruent with the law. If the law is unclear, the court's conscience will suggest what the law should provide. Therefore, the theme of your argument should appeal to the court's conscience. This is the playing field on which litigation takes place.

Don't Give Your Adversaries Free Airtime

Kenneth F. Oettle

Advocacy is like advertising: if you keep putting the thought out there, sooner or later the consumer may try it on for size. Don't do your opponents' advertising for them. Don't give them free airtime.

An associate representing a defendant began a preliminary statement by repeating six of the plaintiffs' allegations. I deleted the paragraph. She acknowledged that she was giving plaintiffs free airtime by restating their case, but she thought she was obliged to begin by listing the points she would need to refute. She also thought the allegations would be neutralized if she preceded each one with *Plaintiffs allege.*

Saying *plaintiffs allege* won't neutralize the allegations unless they are incredible on their face. To the contrary, restating the allegations may fix them in the reader's mind, especially if the reader, whether judge or law clerk, has just finished plaintiffs' brief, which probably cast the allegations in their best light.

Naked reiterations of the other side's position are frequently (actually, just short of invariably) followed by what I call the "no-no statement." You write, *Plaintiff says X*, and then you follow with, *Plaintiff is wrong, misses the point, falls short of the mark*, or *fails to understand the issue*. Initially, you provide no *because*, just a negation, a no-no statement.

The no-no statement seems necessary to you, as indeed it might. You've just finished stating plaintiff's position, so every fiber of your

advocate's body demands that you say the opposite, fast. So you do. You make a no-no statement.

Sometimes no-no statements are immediately followed by a supporting rationale, which repairs some of the damage, but sometimes they are not. Even if you supply a rationale, you lose a tempo because you spend two "beats," as it were, accomplishing nothing — one beat to restate plaintiff's argument and another to deliver the bare negation, the no-no statement, which has little value other than to assure the reader that you haven't given up yet.

The following no-no statement is accompanied by, but delays, a rationale:

> Insurer X alleges that ABC Co.'s retention of environmental consultants shows that ABC Co. knew or suspected that its groundwater was contaminated. *This is untrue, and Insurer X is unable to muster any evidence to support this contention.* Quarterly groundwater testing was mandated by RCRA.

All the information the writer wishes to convey is in this paragraph, but in the wrong order. First the writer gives the other side free airtime, restating the insurer's contention that the hiring of consultants to test groundwater shows knowledge of contamination. Then the writer makes a no-no statement (*This is untrue, and Insurer X is unable to muster* . . . blah blah blah). So far, the score is 1 to nothing for Insurer X, and ABC Co. is 38 words into the paragraph.

Changing the order of presentation avoids giving the insurer free airtime and eliminates the no-no statement:

> ABC Co. retained environmental consultants because RCRA mandated quarterly groundwater testing, not because ABC Co. knew of or even suspected groundwater contamination as Insurer X contends.

As in the first version, the writer presents the insurer's position and the company's position, but the order is different. In the revised version, the writer provides the explanation first, so when the reader sees the insurer's position, it is with the explanation in mind. Not all no-no statements are this easily eliminated, but many are.

A second example appeared as the opening paragraph of an appellate reply brief:

> Respondent argues that, for this Court to reverse the trial court, it must repudiate the holding in *Smith v. Jones*. Respondent is mistaken. Contrary to Respondent's argument, this Court need not challenge the holding in *Smith* in order to find in Appellant's favor. *Smith* is silent on federal law. It does not mention ERISA or cite even a single federal case.

This opening grants free airtime and uses not one but two no-no sentences, beginning with *Respondent is mistaken*. We do not learn until the last sentence of the paragraph, 43 words in, why the Court would not have to repudiate *Smith* to find for Appellant.

Minor adjustments shape up the opening:

> Respondent incorrectly contends that this Court will have to repudiate *Smith v. Jones* to reverse. *Smith* is not an ERISA case and doesn't even mention federal law. Thus, it is inapposite.

The word *incorrectly* interrupts the free airtime and provides the negation for which the writer previously used a no-no statement, allowing the writer to get more quickly to the point. Replacing the phrase *to find in Appellant's favor* with the punchier phrase *to reverse* further shortens and sharpens the passage, propelling the reader toward the conclusion.

Eschew Exaggerations, Disparagements, and Other Intensifiers

Kenneth F. Oettle

An advocate's instinct is to disparage the other side. Motivated by indignation at the perceived insult to our intelligence and to the cause of truth, we say the other side's position is "obviously" or "clearly" wrong, their reading of a statute is "preposterous," and they cite no law "whatsoever." We almost cannot help ourselves.

Such characterizations of the other side's arguments are not effective writing. They are more likely to trigger disbelief than agreement because they are the known refuge of persons whose positions are weak. They are a way of pounding the table when you cannot pound the law or the facts. If you pound the table with *clearly*, *obviously*, and *whatsoever*, the reader may figure that you have nothing substantive to say.

Just as bad, if not worse, are statements disparaging the opposing advocate. In the following examples, the italicized words should be eliminated:

1. Plaintiff's *disingenuous* reading of the rule is inconsistent with the public policy that supports the rule.

2. Defendant *blithely* ignores the fact that he was present when the statements of which he claims ignorance were made.

3. *In an outrageous show of chutzpah,* the plaintiff blames his injury on the defendant rather than on his own inattention.

Words should speak for themselves — you should not have to speak for them. Consider the following intensifier in a brief submitted by a condemnee appealing for the third time from a trial court's refusal to value the condemned property fairly:

> An appalling ten years after the taking, condemnee comes before the Appellate Division for the third time.

The word *appalling* is unnecessary because the egregiousness of the condemnee's having to wait ten years for a shot at justice is evident merely in the recital, without need of editorial gloss. The passage of time speaks for itself, and the point is made just as well without *appalling*:

> Ten years after the taking, condemnee comes before the Appellate Division for the third time.

Some writers vigorously defend the use of "strong language," deeming it a matter of taste and contending that those who shy from the practice are wimps. This view has some merit, but not much. Aggressive writing may intimidate a few adversaries, and more importantly, it may give some clients the sense that you are vigorously advocating their cause. But experienced lawyers are not easily intimidated, and they frequently turn strong language back on the writer, portraying the writer (and, by dint of association, the writer's client) as offensive rather than thoughtful or thorough.

Judges are largely unmoved by intensifiers. If the words are ad hominem attacks on the other side (e.g., contending that an argument is "disingenuous"), the court may deem it unseemly. If they are used to pump up your own argument (e.g., contending that your point is "clear" or that a delay was "appalling"), the court may be insulted because you consider it necessary to point out the obvious (e.g., that a ten-year odyssey in court is appalling). If the

facts don't speak for themselves, they probably aren't good enough facts.

Though you may wish to express indignation if the other side is caustic, don't sink to their level. In the end, the best way to persuade the client that you are a dedicated and effective advocate is to prevail in court, and the best way to prevail in court is to make your point and back it up with authority.

Persons who use intensifiers are often trying to make up for a failure to highlight good facts. Consider the following first sentence in the preliminary statement to our condemnee's brief, where the condemnee argued that the trial court had undervalued the condemned property. Which version would you use, A or B?

> A. Condemnee seeks a redetermination of fair market value based on the value that a hypothetical willing buyer would have paid for the property at the time of the taking.
>
> B. Condemnee seeks a determination that a person buying into the Jersey City waterfront real-estate boom in April 1986 would have seen the potential of this choice parcel and would have paid a premium for it.

The best fact for the condemnee is that its condemned property was situated in the midst of a waterfront real-estate boom, so a willing buyer would have paid a premium for the property. Using version B, the writer integrated the most important fact (waterfront real-estate boom) into the first sentence of the preliminary statement. With version A, the writer would have presented nothing more than a statement of the law. Thus, version B is persuasive, and version A is not. The facts in version B supply the "intensity" for which intensifiers are a poor substitute.

Just as someone always votes for the other side in an election, some writers would use version A anyway, reasoning that (1) they don't want to appear to be too much the advocate too soon or (2) it's important to invoke the key terms — such as *fair market value*, *hypothetical willing buyer*, and *time of the taking* — in the relevant principle of law. These rationales are unimpeachable as general statements, but taken in context, they are outweighed by the more important principle that persuasion begins with good facts.

Transition by Repetition: Take One Step Back to Go Two Steps Forward

Kenneth F. Oettle

> You will be tempted to believe that because a connection between ideas is perfectly clear to you as a writer, it is also perfectly clear to the reader. It isn't.[1]

A Zen proverb says that "a good craftsman leaves no traces." In good legal writing, the prose moves along so well that the reader never stops to admire the writer's skill. That is the ultimate goal — to focus the reader on the argument, not the writing.

One device that keeps the prose moving and transparent to the reader is the transition, one form of which is the repetition of words from a prior sentence or paragraph. The repeated words are, in effect, a step backward to move two steps forward. Below is an example of words carried from the end of one paragraph to the beginning of the next.

> [Last sentence in paragraph:] For all these reasons, the slowdown of *traffic* at *that interchange* constitutes a *safety hazard* and must be alleviated as soon as possible.
>
> [First sentence in new paragraph:] Not only do *traffic* conditions at *that interchange* constitute a *safety hazard*, but they increase air pollution as well.

The transition by repetition is in the words *traffic*, *that interchange*, and *safety hazard*.

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[1] Lucile Vaughan Payne, *The Lively Art of Writing: Developing Structure* 99 (Follett Publg. Co. 1982).

As suggested by the summarizing phrase *For all these reasons*, the reader beginning the second paragraph probably has a visual, intellectual, and emotional matrix for traffic conditions at the interchange. By restimulating this matrix with the trigger words *traffic*, *that interchange*, and *safety hazard*, the writer can hook the second paragraph into the first. Not only does this achieve continuity — which holds the reader's attention — but it adds emphasis through repetition.

In the example above, the paragraphs are linked not only by the repetition of key words but also by the *Not only . . . but also* construction, which is used in conjunction with, and intensifies, the repetition of key words. *Not only . . . but also* is inherently transitional, like *first*, *next*, *in addition*, *for example*, *therefore*, and *thus*.

Let's take a second example. In this one, the second sentence does not flow smoothly from the first:

> To gain access to public records under the Right-to-Know Law or the common law, a person must pass through several screens. Standing is required under both the Right-to-Know Law and the common law.

The paragraph begins by telling the reader that a person needs to pass through several "screens" to gain access to public records. Thus, the reader expects to be told what a person must do (how the person must pass through screens), what the several screens are, or both. In effect, the reader experiences the first sentence as the beginning of a story about a person and about screens, and the reader assumes that the story will continue to be about a person and about screens.

But the second sentence seems to be about something called "standing," which could be a screen, but the reader does not automatically know that. When the reader sees the word *Standing* at

the beginning of the second sentence after not having seen it in the first, the reader may wonder, "Standing. Hmmm. How does 'standing' fit in here? It isn't a person. Is it one of the 'screens'? I thought this story was about persons and screens."

When neither word appears at the beginning of the second sentence, the reader is momentarily disoriented. Ultimately, the reader will deduce that standing is one of the screens, but at the cost of time and energy.

In the following versions, the relationship between the two sentences is improved.

> [Better:] To gain access to public records under the Right-to-Know Law or the common law, a person must pass through several screens. First, the person seeking disclosure must establish standing.
>
> [Alternative:] To gain access to public records under the Right-to-Know Law or the common law, a person must pass through several screens. One such screen is the requirement that the person establish standing.

In the improved versions, the immediate repetition of the word *person* or *screen* propels the reader from the first sentence into the second by tapping the expectation energy developed around the terms *person* and *screen*.

Readers take transitions for granted until they are omitted; then suddenly the prose is no longer transparent. The reader becomes confused and loses your point. Worse, the reader's confusion, together with his or her resentment at having to work hard to grasp your meaning, may cause the reader to lose faith in you and your presentation. The more this happens, the more the reader will doubt what you say, even to the point of not reading it. In an unfortunate but inexorable progression, serious consequences can flow from an accumulation of small mistakes.

Carefully Craft Your Sets and Subsets

Kenneth F. Oettle

A topic always worth visiting is sets and subsets — categories, big and small; groups; lists. Items in a list should generally be coordinate to, not more or less inclusive than, other items in the list.

Take a statement of reasons why similar cases before the same court should be consolidated:

> Consolidation is appropriate because it will encourage the orderly and expeditious adjudication of this controversy, conserve judicial resources, save witnesses' time and expense, and avoid duplicative trials.

Sounds pretty good, doesn't it? It's strong on emphasis because it uses active verbs and invokes efficiency five times (*orderly*, *expeditious*, *conserve*, *save*, and *avoid duplicative*). It also uses parallel construction well — four consecutive verbs of the same form: *encourage*, *conserve*, *save*, and *avoid*.

Parallel construction lulls readers because the good grammar disturbs no patterns and inspires confidence. (In fact, many writers have trouble creating a fluid structure for such a long sequence.) Yet the list is not precise because the writer mixes sets and subsets, causing overlap and thus duplication. This compromises the communication, leaving the reader to puzzle it out or miss part of the message.

The first item in the sequence, the *orderly and expeditious adjudication of this controversy*, is essentially the purpose of consolidation. It is a very broad category. The next item, *conserve judicial*

resources, is a subset. It is one effect of an orderly and expeditious result.

Already, the list has a problem. It begins with a set and continues with a subset without alerting the reader to the switch, as by saying *for example*. This suggests that the list is padded, as if the writer were claiming two categories while providing only one.

The next item in the sequence — saving witnesses' time and expense — is also a subset. Like the subset of saving judicial resources, it is another effect of an orderly and expeditious adjudication.

The fourth and last element in the sequence, *avoid duplicative trials*, is a subset of the second and third items in the list, *conserve judicial resources* and *save witnesses' time and expense*. Avoiding duplicative trials is one way to conserve judicial resources and save witnesses' time and expense. Thus, the fourth item is a subset of the preceding two subsets. The list does not include saving parties' time and expense, which is an omission.

To shape up the list, we could use the broadest category as a controlling set (orderly and expeditious adjudication) and limit the list to subsets — resource-saving items. We already have two such items: *conserve judicial resources* and *save witnesses' time and expense*. We could replace *duplicative trials* with *saving time and expense for the litigants*, correcting the omission of the parties' time and expense:

> Consolidation is appropriate because it will encourage the orderly and expeditious adjudication of this controversy: it will conserve judicial resources, save time and expense for witnesses, and save time and expense for the parties.

Now the set and subsets work together. The set is presented first, and the subsets follow. The reader knows which is the set and

which are the subsets, and the writer does not appear to be faking sets. And because *time and expense* is duplicated, we can trim further:

> Consolidation is appropriate because it will encourage the orderly and expeditious adjudication of this controversy: it will conserve judicial resources and will save time and expense for the witnesses and the parties.

This is pretty good, but we sacrificed something to tighten the list. We gave up an example of how to save time and expense — avoid duplicative trials. Our current version of the list speaks of conserving resources but does not say how we'll do it. If we resurrect our reference to avoiding duplicative trials and add a reference to discovery, thus covering pretrial activities as well as trial, we can improve the presentation.

We can group witnesses and parties as "private" interests, create a set called "private and judicial resources," and say that resources for both elements of this set — private and judicial — will be conserved by eliminating duplicative discovery and trial. The reformulation would read as follows:

> Consolidation is appropriate because it will encourage the orderly and expeditious adjudication of this controversy: it will conserve both private and judicial resources, eliminating duplicative discovery and trials.

This reformulation of the second sentence has better pace and in some respects stronger impact. It not only states the conclusion (save resources) but also provides examples (eliminate duplicative discovery and trials). It adds balance in that the elements "private and judicial" parallel the elements of discovery (private) and trial (judicial).

One final concern. We lost our reference to the convenience of witnesses. A court may be sympathetic to third-party witnesses drawn into a fight not of their making. By moving the elimination of duplicative discovery and trials to the beginning of the second sentence, we have a solution:

> Consolidation is appropriate because it will encourage the orderly and expeditious adjudication of this controversy. Eliminating duplicative discovery and trials will conserve both private and judicial resources, reducing the burden on the parties, on third-party witnesses, and on the court.

Reduced burden is a function of (a consequence of) resources' being conserved. By adding the concept of burden to the concept of conservation, we can add back the witnesses.

Much work goes into reformulating sets and subsets to find the optimum way to articulate what is essentially the same group of related facts. We consider the scope of the sets and subsets; the grammatical flow, including, among other things, parallel construction; the sound, including assonance (successive vowels) and alliteration (successive consonants); and the placement of words for impact.

In a consolidation motion, the court probably knows the arguments by heart, so the main virtue of coordinating sets and subsets is defensive — to avoid sending the signal that you fake your sets and thus may fake other things, or that you just don't think things through. You get some offensive credit as well because the reader will instinctively respect a rigorous treatment of sets and subsets.

Close editing like this is a fascinating and sometimes frustrating puzzle. Many writers consider the puzzle solved when they have rattled off several items that seem to relate reasonably well. Some writers don't notice alternatives; others don't care. Readers care, though they sometimes don't realize it.

Few attorneys who review draft briefs challenge a list. At most, a writer might be told, "I think the point could have been a little tighter." Then the dedicated writer will go back to the drawing board to see what could have been tighter. Often, it's the list.

Give a Quotation a Good Introduction

Kenneth F. Oettle

Just as a moderator introduces a keynote speaker to the crowd, you should introduce quotations to the reader. It is a golden opportunity to engage the reader and drive your point home through repetition.

The quotation below appeared in the appellate brief of a building owner who failed to make a man-lift available to an independent roofer. The roofer was injured when he used an ordinary ladder in high winds and fell. Which introduction to the quotation would you use?

> Version 1:
>
> A landowner has no duty to protect an employee of an independent contractor from known hazards incidental to the contract work. *As the court ruled in Smith v. Jones:*
>
> > The landowner may assume that the worker, or his superiors, are possessed of enough skill to recognize the degree of danger involved and to adjust their methods of work accordingly.
>
> Version 2:
>
> A landowner has no duty to protect an employee of an independent contractor from known hazards incidental to the contract work. *To the contrary, a landowner is entitled to rely on the employee's ability to protect himself:*
>
> > [Same quotation; then cite *Smith v. Jones*.]

The first version introduces the quotation with the noncommittal *As the court ruled*, leaving the reader to interpret the quotation. The second version alerts the reader to the gist of the quotation, which is an embellishment on, not merely a restatement of, the principle that a landowner has no duty to protect employees of independent contractors from known hazards.

Writers typically use version 1, but version 2 is better. It calls attention to the ability of a contractor's employee to protect himself and the right of the landowner to rely on that. And it shortens the languid phrase *adjust their methods of work accordingly* to the sharper *protect himself*. It is a legitimate rewording for effect.

Previewing quotations serves several rhetorical purposes. It induces the reader to read the quotation — which might otherwise be skipped — by providing a key to its meaning. Not only does this proffer help the reader interpret the quotation, making the reader's job easier, but it challenges the reader to determine whether the writer's summary is correct.

If the précis is accurate, the reader will regard the writer as honest and reliable. Thus, by substantively introducing the quotation, the writer increases the odds of its being read and earns a bonus in the bargain.

A substantive introduction can guide the reader through a quotation in several ways: (1) by directing attention to a particular passage; (2) by clarifying a difficult thought; (3) by characterizing something that could but shouldn't be read two ways, making sure the reader reads it the right way; and (4) if you're aggressive, by characterizing a passage that could legitimately be read in either of two ways. All this helps you retain control of the material.

Finally, the introduction drives the point home by repetition. First you say what the quotation will say; then the quotation says it again. If the thought is important enough to illustrate with a quotation, it's important enough to repeat and reinforce.

Not only do substantive introductions to quotations serve a rhetorical purpose, but they serve a creative purpose as well. Having to write such an introduction forces the writer to examine whether the quotation is truly helpful. If the writer cannot summarize the passage in a few words consistent with the writer's position, then the quotation may be off point. Thus, the substantive introduction serves as a self-monitoring device.

A writer may even quote from a quotation to introduce it, as in the following example from a brief on behalf of a public entity appealing an award for injuries from a fall allegedly caused by bad lighting. The public entity claimed that the absence of expert testimony on the subject of adequate lighting was reversible error. It introduced a supportive quotation as follows:

> In *Polyard v. Terry*, the Appellate Division observed that an expert's opinion is "undoubtedly admissible, and usually useful" when a condition of public property is not obviously dangerous:
>
> > The opinion of an expert is undoubtedly admissible, and usually useful, when, as here, a road-surface characteristic is not so pronounced that its effect on the control of an automobile is obvious.

Previewing the phrase *undoubtedly admissible, and usually useful* is a bit repetitious because the quotation is short, but the value of the dictum justifies the duplication.

Writers give several reasons for their reluctance to introduce quotations with more than *As the court said*: they feel they can't say it better than the court and might say it wrong; they don't want to bore the reader with repetition; and they don't want to lose credibility by overadvocating. Such concerns are understandable but largely misguided.

You don't have to say it better than the court — just correctly. You may say it wrong, but if you don't know the point of the

quotation well enough to summarize it accurately, then you shouldn't be using the quotation anyway.

As for boredom, repetition in this business is often a good thing. If you have something useful to say, don't be modest about saying it twice. You would rather the reader think, "Enough already. I get your point," than that the reader ask, "What is your point?"

The fear of overadvocacy is healthy but usually excessive, especially in novice writers. To counter it, think of the service you provide to the reader with a substantive introduction to a quotation. In return for that, the reader will put up with a little advocacy.