

A Series

By Professor Rick Bales
with Wayne Schiess

Cultured Writing

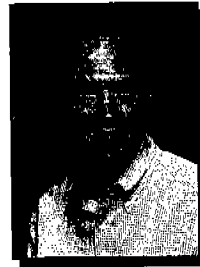
In an ABA Journal essay on legal writing about twenty years ago, the late Irving Younger found it appalling that only 10 of 150 students in his evidence class recognized Patroclus as a character in the Iliad, and only one student recognized "The Rest is Silence" as Hamlet's last words.¹ Lamenting the quality of secondary and undergraduate education is certainly nothing new. But consider the other side of the coin for a moment: what is the value of a reference that less than 10% of the audience understands?

Writers must walk a fine line when adding cultural references to their writing. On the one hand, an apt or clever reference can make the reader smile or nod or pause for reflection, and can be a valuable way to sustain the reader's attention on what otherwise may be a less-than-titillating legal topic. On the other hand, a writer does not want to alienate the reader by making the reader feel excluded because the reader didn't understand the reference, or trivialize the subject material by adding a reference that seems flippant.

Before using a cultural reference, consider the purpose you intend the reference to serve. If its purpose is to impress the reader with your wit or cultural erudition, resist the temptation. Wit for the sake of wit is likely to distract the reader from the legal point you are trying to make. Similarly, trying to impress the reader with cultural knowledge often backfires. That's because it relies on exclusion: it strokes the ego of the cultured reader because she knows that the lumpen² masses won't understand. But if your reader didn't take a college class on Twentieth Century Russian Literature, she may not understand the meaning of "lumpen masses" and will resent you for making her feel ignorant.

Moreover, it's easier to make readers feel ignorant today than it was several years ago. Forty or fifty years ago, the concept of culture was more homogenous; a

writer could assume that a college-educated reader had read the Greek classics, most if not all of Shakespeare's plays, and a variety of other works of Western European literature. Today, however, the concept of culture has expanded significantly to include works from around the world, and some of the Western European classics have been put aside to make room. Consequently, while most college-educated people likely have read one or a few of Shakespeare's plays, few people have read them all, and the ones you have read may not be the same ones your reader has read.



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One of my favorite recent cultural references is courtesy of Judge Karen Moore, of the United States Court of Appeals for the Sixth Circuit. Writing on the issue of how courts should approach consumer arbitration agreements that shift arbitration fees to consumers, Judge Moore explained:

[T]he *post hoc* judicial review approach places plaintiffs in a kind of "Catch-22." They cannot claim, in advance of arbitration, that the risk of incurring arbitration costs would deter them from arbitrating their claims because they do not know what the costs will be, but if they arbitrate and actually incur costs, they cannot then argue that the costs deterred them because they have already arbitrated their claims. Just as Yossarian could not escape flying combat missions by claiming that he was crazy because anyone wanting to be released from combat must be sane, under this approach potential litigants cannot escape arbitration by claiming that the costs are prohibitive until after arbitration, at which point the costs were not

prohibitive, because the litigants actually arbitrated their disputes.³

Even if I had not read Joseph Heller's "Catch-22," I would understand Judge Moore's point that under the *post hoc* judicial review approach, there is no effective way for a consumer to object to the imposition of arbitration fees. Judge Moore had the best of both worlds: she used her cultural reference to make her point, but she didn't risk alienating the reader.

Here are some suggestions for using cultural references in legal writing:

First, read non-legal material regularly. This may enhance your understanding of other writers' cultural

references, but more importantly, it will help give you a non-legal frame of reference for what is good writing and what is not.

Second, keep a running list of cultural references, metaphors, and other phrases that enhanced your understanding of a subject. You might later have an opportunity to use them in your own writing.

Third, consider using popular references or references that are largely self-explanatory, such as Judge Moore's reference to "Catch-22."

Finally, remember that your goal is to lead your reader to a deeper understanding of your topic – not to impress the judge with your wit or your knowledge of cultural arcana.

Footnotes

1. Irving Younger, *Culture's the Thing*, reprinted in 8 SCRIBES J. LEG. WRITING 137 (2001-02).
2. "[O]f or pertaining to disfranchised and uprooted individuals or groups." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 853 (1989). The term "lumpen masses" was frequently used as a derogatory term by Russian cultural elites in the 1920s and early 1930s to describe the target audience for the culture – socialist realism – that Stalin directed the cultural elites to create for the masses. The term fell into disfavor after Stalin had most of the cultural elites shot.
3. *Morrison v. Circuit City Stores*, 317 F.3d 646 (6th Cir. 2003) (en banc).