

[A Brief Brouhaha](#)

Tuesday, January 12, 2010

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I have read hundreds of legal briefs since I started practicing law almost a dozen years ago. First as a law clerk for an appellate judge and then as an attorney practicing primarily appellate litigation, I have seen all kinds of briefs - truly the good, the bad and the ugly. In the last category, I would place those frequently well-written, but nonetheless obnoxious, briefs that take a holier-than-thou, smarter-than-the-judge attitude.

So I was curious when I read numerous reports not long ago of a brief filed by Sidley Austin lawyers in a case in Illinois state court involving claims of innocence by convicted murderer Anthony McKinney. Working on McKinney's behalf are students at Northwestern University's Medill Innocence Project. State prosecutors served subpoenas on the students, seeking to obtain, among other things, video footage of a witness statement and the students' notes. Sidley Austin filed a motion to quash the subpoenas on behalf of the students. Following the state's response to the motion, Sidley submitted a reply brief. It was this reply brief that received so much attention.

According to the press reports, when the Sidley lawyers showed up for a hearing on their motion, the trial judge (Diane Gordon Cannon, a former prosecutor) excoriated them, even before the hearing formally began. Cannon reportedly demanded that the Sidley lawyers identify the author of the reply brief, contending that no name appeared on the briefs. In fact, two Sidley lawyers, Richard J. O'Brien and Linda R. Friedlieb, were listed as counsel on the last page of the brief. The judge then referred to the brief as "reprehensible," an "editorial" not fit for court, and "dripping with sarcasm." She also compared the brief unfavorably to one she had received earlier that day from a pro se prisoner.

Wow. This must be some brief. Naturally, I had to check it out to see just how over the top and obnoxious it really was.

My primary conclusion after reading the brief a number of times is that the Sidley brief is well-written, to the point, devoid of irrelevant ad hominem attacks and quite persuasive. While I've seen sarcasm in many briefs (and cringed every time I read it), I looked high and low through the Sidley Austin brief and was unable to find anything remotely sarcastic in the brief. I'm also at a loss as to what is "reprehensible" about it.

Sidley's brief includes an introduction in which Sidley argues that (1) the state incorrectly contended that the Illinois Reporter's Privilege Act "is limited to the protection of confidential sources"; (2) the state "makes no convincing case for satisfaction" of the act's requirements for compelled disclosure; and (3) the state's brief was "laced" with "rhetoric that shows a disturbing lack of sensitivity to the First Amendment values that underlie the Act and [the] role of

investigative journalism in our society."

The bulk of the brief consists of a typical argument section, with copious citations to cases purportedly supporting Sidley's arguments and discussion of the alleged inapplicability of the cases relied on by the state. While the argument section does contain occasional adjectival flourish, such as references to the state's arguments as "off-point and distracting," "clearly erroneous," "irrelevant," "not convincing" and "nonsensical," these are hardly worthy of judicial rebuke. Brief writers, particularly those preparing responsive and reply briefs, frequently refer in similarly negative terms to their adversaries' arguments. The brief also refers at one point to the state's efforts to obtain material from the students as "a classic fishing expedition," an innocuous term that, according to a quick Lexis search, shows up in about 60 judicial opinions every month.

Finally, in a stirring conclusion, the brief touts the important work of the Innocence Project -- and its success in uncovering 11 instances of wrongful convictions over the past 10 years -- and then accuses the state of using the subpoenas "to severely undermine the ability of the Project to do its work in the future."

That's pretty much it. In my view, Cannon overreacted. Other than its use of maybe one or two unnecessary adjectives -- the brief is persuasive enough without referring to the state's arguments as "nonsensical" -- the now-infamous brief is well-written, temperate in tone and, most importantly, focused on the substance of Sidley's arguments in support of its motion to quash the subpoenas.

For those curious about the brief and interested in judging for themselves whether the brief deserved the scorn heaped upon it by Cannon, it can be found at:

www.medillinnocenceproject.org/files/mckinney/shield_law_our_response_to_States_Brief.pdf

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This post originally appeared on The Legal Intelligencer Blog.