

JUDICIAL OPINION WRITING

For

State Tax Judges

**October 12, 2018
Chicago, Illinois**

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A

Ethical Judicial Opinion Writing

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INTRODUCTION

The judiciary's power comes from its words alone—judges command no army and control no purse. In a democracy, judges have legitimacy only when their words deserve respect, and their words deserve respect only when those who utter them are ethical. Opinion writing is public writing of the highest order; people are affected not only by judicial opinions but also by how they are written. Therefore, judges and the opinions they write—opinions scrutinized by litigants, attorneys, other judges, and the public—are held, and must be held, to high ethical standards. Ethics must constrain every aspect of the judicial opinion.

One way to judge judges is to read their opinions. Although a judge's role in the courtroom is a crucial judicial function, only those in the courtroom witness the judge's conduct, and most of them are concerned with their case alone. Judicial writing expands the public's contact with the judge. Writing reflects thinking, proves ability, binds litigants, covers those similarly situated, and might determine the result of an appeal. Judges hope that what they write will enhance confidence in the judiciary and bring justice to the litigants. The heart of a judge's reputation and function rests with the use of the pen.

Judges must resolve controversies. Processes in the courtroom might influence a judge's decision, but the written opinion rationalizes issues, explains facts, and settles disputes.¹ Opinions open windows into judges' minds and show how judges fulfill their duties. They provide accountability because they are available to the public, the litigants, and higher courts to read and review.

An opinion's quality is determined by tone, organization, style, method, and

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1. Judith S. Kaye, *Judges As Wordsmiths*, 69 N.Y. St. B.J., Nov. 1997, at 10, 10 [hereinafter Kaye, *Wordsmiths*].

reasoning. Because opinions offer a glimpse into a judge's mind, they must be credible, impartial, dignified, and temperate. As one scholar explained, "Recognizing the extent to which [judicial] opinions are subject to scrutiny by the legal community, contributing substantially to legal scholarship, education, and history, it is crucial that the content of these opinions meet high ethical standards."²

To meet these high ethical standards, a judge must ensure accuracy and honesty in research, facts, and analysis. Opinions must exhibit the qualities of good moral character: Candor, respect, honesty, and professionalism.³ These qualities are not the only considerations in opinion writing, but they offer a required starting point.

The way an opinion is written can tell the reader as much about a judge as the opinion's substance. Sloppy writing shows that the judge put insufficient time into writing the opinion. An opinion that presents a slanted version of the facts or gives short shrift to a seemingly meritorious argument might suggest that the judge did not explore both sides of an issue.⁴ Lambasting or lampooning lawyers or litigants might indicate bias.⁵ An attempt to shoehorn facts into a particular result when further research might yield a clearer, more convincing, and different result might show poor reasoning.⁶ Perhaps most important of all, poorly drafted opinions "all too often reach the wrong result from an objective, or philosophically neutral, point of view."⁷ Ethical judicial opinion writing inextricably intertwines style and substance.

There is no one right way to write a judicial opinion. This article does not seek to define the perfect judicial opinion. Rather, this article intends to show how form and substance must be laced with ethical considerations. Part I defines the concept of ethics as applied to judicial opinion writing. Part II explains the function and importance of opinions to the judiciary and the public. Part III explores the different types of audiences of judicial opinions. Part IV contains a general discussion of different opinion writing styles commonly used in judicial opinions. Part V discusses the ethical considerations present in pure opinions: Judicial writings whose constituent characteristics are highly formalized. Part VI explores the ethical considerations present in less formal judicial writings,

2. Jamie S. Dursht, *Judicial Plagiarism: It May Be Fair Use But Is It Ethical?*, 18 CARDOZO L. REV. 1253, 1295 (1996).

3. See MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* 125 (2002) [hereinafter SMITH, *ADVANCED LEGAL WRITING*]. Professor Smith offers these writing guidelines to evince good character: (1) focus on the litigants' behavior, not on the litigants; (2) focus on behavior that relates to the matter under discussion; and (3) do not evince hostility toward an attorney. *Id.*

4. William J. Palmer, *Appellate Jurisprudence as Seen by a Trial Judge*, 49 A.B.A. J. 882, 883 (1963).

5. Steven Lubet, *Bullying from the Bench*, 5 GREEN BAG 11, 14 (2001).

6. Douglas K. Norman, *Legal Staff and the Dynamics of Appellate Decision Making*, 84 JUDICATURE 175, 176 (2001) [hereinafter Norman, *Dynamics*].

7. AM. BAR. ASS'N APPELLATE JUDGES CONFERENCE, *JUDICIAL OPINION WRITING MANUAL* ix (1991) [hereinafter ABA OPINION WRITING MANUAL].

otherwise known as impure opinions. Part VII reviews ethical considerations specific to pure and impure opinions. Finally, part VIII discusses the use of law clerks in writing opinions.

I. JUDICIAL ETHICS IN THE CONTEXT OF THE JUDICIAL OPINION

Before engaging in a meaningful discussion of what an ethical opinion is, it is necessary to define the term “ethical.” The dictionary defines “ethical” as “of or pertaining to morality or the science of ethics” and “pertaining to morals.”⁸ The dictionary definition of “moral” is “of or pertaining to human character or behavior considered as good or bad; of or pertaining to the distinction between right and wrong, or good and evil, in relation to the actions, volitions, or character of responsible beings.”⁹ From the dictionary definition of “ethical,” it is clear that judges should be of good character: virtuous, righteous, and responsible.¹⁰ Most would agree that judges should possess these qualities, but what must a judge do to meet those standards? It is easy to define extreme misconduct in the negative—like taking bribes in exchange for favorable rulings. It is difficult, however, to define what moral conduct is in the affirmative. It is just as difficult to determine what qualities an ethical opinion possesses. It is easy to identify certain kinds of immoral behavior with respect to writing, such as plagiarism¹¹ or libel,¹² but beyond the obvious are no hard-and-fast rules of what constitutes ethical judicial writing.

Judges occupy a special position in the legal community. They are in a unique position to influence it. Judges can give momentum to—or stop—trends developing in the legal profession. A judge’s influence on the legal community is not limited to the lawyers and litigants. Judges are professional writers¹³ who can and should use opinions to influence the legal profession for the better. One way to improve the profession is to put an end to legalese in judicial opinions. Many law-journal articles are devoted to translating “legal writing” into plain English

8. THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 856 (1993) [hereinafter NEW SHORTER OXFORD].

9. *Id.* at 1827.

10. Cuthbert W. Pound, a Chief Judge of the New York Court of Appeals, stated that: “the judge should no doubt . . . be both lawyer and philosopher of the highest grade, blessed with saving common sense and practical experience as well as sound comprehensive learning, but such men are rare.” Cuthbert W. Pound, *Defective Law—Its Cause and Remedy*, 1 N.Y. ST. B. ASS’N BULL., Sept. 1929, at 279, 285.

11. See generally Dursht, *supra* note 2, at 1259 (“Every schoolchild is taught the impropriety of claiming credit for someone else’s work.”) (quoting William A. Henry, III, *Recycling in the Newsroom*, TIME, July 29, 1991, at 59).

12. See generally Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273 (2003).

13. See generally George D. Gopen, Essay, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333 (1987).

for all to understand.¹⁴ Despite this centuries-old criticism,¹⁵ little has been done to rectify the situation. If judges wrote opinions in plain English, they would set a trend in the legal profession toward clearer writing.

Another criticism of modern legal practice is the lack of civility among members of the legal profession.¹⁶ A judge who lacks civility on the bench or in an opinion bolsters incivility in the profession.¹⁷ By demonstrating civility on the bench and demanding the same from the lawyers who appear before them, judges can encourage civility.¹⁸ Judges should always be conscious of their role in the legal world and behave accordingly.

To define ethics in the context of opinion writing, one good place to start is the *Model Code of Judicial Conduct* (“*Model Code*”).¹⁹ But reflecting its status as a model, judges and the public often use the *Model Code* (which does not specifically address judicial opinion writing) as a guide rather than as a set of binding rules; the *Model Code* is only binding when a specific state adopts all or part of it. The guidelines the *Model Code* provides with respect to judicial conduct can be viewed as standards that should be reflected in judicial writing. A judge’s written opinions cannot be separated from a judge’s judicial ethics.

Judicial opinions, more than any other part of a judge’s job, influence the public perception of the judiciary—and public perception of the judiciary is a key concern of the *Model Code*.²⁰ From a narrow perspective, a litigant will see from reading the opinion how the judge reached a decision. From a broad perspective, the public witnesses its rights defined, and to some extent its rights created or altered, in judicial opinions.²¹

Canon 1 of the *Model Code* provides that “[a] judge shall uphold the integrity and independence of the judiciary.”²² Subsection A of the same canon explains what upholding integrity and independence means: “A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the

14. See, e.g., Robert W. Benson, *The End of Legalese: The Game is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519 (1984-1985); Patricia M. Wald, “How I Write Essays,” 4 SCRIBES J. LEGAL WRITING 55 (1993) [hereinafter Wald, *How I Write*]; George Rose Smith, *A Primer of Opinion Writing, For Four New Judges*, 21 ARK. L. REV. 197, 209 (1967); Gopen, *supra* note 13.

15. Gopen, *supra* note 13, at 333.

16. Lubet, *supra* note 5, at 14.

17. *Id.*

18. *Id.*

19. MODEL CODE OF JUDICIAL CONDUCT (2004) [hereinafter MODEL CODE]. The American Bar Association recently issued its Final Draft Report to amend the current *Model Code*. See ABA, <http://www.abanet.org/judiciaethics/finaldraftreport.html> (last visited Mar. 15, 2008). Note that federal judges have their own code of judicial conduct, called the *Code of Conduct for United States Judges*. See <http://www.uscourts.gov/guide/vol2/ch1.html> (last visited Mar. 15, 2008).

20. See generally MODEL CODE Canon 3.

21. See, e.g., Blake D. Morant, *Electoral Integrity: Media, Democracy, and the Value of Self Restraint*, 55 ALA. L. REV. 1, 1 (2003) (discussing impact of Bush v. Gore, 531 U.S. 98 (2000), on public’s view of judiciary).

22. MODEL CODE Canon 1.

judiciary will be preserved.”²³ The drafters of the *Model Code* were aware that to be effective, the judiciary must maintain legitimacy²⁴—and to maintain legitimacy, judges must live up to the *Model Code*’s moral standards when writing opinions. If the public is able to witness or infer from judges’ writing that judges resolve disputes morally, the public will likewise be confident of judges’ ability to resolve disputes fairly and justly.²⁵

Canon 2 provides that “[a] judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.”²⁶ At its basic level, it prevents judges from acting on bias²⁷—including racist or sexist beliefs. It also ensures that judges comply with the law and promote public confidence in the integrity of the judicial system.²⁸ Canon 2 was written in general terms to proscribe a broad range of activity.²⁹ The comments to Canon 2 explain that the “test” for the appearance of impropriety is “whether the conduct [at issue] would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.”³⁰ Canon 2 is designed to ensure that a judge’s conduct promotes the image of a fair, competent, and impartial judiciary and to prevent conduct that might tarnish that image. Poor judicial writing will do more than just tarnish a judge’s reputation; it will also sully the reputation of the judiciary as a whole and good government as well. Judges have an obligation to ensure that their written work reflects the integrity, impartiality, and competence they are expected to exhibit from the bench. These qualities are as important as justice and fairness. Without integrity, impartiality, and competence, neither justice nor fairness is possible.³¹

Canon 3 prescribes that “[a] judge shall perform the duties of judicial office impartially and diligently.”³² The comments to Canon 3 require the judge to be patient and to allow each litigant to be heard.³³ The judge must also give due consideration to the litigants and their claims, regardless of any initial impulse or thought about the validity of a particular claim. Further, judges are expected to recuse themselves if they have a personal bias against a litigant or a litigant’s

23. MODEL CODE Canon 1(A).

24. MODEL CODE Canon 1 cmt.

25. Adherence to these moral standards is important because “liberty or property interests [are] at stake.” Marshall Rudolph, *Judicial Humor: A Laughing Matter?*, 41 HASTINGS L.J. 175, 187 (1989).

26. MODEL CODE Canon 2.

27. MODEL CODE Canon 2. Based on that canon and other issues of propriety, some states require that opinion writing be gender neutral. See, e.g., NEW YORK STATE JUDICIAL COMMITTEE ON WOMEN IN THE COURTS, FAIR SPEECH: GENDER NEUTRAL LANGUAGE IN THE COURTS (2d ed. 1997).

28. MODEL CODE Canon 2(A) cmt.

29. MODEL CODE Canon 2(A) cmt.

30. MODEL CODE Canon 2(A) cmt.

31. RONALD DWORKIN, *LAW’S EMPIRE* 166 (1986).

32. MODEL CODE Canon 3.

33. MODEL CODE Canon 3.

lawyer.³⁴ In the fight against bias, the best judge is the one who realizes that all people are biased. That judge “is more likely to make a conscientious effort at impartiality than one who believes that elevation to the bench makes him at once an organ of infallible logical truth.”³⁵ Thus, “[a]n ethical judge must demand of herself that she identify and understand her own biases and how they affect her reaction to a case.”³⁶

Subsection (B)(4) of Canon 3 is especially pertinent. It provides that “a judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity”³⁷ Canon 3 emphasizes that judges should always act professionally and respectfully to all. A judge must never patronize or offend the losing side. The judge must treat all with dignity and respect.

Because judges represent the judiciary to the public and serve as role models in the legal profession,³⁸ we expect them to live up to high standards, both on and off the bench. Therefore, there is a societal interest in selecting only the most qualified people with the right temperament to be judges.

Much of the legal profession revolves around the judiciary: Judges resolve disputes, attorneys seek to settle cases rather than risk an unfavorable result from a judge, and transactional work is geared toward avoiding the judicial system.³⁹ Lawyers also rely on the rules of precedent to advise clients and assess risk. As Mortimer Levitan insightfully remarked:

If lawyers ever lose their capacity for believing that precedents enable them to predict what the courts will do in the future, they would advise their sons to study dentistry or plumbing or some other respectable and highly remunerative profession. A lawyer would experience only frustration from his practice if candor compelled him to advise his client: “The courts held this way last month, but heaven only knows how they’ll hold next month!” And the bewildered client—what would he do? Probably seek a lawyer with more illusions or less candor.⁴⁰

The legal community pays close attention to precedent that judges hand down. Precedent steers lawyers in advising and representing their clients.

This article does not mean to suggest that the judicial system is rife with

34. MODEL CODE Canon 3(E)(1)(a).

35. Morris R. Cohen, *The Place of Logic in the Law*, 29 HARV. L. REV. 622, 638 (1916).

36. David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 GEO. J. LEGAL ETHICS 509, 514 (2001).

37. MODEL CODE Canon 3(B)(4).

38. Lubet, *supra* note 5, at 14 (questioning why lawyers should be polite to an abusive judge who insults and demeans them).

39. Robert W. Benson, *The End of Legalese: The Game is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 558 (1984-1985).

40. Mortimer Levitan, *Professional Trade-Secrets: What Illusions Should Lawyers Cultivate?*, 43 A.B.A. J. 628, 666 (1957).

unethical judges who write poor opinions. To the contrary, most judges write hundreds—if not thousands—of legal opinions in their tenure and do a good job. Given mounting caseloads and time pressures in the modern-day opinion-writing process, it is impossible and unrealistic to expect every opinion to be perfect. To create a good opinion, however, ethics must be paramount. No ethical judge ought ever write an unethical opinion.

II. WHY WRITE OPINIONS?

To write an effective, ethical opinion, the judge must be conscious of the purposes of opinion writing. To understand these purposes, it is helpful to understand the history of the American written opinion.

The American legal system originated as a “speech centered” one modeled on English jurisprudence. In the English system, and in most common-law systems, oral argument is the dominant form of advocacy; the only written item is a short “notice of appeal” giving a one- or two-sentence synopsis of the issue to be argued,⁴¹ and judgments are rendered orally at the end of the proceeding.⁴² In the early American legal system, during the colonial period, “[o]ral arguments lasting several days were not uncommon.”⁴³ But as the United States increased in size and cities flourished, oral advocacy took a backseat to written advocacy. The country’s size undoubtedly played a role in this shift: “Because individuals had to travel great distances in order to attend political meetings and participate in government, the written and printed word were becoming an important means of political and governmental communication.”⁴⁴ It was inevitable “that the courts would eventually come to rely on the written or printed word as a means of communication between lawyers and judges who were separated by significant distances.”⁴⁵ The American legal system is now a “writing centered” system in which parties must often request time for oral argument. Some judges do not always hear oral argument, and for the most part oral argument, when granted, is limited to a short duration. As the legal system moved away from oral advocacy, it also moved away from oral decision making.

The shift to a writing-centered system is evident in *Marbury v. Madison*. The Supreme Court held that “[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases,

41. R. Kirkland Cozine, *The Emergence of Written Appellate Briefs in the Nineteenth-Century United States*, 38 AM. J. LEGAL HIST. 482, 483 (1994).

42. Daniel J. Meador, *English Appellate Judges from an American Perspective*, 66 GEO. L.J. 1349, 1364-67 (1978).

43. Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1179 (2004).

44. *Id.* at 1180.

45. *Id.*

must of necessity expound and interpret that rule.”⁴⁶ Most understand *Marbury* to mean that under the separation of powers doctrine, the judicial branch interprets laws that the legislative branch enacts and the executive branch enforces. For judges, *Marbury* means more than that. *Marbury* requires judges to give reasoned opinions, not merely judgments, in cases that call for explanation. The judicial opinion is integral to the function of the American judicial system. Opinions are the vehicles by which the judiciary elucidates, expounds upon, and creates rights for Americans.

Justice George Rose Smith once pointed to the democratic process as a reason to write opinions: “Above all else to expose the court’s decision to public scrutiny, to nail it up on the wall for all to see. In no other way can it be known whether the law needs revision, whether the court is doing its job, whether a particular judge is competent.”⁴⁷ Justice Smith recognized that judges are not untouchable beings. Judges serve their audience. With this service comes the need for judges to be trusted. Writing opinions makes obtaining trust easier; it allows an often opaque judicial institution to become transparent.

Writing judicial opinions essentially serves four functions. First, “opinions are written to tell the parties why the winner won and the loser lost.”⁴⁸ The law forbids vigilante, or “self help,” justice.⁴⁹ If individuals believe they will receive unexplained outcomes in the judicial forum, reliance on self-help might become the norm.⁵⁰

Second, written opinions “constrain arbitrariness.”⁵¹ A written opinion explains the decision to the parties, especially the losing party.⁵² The losing party must be satisfied that its arguments have been considered and fairly evaluated. A written opinion also assures the public that the decision is the product of reasoned judgment and thoughtful analysis, rather than an arbitrary exercise of judicial authority.⁵³

Third, written opinions ensure correctness.⁵⁴ Writing an opinion reinforces the judge’s decision-making process. It forces the judge to evaluate whether the

46. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

47. Smith, *supra* note 14, at 200-01.

48. McGowan, *supra* note 36, at 567; accord FEDERAL JUDICIAL CENTER, JUDICIAL WRITING MANUAL 1 (1991) [hereinafter FEDERAL JUDICIAL CENTER] (“[O]pinions communicate a court’s conclusions and the reasons for them to the parties and their lawyers.”).

49. McGowan, *supra* note 36, at 567.

50. *Id.*

51. Thomas E. Baker, *A Review of Corpus Juris Humorous*, 24 TEX. TECH L. REV. 869, 872 (1993) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 589 (1972) (Marshall, J., dissenting)); Moses Lasky, *Observing Appellate Opinions from Below the Bench*, 49 CAL. L. REV. 831, 838 (1961) [hereinafter Lasky, *Observing Appellate Opinions*].

52. Lord Devlin, *Judges and Lawmakers*, 39 MOD. L. REV. 1, 3-4 (1976).

53. See generally KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

54. Baker, *supra* note 51, at 872.

reasoning and the facts warrant the conclusion reached.⁵⁵ Many “[m]isconceptions and oversights of fact and law are discovered in the process of writing.”⁵⁶ A judge’s writing process must begin early, and a judge must edit until the deadline. A structured and unrushed writing process in which the judge organizes thoughts in advance, rewrites, and edits will allow the attorneys, the litigants, and those unfamiliar with the case to understand the opinion on their first read. If a judge has difficulty explaining a concept or decision, then more research—which might itself unearth other relevant cases or good ideas—is required to make everything understandable. A judge struggling with an opinion must reevaluate all reasoning and accept that a conclusion different from the one the judge originally planned to reach might be correct. Ultimately, a judge must always be happy with an opinion. A judge who is not happy with an opinion is a judge who has not taken seriously the responsibility to ensure that an opinion is correct.

Fourth, written opinions are the common law. They encapsulate much of legal discourse. In our system of *stare decisis*, courts must look backward and forward to evaluate the bases and implications of their decisions.⁵⁷ For appellate opinions of courts of last resort,

the test of the quality of an opinion is the light it casts, outside the four corners of the particular lawsuit, in guiding the judgment of the hundreds of thousands of lawyers and government officials who have to deal at first hand with the problems of everyday life and of the thousands of judges who have to handle the great mass of the litigation which ultimately develops.⁵⁸

Opinion writing helps judges structure their decisions as dialogues that consider the common law’s past and future.⁵⁹ Additionally, written opinions provide both upward and downward guidance in the court system. An intermediate appellate court writes to supervise and guide trial courts. In turn, a jurisdiction’s highest appellate court supervises the intermediate appellate court to bring uniformity to the law.⁶⁰ Judges must be conscious that their writings will become part of the common-law doctrine and be relied on by other courts. An unethical opinion

55. See Mary Kate Kearney, *The Propriety of Poetry in Judicial Opinions*, 12 WIDENER L.J. 597, 599 (2003) (“Judges write opinions to explain their resolution of a case, to place that case in the context of past decisions, and to offer precedent for future decisions.” Doing so enables them to “clarify [their] thoughts as [they are] reduce[d] . . . to paper”); FEDERAL JUDICIAL CENTER, *supra* note 48, at 1 (“[T]he preparation of a written opinion imposes intellectual discipline on the author, requiring the judge to clarify [the judge’s] reasoning and assess the sufficiency of precedential support.”).

56. Baker, *supra* note 51, at 873; accord Reed Dickerson, *Legal Drafting: Writing as Thinking, or, Talk-Back from Your Draft and How to Exploit It*, 29 J. LEGAL EDUC. 373 (1978).

57. See Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 819 (1961) [hereinafter Leflar, *Judicial Opinions*].

58. Henry M. Hart, Jr., *The Supreme Court, 1958 Term-Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 96 (1959).

59. See McGowan, *supra* note 36, at 570 (“Opinions record the life experience of rules.”).

60. See Baker, *supra* note 51, at 873.

carries negative implications that can reach beyond the parameters of the individual case for which it was written.

III. THE OPINION'S AUDIENCE

Judges write opinions for different audiences, but they write primarily for professionals, for the public, and for the litigants in the case.⁶¹ Judges must always know when to write (as opposed to deciding a matter orally), for whom to write, and when and how to publish. Unfortunately,

[t]oo often . . . judges write as if only the writer counted. Too often they write as if to themselves and as if their only purpose were to provide a documentary history of having made a judgment. Instead, they must realize that the purpose of an opinion is to make a judgment credible to a diverse audience of readers.⁶²

Judges may write for more than one audience. Judges can write not only for the litigant and the public but at the same time also for professionals, including lawyers, professors, law students, and other judges.⁶³ A judge may write an opinion to convince others in the profession that a certain view of the law and its purpose is correct or incorrect.⁶⁴

Appellate and trial opinions have different audiences and purposes. Appellate judges often write opinions to resolve controversies in their jurisdiction or to correct an erroneous trial-court opinion. For this reason, appellate opinions are mostly directed at lawyers and judges. But appellate opinions are also the primary source of material for the casebooks that law students use to learn the law; law students may be an opinion's secondary audience. Trial judges also write for the legal profession because they ensure that their opinions survive possible appellate review. In that respect, trial judges must explain their reasoning fully.

Frequently, trial judges write directly for the litigants, especially when a case involves settled issues or when a pro se litigant is involved. An opinion is the way judges convey the judgment of a case. Judgments are primary; opinions merely explain judgments: "judicial opinions are simply explanations for judgments—essays written by judges explaining why they rendered the judgment they did."⁶⁵ It is important for litigants to understand how and why the judge reached a particular result. Judges have a duty, running directly to the litigants, to render legally sound decisions.

Although the public is not the primary consumer of judicial opinions, judges

61. See Kearney, *supra* note 55, at 601 (describing "wide audience" that opinions reach).

62. Dwight W. Stevenson, *Writing Effective Opinions*, 59 JUDICATURE, Oct. 1975, at 134, 134.

63. Wald, *How I Write*, *supra* note 14, at 58.

64. RUGGERO J. ALDISERT, *OPINION WRITING* 26 (1990).

65. Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 62 (1993).

must also keep the public in mind when writing opinions. This is more important now that opinions are becoming increasingly accessible to the public through the Internet. The public becomes an audience for a judicial opinion when the opinion changes the law or its application. That change, in turn, changes the way people or entities interact. Journalists are often called on to communicate to the public the substance of opinions involving issues of public interest.⁶⁶ Important decisions should be written so that people can easily understand how their rights are affected.⁶⁷

The idea that judicial opinions should be accessible to the public is uniquely American. The English believe that the legal system is accountable mostly to litigants and, therefore, that the judicial decision-making process should take place in open court—where litigants can hear the opinion of all the judges.⁶⁸ For Americans, accountability in the judicial system stems from the fully deliberated written judicial opinion. The belief is that the judiciary, as the third branch of government,⁶⁹ is accountable to more than the litigants. The judiciary is accountable to the legislature to interpret and follow the law and to the public to apply the law. The judiciary's integrity depends on clear, impartial, and fair opinions. The underlying legal principle of *stare decisis*—that courts in the same jurisdiction apply the law in the same manner as higher courts—means that American judges do not “just write decisions, [they] write precedents.”⁷⁰

Judges must always bear their audience in mind when writing opinions. Before the writing process begins, a judge should consider (1) who is the reader of the opinion; (2) what resolutions the opinion makes; (3) what speaking voice should be used when writing the opinion; and (4) what relation should the judge express with the reader—in other words, the decision's tone.⁷¹ As to the first point, judges must bear in mind who is likely to read their opinions.⁷² Whether the opinion is designed for litigants, lawyers, the judiciary, or the public, it is vital for judges to write with their audience in mind. Second, judges must realize that not everyone will agree with their opinions. The losing lawyer, the losing litigant, and, in some

66. FEDERAL JUDICIAL CENTER, *supra* note 48, at 6.

67. See Nadine J. Wichern, *A Court of Clerks, Not of Men: Serving Justice in the Media Age*, 49 DEPAUL L. REV. 621, 667 (1999) (observing that “[g]enerally, judges only speak to the public through their opinions” and opining that “[t]he primary function of written opinions should be to inform the law’s consumers”).

68. Ehrenberg, *supra* note 43, at 1164.

69. Judicial accountability and transparency of judicial opinions are fundamental concepts supporting the idea of the judiciary as a co-equal governmental branch. Smith, *supra* note 14, at 200–01.

70. Kaye, *Wordsmiths*, *supra* note 1, at 10; accord Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT’L L. 81, 100 (1994). The American practice of explaining a ruling’s rationale contrasts starkly with the way opinions are written in France. French judges hand down decisions as *fiats* without explanation. Additionally, French courts may change jurisprudence dramatically without an explanation from the court. From an American perspective, the French system’s lack of accountability and reasoning would be considered unethical.

71. Walker Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U. L. REV. 915, 921 (1961), *reprinted in* 6 SCRIBES J. LEGAL WRITING 115, 123 (1998).

72. *Id.* at 921–22, *reprinted in* 6 SCRIBES J. LEGAL WRITING 115, 124 (1998).

instances, an appellate court might all disagree.⁷³ Realizing that, judges should write persuasive opinions while presenting the facts honestly, and perhaps even conceding a point or two to the losing side.⁷⁴ Third, judges must choose whether the opinion will be written in a formal (or “pure”) style⁷⁵ or in an informal (or “impure”) style. Fourth, judges must decide on the opinion’s tone.⁷⁶ Keeping these considerations in mind will help judges tailor their decisions to reach all who will be affected by what they write.

IV. THE OPINION’S STYLE

For judges, words are critical. Literary style is important to a judge seeking to write an ethical opinion. If good opinion writing is critical to the good administration of justice, literary style is critical to good opinion writing. As Robert Leflar wrote:

Some judges argue that literary style has little or nothing to do with the quality of opinions, that style is “dressing” merely, and that the functions of opinions are served wholly by their substantive content. This simply does not make sense. For one thing, every judge has a writing style, whether he knows it or not Whatever it is, it determines how effectively the substantive content of opinions is conveyed⁷⁷

Style and substance are important ingredients in a good opinion.

An opinion that “presents a sound statement of the law will hold its own regardless of its literary style But, the fact that substance comes before literary style does not warrant the conclusion that literary style is not important.”⁷⁸ Although literary style is important, a satisfactory “objective is not a literary gem but a useful precedent, and the opinion should be *constructed* with good words, not plastered with them.”⁷⁹ There is not—and should not be—only one way to write an opinion. As one prominent judge explained, once we accept that there are different ways to write an opinion, we become open to the

73. *Id.* at 922, reprinted in 6 SCRIBES J. LEGAL WRITING 115, 124 (1998).

74. *Id.*

75. Justice Cardozo described the high style as “the voice of the law speaking by its consecrated ministers with the calmness and assurance that are born of a sense of mastery and power.” BENJAMIN N. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 10 (1931), reprinted in 52 HARV. L. REV. 471, 475 (1939), and in 48 YALE L.J. 489, 493 (1939), and in 39 COLUM. L. REV. 119, 123 (1939) [hereinafter CARDOZO, LAW AND LITERATURE].

76. Gibson, *supra* note 71, at 125-26.

77. Leflar, *Judicial Opinions*, *supra* note 57, at 816.

78. Am. Bar Ass’n Sec. of Jud. Admin., Committee Report, *Internal Operating Procedures of Appellate Courts* 34-35 (1960-1961) [hereinafter “ABA Committee Report”].

79. BERNARD E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS § 103, at 204-05 (1977) (emphasis in original).

possibility that there are better and worse ways to write opinions.⁸⁰ There are many useful approaches to writing effective opinions.

Judges must write precisely, simply, and concisely. They must state the rule on which the decision turns. They must apply law to fact. They should spark interest: “[A] judicial opinion need not be a dull, stereotyped, colorless recital of facts, issues, propositions, and authorities but can be good writing and make good reading.”⁸¹ Using good grammar and correct usage are also important in opinion writing. Doing so makes the opinion readable. It sends a message that the judge took the time to write a grammatically correct and clear opinion. It shows that the judge took the opinion seriously.

Good legal writers, like all good writers, follow certain axioms: Do not end sentences with prepositions; refrain from writing in passive voice; and avoid splitting infinitives. These axioms are tools to enhance one’s writing style, yet they should not always be followed; exceptions sometimes prove the rule.⁸² Good writers will stray from grammatical convention when necessary to enhance the clarity of their writing.⁸³

A judicial opinion must be more than semantically and grammatically correct. Writing style is a judge’s signature—the judge’s own imprimatur on the law. The importance of style is encapsulated in Llewellyn’s aphorism: “Ideals without technique are a mess. But technique without ideals is a menace.”⁸⁴ For this reason, judges should shun chameleon writing, which adopts the winning litigant’s style and changes from case to case. Moses Lasky said it best:

Then there is the opinion manufactured in what Judge Cardozo, I believe, called the “style agglutinative,” by scissors and paste pot. In consequence, there are notable judges whose opinions vary both in style and legal attainment according to the brief of the party for whom they have decided to decide; the opinion consists of reassembled segments clipped from the prevailing briefs.⁸⁵

Chameleon writing shows no individual thought or reasoning. Judges should not allow their writing to be a cut-and-paste job. Rather, within the constraints of grammar and ethics, each judge may express a unique writing style. Judges—particularly federal judges—should similarly avoid the temptation to rely too heavily on their clerks’ writing styles. For judges to speak with their own voice, they need to avoid not only the litigants’ language but that of their cyclic clerks as well.

80. See Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1423 (1995) [hereinafter Posner, *Judges’ Writing Styles*].

81. WITKIN, *supra* note 79, at § 103, at 202-03.

82. See Posner, *Judges’ Writing Styles*, *supra* note 80, at 1424.

83. See generally Gopen, *supra* note 13, at 348-53.

84. Karl N. Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651, 662 (1935).

85. Lasky, *Observing Appellate Opinions*, *supra* note 51, at 831-32.

Judges sometimes use styles foreign to traditional opinion writing. Some have argued that styles found in popular culture may be utilized in opinion writing.⁸⁶ Judges have borrowed from the conventions of poetry, limericks, and even rap to write stylized opinions.⁸⁷ Although many judges have tried their hand at using these styles of opinion writing, most fail to write good law or even good poetry.⁸⁸

An example of an opinion becoming more famous for its style than its substance is a much-publicized decision rendered in the Michigan Circuit Court.⁸⁹ In *Mathers v. Bailey*, the plaintiff, a childhood acquaintance of the rapper Marshall Mathers (otherwise known as Eminem, or Slim Shady), brought a claim for invasion of privacy and false light for rapping that the plaintiff had bullied him when they were in middle school together.⁹⁰ Following a well-reasoned opinion that explained the facts and the law in connection with Eminem's summary-judgment motion, the court granted Eminem's motion.⁹¹ The judge then tried her own hand at rap by creating thirty-six lines of lyrics that included the following: "Bailey also admitted he was a bully in youth/Which makes what Marshall said substantial truth/This doctrine is a defense well known/And renders Bailey's case substantially blown."⁹² The "rap" was unnecessary to the court's decision and served only to publicize it.⁹³ This opinion underscores the point that using poetry or rap as a style in an opinion undermines the court's authority. Using these styles turns the opinion into a spectacle rather than a legal tool.⁹⁴

The problem with writing an opinion in nontraditional styles is that the judge must fit the case's substance into the desired format rather than allow the facts and law to lead the writer and reader to a logical conclusion that the law supports.⁹⁵ Often the traditional way is the better way. Opinions are not the place to experiment with writing styles.

As articulated by Judge Richard A. Posner, there are essentially two types of opinions—the pure opinion and the impure opinion.⁹⁶ The pure opinion is a formal opinion written with legalese and with a tone of "high professional

86. See, e.g., ALDISERT, *supra* note 64, at 196.

87. See Gerald Lebovits, *Poetic Justice: From Bad to Verse*, 74 N.Y. ST. B.J., Sept. 2002, at 44, 48 [hereinafter Lebovits, *Poetic Justice*].

88. *Id.* at 48.

89. See *Mathers v. Bailey*, No. 2001-3606-NO, 2003 WL 22410088 (Mich. Cir. Ct. Oct. 17, 2003).

90. See *id.* at *1.

91. See *id.* at *6 n.11.

92. *Id.*

93. See, e.g., Bill Hoffmann, *Rappin' the Gavel: Judge Busts a Rhyme as She Clears Eminem*, N.Y. POST, Oct. 22, 2003, at 29; Anthony Harwood, *SHADY M'LADY Rap-style Ruling in Pounds 600k Case*, SCOT. DAILY REC., Oct. 21, 2003, at 3.

94. See Lebovits, *Poetic Justice*, *supra* note 87, at 48.

95. See Susan K. Rushing, *Is Judicial Humor Judicious?*, 1 SCRIBES J. LEGAL WRITING 125, 137 (1990).

96. See Posner, *Judges' Writing Styles*, *supra* note 80, at 1421.

gravity.”⁹⁷ Far removed from conversation, it is often solemn, impersonal, and matter of fact. The judge’s voice is masked with details, numerous and lengthy quotations from previous judicial opinions, and a serious tone.⁹⁸ Although attorneys and other judges might be able to decipher the pure opinion, it is inaccessible to the average reader.⁹⁹ By contrast, the impure opinion is conversational and written in simple, accessible language.¹⁰⁰ Judges who write in the impure style not only render judgment but also explain the decision to the layperson.¹⁰¹ The impure opinion is candid, relaxed, and sometimes humorous,¹⁰² whereas the pure opinion is replete with heavy rhetoric. Adelberto Jordan explained the pure versus impure dilemma:

Judges may face a dilemma in trying to write opinions that are figurative, quotable, humorous, or unique. While they may want to forsake the wooden form of judicial opinion writing (issue, facts, law, application, conclusion), they must, in some way, maintain the dignity and integrity that, at least in part, gives the judiciary its legitimacy.¹⁰³

Judges often fall into the mold of either writing pure or impure opinions. The choice is based on the judge’s own personality, the traditions of the court on which the judge sits, or the opinion’s intended audience.

Judges who often write for other judges (in higher or lower courts), lawyers, and litigants tend to write in a pure style.¹⁰⁴ The judge wants to ensure that the opinion is reasoned, based on precedent, and authoritative. The pure style is best for lawyers and judges concerned about the decorum of the judicial opinion.¹⁰⁵ The pure opinion is exemplified by Justices Louis Brandeis, William Brennan, Benjamin Cardozo, Felix Frankfurter, and the second John Harlan. The pure opinion “is characteristic of the vast majority of opinions written by law clerks, which means most opinions in all American courts today.”¹⁰⁶ Indiana Court of Appeals Judge Paul Buchanan favored the pure approach when he wrote that “[u]sing a structured opinion results in more than efficiency and readability The discipline of organizing, dividing, and identifying the parts of an opinion is a process which, if honestly pursued, necessarily produces brevity, clarity, and

97. *Id.* at 1426.

98. *Id.* at 1429.

99. *See id.*

100. *Id.* at 1427.

101. *Id.* at 1430.

102. *Id.*

103. Adelberto Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. MIAMI L. REV. 693, 695 n.11 (1987).

104. *See* Posner, *Judges’ Writing Styles*, *supra* note 80, at 1431.

105. *See id.*

106. *Id.* at 1432.

accuracy.”¹⁰⁷ Judges writing for the public will write candidly and simply in the impure style. Impure opinions tend to be fact-based and use almost no legalese. The impure style is best for the layperson because the candor and simplicity that characterize the style make impure opinions easier to understand. Neither style, however, is free from ethical considerations.

V. ETHICAL CONSIDERATIONS IN A PURE OPINION

Purists believe in the solemnity and dignity of the law. A pure opinion reflects that belief. Purists do not strive foremost for readability; they write with other goals in mind. A pure opinion embodies the high, dignified place the judicial system has in American society. Purists use an impersonal tone, lay out facts and legal propositions in great (sometimes excruciating) detail, pay much deference to precedent, use technical terms without definition, and scrupulously comply with citation conventions.¹⁰⁸ At its extreme, the pure opinion is written in a lofty and formalistic tone. Purists organize, divide, and identify the essential elements of a case to provide accuracy. There are several dangers to writing in the pure style: (1) over-citation; (2) over-reliance on authority instead of reasoning; (3) overuse of footnotes; (4) failing to connect facts to law; (5) using Latinisms; and (6) hiding reasoning behind pretentious language. The pure opinion sacrifices clarity and readability, and relies on reason in favor of dogmatic, unyielding, and inflexible rules. At its extreme, the pure opinion is mechanical.

A. THE OPINION’S LENGTH

Some purists believe that a judicial opinion should be a scholarly exposé on the law. Pure opinions can be lengthy, verbose, and repetitious. A careful and methodical opinion does no disservice to the law, but it risks alienating the reader. It is probably true that as the length of an opinion increases, the number of readers decreases. Purists must be conscious not to alienate readers with their trademark dense writing style and length.

An opinion’s length is often determined by the nature and complexity of the facts and the issues, by the audience the judge intends to reach, and by the judge’s hopes for publication.¹⁰⁹ Judges must account for all these factors in writing their opinions. A memorandum opinion should not be used when disposing of a case by reversal or remand.¹¹⁰ Litigants, especially losing litigants, want to be assured that the court considered the issues and engaged in a reasoned and fair

107. Paul H. Buchanan, Jr., *For Structured, Digestible, Streamlined Judicial Opinions*, 60 A.B.A. J., Oct. 1974, at 1249, 1251.

108. Posner, *Judges’ Writing Styles*, *supra* note 80, at 1429.

109. Gerald Lebovits, *Short Judicial Opinions: The Weight of Authority*, 76 N.Y. St. B.J., Sept. 2004, at 64, 64 [hereinafter Lebovits, *Short Judicial Opinions*] (citing FEDERAL JUDICIAL CENTER, *supra* note 48, at 4).

110. ALDISERT, *supra* note 64, at 20.

analysis.¹¹¹ The public wants to be assured that if it relies on the judiciary, then cases will be decided fairly.¹¹² Judges and lawyers want an opinion to be well-reasoned so that it has some precedential value.¹¹³

The most important factors determining the opinion's length are "the complexity of the facts and the nature of the legal issues."¹¹⁴ These factors determine whether a case requires a "full dress" opinion, a memorandum opinion, or a summary order.¹¹⁵ Cases that involve issues about which the controlling law is uncertain, or which contain complex material facts, require more exposition and analysis than cases involving clear precedents or simple material facts.¹¹⁶ Although some judges might want to write long opinions, opinions must be no longer than they need to be. Reducing the number of longer opinions might lead judges to write more thoughtful ones. Judge Bruce M. Selya offered good advice in two law-review articles. Judge Selya proposed that when it comes to judicial opinions, less is better; judges should write less, but think more.

Two centuries ago, Lord Mansfield lived by the following heroic maxim: "I never give a judicial opinion upon any point, until I think I am master of every material argument and authority relative to it." In these more hectic times, judges are faced with the choice of either reducing the number of full-dress opinions or lowering the level of mastery to which they aspire. The better choice is clear. Unless we are to defenestrate the ideal of Lord Mansfield—and I think we all agree that we should cling to it—judges must begin to think more and write less.¹¹⁷

I do not pretend that it will be a walk in the park. Despite all the bromides, judges have fierce pride of authorship—and this pride is, on balance, a good thing. It is the pride of the craftsman, sticking to his last. To complicate matters, using fewer citations will make some judges uneasy, worried that either their devotion or their scholarship will be called into question. Finally, eschewing routine citations will drive some law clerks to tears. But I think that, if judges can steel themselves to abjure rote recitations of established legal principles, forgo superfluous citations, and work consciously toward economies of phrase, the game will prove to be well worth the candle. With apologies to Robert Browning, the reality is that "less is more." If appellate judges do not come to accept and act upon this reality, we will simply spend our days writing more

111. Lebovits, *Short Judicial Opinions*, *supra* note 109, at 64.

112. *See id.*

113. *Id.*

114. FEDERAL JUDICIAL CENTER, *supra* note 48, at 4.

115. *Id.* at 3.

116. *Id.*

117. Bruce M. Selya, *Judges on Judging: Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age*, 55 OHIO ST. L.J. 405, 414 (1994) (footnote omitted) (quoting *Rex v. Wilkes*, (1770) 98 Eng. Rep. 327, 339 (K.B.)).

and more about less and less for audiences that are increasingly alienated, or bored, or both.¹¹⁸

Writing should be thorough but economical. In the search for brevity, however, judges should not be abrupt.¹¹⁹ Judges must strive to be concise: “Brief opinions hold the reader’s attention, allow readers to move on to other things, and distill the opinion’s essence.”¹²⁰ Unfortunately, opinions have been getting longer. For example, between 1960 and 1980, the average length of federal court of appeals opinions increased from 2863 words to 4020 words; the average number of footnotes increased from 3.8 to 7; and the average number of citations rose from 12.4 to 24.7.¹²¹ Long opinions can cloud issues, obscure facts, and cause the reader to become disinterested or confused.

B. THE DANGERS OF LENGTHY OPINIONS

Lengthy opinions can be dangerous blueprints for impressionable law students. Judicial opinions are the building blocks on which future lawyers model their legal-writing skills. If judges write in a particular way, then students will take their cues from that style in crafting their own writing: “For better or worse, the opinion affects the basic writing pattern of the profession.”¹²² Appellate opinions are the main source of educational material in casebooks that law professors use to teach the next generation of lawyers.

The first time that lawyers-to-be read opinions in earnest is during their first year of law school. Law schools teach students to “think like lawyers,” a way of thinking different from the way most people think.¹²³ Because law students must learn a new way of thinking, they seek examples of what it means to think, speak, and write like a lawyer. From the first day of class, law students are exposed to definitive opinions that have shaped the law. Those opinions may not be the perfect style or framework for writing judicial opinions. Students often receive a distorted view of how a lengthy opinion is actually written and how the case is

118. Bruce M. Selya, *Favorite Case Symposium: In Search of Less*, 74 TEX. L. REV. 1277, 1279 (1996) (footnote omitted).

119. See Lebovits, *Short Judicial Opinions*, *supra* note 109, at 60. For a clipped opinion, see *Denny v. Radar Industries, Inc.*, 184 N.W.2d 289 (Mich. App. 1970), in which the entire opinion reads: “The appellant has attempted to distinguish the factual situation in this case from that in *Renfroe v. Higgings Rack Coating & Manufacturing Co., Inc.* (1969), 17 Mich. App. 259, 169 N.W. 2d 326. He didn’t. We couldn’t. Affirmed. Costs to appellee.” See also ALDISERT, *supra* note 64, at 7 (judges err when “[t]hey fail to set forth specific reasons for choosing one line of cases over others, saying, ‘We think that is the better view’ and, ‘We prefer the majority view’ without explaining why”).

120. Lebovits, *Short Judicial Opinions*, *supra* note 109, at 64; Kaye, *Wordsmiths*, *supra* note 1, at 11 (“[A]s the length of writings grows, the number of people who actually read them likely dwindles.”).

121. See Lebovits, *Short Judicial Opinions*, *supra* note 109, at 64 (citing RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 72 (1985)).

122. DAVID MELLINKOFF, *LEGAL WRITING: SENSE AND NONSENSE* 70 (1982).

123. See Alan M. Lerner, *Law & Lawyering in the Work Place: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solver*, 32 AKRON L. REV. 107, 109 (1999).

decided substantively. Textbook editors pare down long opinions in casebooks, thereby distorting students' perceptions of the case and how the law operates.¹²⁴

Although legal-writing instructors encourage their students to write concisely, the use of judicial opinions in legal education by the casebook method might contribute to the lengthening of opinions. In their indirect role as educators, judges realize that it is incumbent on them to explain fully their decision-making process. Judges may also believe that the public's increased participation in the law warrants a complete explanation of a decision. Concerns about transparency and accountability to the public may lead judges to over-explain their reasoning, making for longer decisions.

Longer opinions also do a disservice to practicing lawyers. Lawyers today must stay abreast of legal developments and are subject to enormous time pressures. Lawyers have little luxury to study opinions. The increase in opinion length¹²⁵ makes it less likely that a lawyer will thoroughly examine the pertinent case law or be able to extrapolate an opinion's pertinent issues, holdings, and nuances.

The public can also be affected by an opinion's length. Litigants will feel dissatisfied with a court's ruling if they cannot understand its reasoning. The possibility that an opinion's length might alienate the public reinforces a perception of law and of the judiciary as something unattainable, unusable, out of a layperson's reach and comprehension. This result is one the judiciary should avoid.¹²⁶

A lengthy decision might suggest excessive reliance on a law clerk's work.¹²⁷ As Judge Ruggero J. Aldisert cautioned, "When I see an opinion heavily overwritten, it is a signal to me that it is the product not of a judge, but of a law clerk, a person who is generally not sophisticated or perhaps confident enough to separate that which is important from what is merely interesting."¹²⁸ A judge should be wary of the implications that lengthy opinions can have.

C. SHORTENING OPINIONS

Eliminating dicta is one way to shorten an opinion. Dicta—often added to placate, or even impress, the opinion's audience—distracts the reader from the issues.¹²⁹ Although some doctrines have arisen from dicta,¹³⁰ it is not the way to

124. Abner J. Mikva, *For Whom Judges Write*, 61 S. CAL. L. REV. 1357, 1359 (1988).

125. *See id.* at 1358 (comparing length of old cases with more modern ones).

126. MODEL CODE Canon 1.

127. For more on the role of law clerks, see *infra* Part VIII, The Role of Law Clerks.

128. ALDISERT, *supra* note 64, at 86.

129. Mikva, *supra* note 124, at 1367.

130. *See, e.g.,* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) ("[W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for correspondingly more searching judicial inquiry.").

develop legal precedent. A judicial opinion should resolve only the pertinent controversy and not discuss superfluous matters.¹³¹ Dicta should be limited because it has the potential to obscure holdings, make incorrect predictions, pressure officials in other branches of government, and “over explain” the case.¹³² Dicta is primarily a concern for appellate judges, whose opinions are binding legal precedent. But dicta can also lead trial judges to interpret appellate decisions erroneously.¹³³

Judges can shorten their opinions by using fewer string citations. Unless there is reason to show the number of cases concurring with a particular rule, it is unnecessary to cite numerous cases that stand for the same proposition, especially when all the cases cited hail from the same court. Most times a judge need cite only the seminal, the most recent, or the most on-point, controlling pronouncement.¹³⁴ That other circuits, districts, or divisions follow the same precedent might be interesting, but absent further reason—such as noting a conflict of authority—noncontrolling precedent should be deleted from the opinion. Not only does eliminating unnecessary citations shorten the opinion, but it also increases the opinion’s clarity by eliminating potentially confusing and irrelevant citations. The exception is that “if an opinion breaks new ground . . . the court should marshal existing authority and analyze the evolution of the law sufficiently to support the new rule.”¹³⁵

Similarly, opinion length can be controlled by limiting what has been stated in earlier case law. The rules from the cases, not the cases themselves, should be emphasized. Over-reliance on authority spells a purist approach to the law: cases matter more than the reasoning in those cases; distinctions among cases are ignored; and reasoning is hidden by long, dull discussions of authority. Those who rely excessively on authority tend to discuss factual minutiae in paragraph upon paragraph, resulting in disorganized opinions.

Unless the weight of the authority is important, the better approach in the pure opinion is to cite cases for their rules and to discuss the facts of cases only to distinguish or analogize them to the facts of the case under consideration.¹³⁶ In our common-law democracy, judges must follow binding precedent and legal rules of statutory interpretation. But not all precedents are binding, and not all statutes can be interpreted at face value. As Illinois Chief Justice Walter Schaefer

131. *E.g.*, JOYCE J. GEORGE, *JUDICIAL OPINION WRITING HANDBOOK* 242 (4th ed. 2000) (“[D]icta in opinions . . . [is] not encouraged.”).

132. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1410 (1995) [hereinafter Wald, *Rhetoric of Results*].

133. *See generally* Richard B. Cappalli, *The Disappearance of Legal Method*, 70 TEMP. L. REV. 393, 400 (1997).

134. FEDERAL JUDICIAL CENTER, *supra* note 48, at 18.

135. *Id.*

136. *See* DEBORAH A. SCHMEDEMANN & CHRISTINA L. KUNZ, *SYNTHESIS: LEGAL READING, REASONING, AND WRITING* 41, 42 (1999) (explaining how to fuse cases to articulate governing rule or pattern).

explained, “lawyers tend to treat all judicial opinions as currency of equal value Yet, when the judicial process is viewed from the inside, nothing is clearer than that all decisions are not of equivalent value to the court which renders them.”¹³⁷ Professor John Henry Merryman noted the problem a half-century ago when he wrote that

[b]y emphasizing “the law” to the exclusion of “the legal process,” by perpetuating the illusion that all there is to decision of a case is location of the appropriate rule . . . these works perpetuate an unsophisticated concept of the legal process in which the actual bases of decision are concealed not only from the society he serves but from the judge who decides.

A first step in freeing himself from this view of law is that the judge recognize that headnotes from previous decisions, no matter how carefully arranged, how accurately copied, how smoothly run together into text, no matter how carefully weighed, distilled and condensed into higher abstractions, do not of themselves decide cases [Judges should] ignore the false front of mechanical jurisprudence¹³⁸

Judicial writing is more complicated than merely citing cases and reciting facts.

Judges should also carefully select the facts they incorporate in an opinion. A judge must include all relevant facts. If the judge, consciously or not, believes that relating “the full relevant truth about a case would weaken the convincingness of a decision [the judge] want[s] to deliver, [the judge] ought to question that decision with soul-searching cogitation.”¹³⁹ An under-inclusive presentation of the facts might suggest that the decision is poorly reasoned. This is especially relevant for trial judges because appellate reversals are often based on a trial judge’s erroneous interpretation of the law. Rarely are cases reversed because the trial judge has presented the facts inaccurately.¹⁴⁰ Although an opinion must contain all relevant facts—omitting relevant facts is always worse than including too many facts—the opinion should omit all irrelevant facts.¹⁴¹ Including too many facts makes an opinion unnecessarily dense and less readable. When presenting the facts, judges should include all relevant facts and eliminate unnecessary, peripheral facts.¹⁴²

137. Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 7 (1966).

138. John Henry Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613, 673 (1954).

139. Palmer, *supra* note 4, at 883.

140. *See id.*

141. *Id.*; FEDERAL JUDICIAL CENTER, *supra* note 48, at 15. In a study examining lawyers’ reactions to a typical judicial opinion and to the same opinion rewritten following the guidelines of the “plain English” movement, Professor Kimble found that of the sixty-one percent of survey respondents who preferred the “plain English” opinion, the greater number preferred it because it left out unnecessary detail. *See* Joseph Kimble, *The Straight Skinny on Better Judicial Opinions*, 9 SCRIBES J. LEGAL WRITING 1, 6-7 (2003-2004) [hereinafter Kimble, *Straight Skinny*].

142. *See* Palmer, *supra* note 4, at 883.

Controlling sentence structure and grammar also helps shorten an opinion. Long sentences with multiple propositions should be broken into two or three separate sentences. There are several benefits to explaining a point in one or two short sentences instead of one long, confusing sentence. A clearly written sentence eliminates the need to repeat or re-explain a point in different words. A reader will have an easier and faster time reading two or three clear sentences once, rather than reading one complicated sentence two or three times. Clear sentences keep the opinion flowing, make it understandable, and allow the reader to get through the entire text of the opinion quickly.

In striving for concision and succinctness, judges should recall their role in molding the common law. When drafting an opinion that lays down a new rule of law or modifies an old one, a judge should keep in mind the opinion's impact as precedent.¹⁴³ The opinion "should present sufficient facts to define for other readers the precedent it creates and to delineate its boundaries."¹⁴⁴ It should also contain a sufficient analysis of the precedents and relevant policies to establish the rationale for the holding.¹⁴⁵ An opinion that fulfills these roles without verbosity is the proper length, regardless of raw word count.

Justice Oliver Wendell Holmes's opinion in the companion cases of *Herbert v. Shanley Company* and *John Church Company v. Hilliard Hotel Company*¹⁴⁶ is an example of a pure opinion. It is both succinct and well-reasoned. The cases concerned whether the petitioner in a copyright dispute was entitled to royalties for free performances of the petitioner's music. Justice Holmes decided the case in a few paragraphs. The first two state the facts and procedural history. In the third and final paragraph, he issued his ruling: "If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected."¹⁴⁷ Justice Holmes used the remainder of the paragraph to expand on the holding. We do not suggest that all opinions use this Holmesian brevity,¹⁴⁸ but much can be said for an opinion that is brief and on-point. Even though short, comprehensive opinions are harder and more time-consuming to write, they are easier to read. In a legal system plagued by lengthy pleadings and verbose orators, "less can be more when the goal is elucidation and persuasion."¹⁴⁹

143. FEDERAL JUDICIAL CENTER, *supra* note 48, at 4.

144. *Id.* at 5.

145. *Id.*

146. 242 U.S. 591 (1917).

147. *Id.* at 594.

148. Judge Abner Mikva agrees that "[i]n our age of legal complexity, then, a purely Holmesian approach is untenable." Mikva, *supra* note 123, at 1363.

149. Kaye, *Wordsmiths*, *supra* note 1, at 11.

D. LEGALESE

Plain expression is necessary for a legal system extensively based on judicial review.¹⁵⁰ Legalese has no place in judicial opinions. Justice George Rose Smith defined legalese as “a word or phrase that a lawyer might use in drafting a contract or a pleading but would not use in conversation with his wife.”¹⁵¹ A pure opinion is easily identified by its legalese. There are two criticisms of legalese: “[I]ts style is strange, and it cannot be understood.”¹⁵²

Legalese has been criticized since Shakespeare’s day,¹⁵³ yet it is still common in today’s judicial opinions. Using legalese contributes to a pure opinion’s high style. It is axiomatic that all legal writing responds substantively and stylistically to the “language of the law.”¹⁵⁴ Legalese is the language of lawyers, containing words that do not often appear outside the legal profession. Some legalese is necessary, having become terms of art over years of development.¹⁵⁵ But most legalese is unnecessary.¹⁵⁶

The law is riddled with legal terms of art necessary to the practice of law. A term of art is defined as a “short expression that (a) conveys a fairly well-agreed meaning, and (b) saves the many words that would otherwise be needed to convey that meaning.”¹⁵⁷ Words like “plaintiff,” “hearsay,” and “felony” are terms of art;¹⁵⁸ they have distinct meanings a synonym cannot replace. Even though a word frequently appears in litigation documents, that does not mean it is untranslatable. For example, “inter alia” should be replaced with “among other things,” and “among other things” is itself often a verbose phrase.

Judges often use phrases from dead or foreign languages. It is said that Latin is a dead language still alive in legal writing, including judicial opinions. The average person has no understanding of Latin (except perhaps *e pluribus unum*), but judges regularly include phrases like “*lex loci delecti*” or “*malum prohibitum*” in their opinions. French also appears frequently in opinions, in phrases such as “*vis-à-vis*,” “*cestui qui trust*,” or “*dehors* the record.” Non-English words and legalese make an English-language opinion prohibitive to the public. These words and phrases invariably force most readers to look up the phrase—or possibly just stop reading the opinion altogether. English translations should be

150. See McGowan, *supra* note 36, at 531 (advocating against using debased language and quoting George Orwell’s observation that if a writer writes “straightforward English then, if nothing else, ‘when you make a stupid remark its stupidity will be obvious, even to yourself’”).

151. Smith, *supra* note 14, at 209.

152. Benson, *supra* note 39, at 520.

153. Gopen, *supra* note 13, at 333.

154. Elizabeth A. Francis, *A Faster, Better Way to Write Opinions*, 4 JUDGES’ J., Fall 1988, at 26, 28 [hereinafter Francis, *Faster, Better*].

155. Benson, *supra* note 39, at 561.

156. *Id.*

157. *Id.* at 562.

158. *Id.*

used instead.

Judges must translate legalese into language comprehensible for those not trained in the law. Judges should control the use of the law's "professional dialect"¹⁵⁹ and compose comprehensible opinions. Perhaps the purists believe their audience consists of only those who understand legalese—judges and lawyers. But legalese segregates a whole other audience: the public. If the public cannot understand an opinion because of the legalese, then the public cannot understand the law's ongoing evolution or, worse, the grounds on which cases are decided. Using language that is difficult to understand diminishes the public's perception of judicial integrity and alienates a public that cannot gauge whether a decision is fair.

Proponents of legalese argue that using legal terms of art ensures that the opinion's plain language will be interpreted in the manner intended.¹⁶⁰ They also maintain that legalese ensures that a term will be interpreted in the same way in the future as it has been in the past. Further, they contend that legalese is understood by those in the legal profession, is designed to keep people out of court, and gives litigants the best chance of winning if they do wind up in court.¹⁶¹

If legalese were as precise as some claim, then it would be unlikely that litigation would turn on the meaning of a word or a phrase.¹⁶² Litigation that turns on the meaning of a word or phrase in a contract or a judicial precedent might have been avoided had plain English been used.¹⁶³ Words carry no special meaning beyond their plain-English counterparts.

Why, then, do judges continue to use legalese? One theory is that judges, as professionals, enjoy having power over others; they use legalese to dominate others.¹⁶⁴ Another theory is that a judge's ability to use language not readily understandable to the rest of society allows the judge to maintain social status—only those select few can interpret and understand what is said.¹⁶⁵ Yet another theory is that legalese is a cover for lazy writing and helps overburdened judges. When trying to get a point across, it is easier to fill a document with complex phrases than to pare down complicated language into plain English.¹⁶⁶

It is more time-consuming and difficult to write an accurate and effective opinion understandable to laypersons than one that is unintelligible. But if opinions are to be accessible, the burden is on judges to take the time to make them so. The Chief Judge of New York, Judith S. Kaye, has written about the

159. See Francis, *Faster, Better*, *supra* note 154, at 29.

160. Benson, *supra* note 39, at 561.

161. *Id.* at 558.

162. See *id.* at 558-59.

163. See *id.*

164. Gopen, *supra* note 13, at 343-45.

165. *Id.*

166. *Id.* at 342-43.

commitment judges must make to writing readable opinions:

First, we need to make sure that our communications are accessible. For sitting judges, this starts with sensitive courtroom behavior and speaking clearly—in English, not in Latin, not in French, and not in pettifog We need to say what we mean in a way that people can understand.¹⁶⁷

Instead of using a phrase from a dead or foreign language, judges should write in plain English.

On an ethical level, legalese hides. Purist judges obscure their thinking by using the inherently unclear language of legalisms. Legalese is imprecise and often muddles lawyers as much as it does lay people.¹⁶⁸ Judges should use clear, precise words to reveal rather than hide their thinking.

E. FOCUSED WRITING

The importance and function of judicial opinions underscores the need for opinions to be focused. Some pure opinions contain not only facts and relevant law but also unnecessary discussions.

Focused writing is not rushed writing. Although a court should decide no more than it must, “sometimes courts extend this ‘law’ to the point of deciding no more than is necessary to get the case off the desk.”¹⁶⁹ As a result, “the court’s opinion slithers out through some pinhole, and the case goes back for further anguished and expensive litigation.”¹⁷⁰

Judges must render just and reasoned decisions. Some judges treat an opinion as an opportunity to write a brilliant essay on the legal topic presented in the case. But opinions are not the place to write scholarly exposés. As noted by Professor Richard B. Cappalli, opinions should favor pedestrian virtues:

Rhetoric need not be utilized for its power of persuasion because, right or wrong, the precedent binds. The appellate court’s primary duty is to reason and write clearly and succinctly, with constant vigilance against future misreadings and distortions. This duty can be executed quite well with pedestrian English and only mildly sophisticated reasoning.¹⁷¹

Opinions should not be written primarily to be cited or to be incorporated in law-school casebooks—even though an opinion will create law if it is memorable. Regardless whether a judge is cognizant that a certain decision will be

167. Judith S. Kaye, *Rethinking Traditional Approaches*, 62 ALB. L. REV. 1491, 1497 (1999).

168. See generally Joseph Kimble, *The Great Myth That Plain Language Is Not Precise*, 7 SCRIBES J. LEGAL WRITING 109 (2000); Joseph Kimble, *Answering the Critics of Plain Language*, 5 SCRIBES J. LEGAL WRITING 51 (1994-1995).

169. Lasky, *Observing Appellate Opinions*, *supra* note 51, at 837.

170. *Id.* (noting that “[j]udicial [p]arsimony then becomes judicial shortchange”); see Seminars for Circuit Court Judges, 63 F.R.D. 453 (1972).

171. Richard B. Cappalli, Viewpoint, *Improving Appellate Opinions*, 83 JUDICATURE 286, 286 (2000).

published because of the novel issues or facts or the political importance of the case,¹⁷² the opinion should always be edited, scrutinized, and polished.

A judge must also be careful not to stray into politics when writing an opinion. The decision should focus only on the issue before the court and not what the legislature should not do, or discuss political realities outside the actual case. An example of an opinion venturing into politics is found in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹⁷³ At the end of his concurrence, Justice Harry Blackmun, who believed that a woman's right to choose is afforded constitutional protection, wrote, "I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issues before us today. That, I regret, may be exactly where the choice between the two worlds will be made."¹⁷⁴ Justice Blackmun's observation was poignant, and arguably correct, but his discussion did not belong in the opinion.

Opinions are not law-review articles, historical treatises, or op-ed pieces. Some opinions require additional commentary, such as opinions involving a technical subject or groundbreaking new law. Still, commentaries on broader political and social policies or "better" examples of statutes that the legislature should have written are not always proper. Policy-oriented dicta are inappropriate. This dicta oversteps the court's role as an interpreter of laws and bullies legislatures or agencies into adopting judicially approved laws. They also suggest to the reader that the case was decided on a social or political agenda and not on the facts and the law. Judges, particularly the purists, must focus their opinions on the issues squarely before the court. Judges should prefer "lean and tight" opinions rather than opinions that exercise in "show and tell."¹⁷⁵

F. LANGUAGE CHOICES

Because purists rely strongly on formalism, their word choices can result in unnecessarily complicated opinions.¹⁷⁶ For example, a writer's "voice" can either clarify the facts or make them murky. Passive voice can also make an opinion murky. Single passives invert a sentence's order. Double passives hide the actor or the sentence's subject. Compare the double passive "the defendant's motion was denied erroneously" with the active "the trial court erroneously denied the defendant's motion." The former leaves the reader wondering who

172. See Ahmed E. Taha, *Publish or Paris? Evidence of How Judges Allocate Their Time*, 6 AM. L. & ECON. REV. 1, 3-6 (2004).

173. 505 U.S. 833, 943 (1992).

174. *Id.* (Blackmun, J., concurring). For a more detailed discussion of the background and motives behind Justice Blackmun's comment in *Casey*, see McGowan, *supra* note 36, at 582-87.

175. Wald, *Rhetoric of Results*, *supra* note 132, at 1408. See generally Kimble, *Straight Skinny*, *supra* note 141, at 6-7.

176. For two articles that discuss ethical language choices in legal writing generally, see Gerald Lebovits, *Legal-Writing Ethics—Part I*, N.Y. ST. B.J., Oct. 2005, at 64; Gerald Lebovits, *Legal-Writing Ethics—Part II*, N.Y. ST. B.J., Nov./Dec. 2005, at 64.

was wrong in denying the motion. Common sense tells practitioners it was a court, but only the second sentence makes it clear to all readers who did what to whom.

The use of nominalizations can further obscure the law to laypeople. Nominalizations, which turn verbs into nouns, fail to give the reader enough information. Compare “an instance of the commission of torture appeared on the record” with “upon examining the record, we find that the police officer tortured the prisoner.” Avoiding nominalizations helps judges write clearly.

Subject complements also impair a reader’s understanding of an opinion. Subject complements appear after the verb “to be” and after linking verbs like “to appear” and “to become.” For example, “angry” is the subject complement of “the judge became angry.” This language choice is deceptive because the reader does not know what made the judge angry.

The unnecessary use of flowery language (also known as “ten-dollar words”) obscures the law to laypeople and impairs comprehension even by judges and lawyers. Judge Bruce M. Selya of the Court of Appeals for the First Circuit is famous¹⁷⁷ for using in his decisions what he calls “neglected,”¹⁷⁸ words—including, for example, sockdolager,¹⁷⁹ algid,¹⁸⁰ longiloquent,¹⁸¹ and decurtate.¹⁸² Read this introduction from one of his opinions to see whether you understand it:

This matter arises on an infrastructure of important concerns involving the prophylaxis to be accorded to attorneys’ work product and the scope of trial judges’ authority to confront case management exigencies in complex multi-district litigation.¹⁸³

This opinion goes on to make the reader’s job difficult, and to make the reader feel dumb, by using “armamentarium,” “auxetic,” “etiology,” “interdicts,” “interposition,” “maladroït,” “neoteric,” “quadripartite,” “tenebrous,” and “transmogrification.”¹⁸⁴ The judge even used the phrase “abecedarian verity”¹⁸⁵—

177. See David Margolick, *At the Bar: Sustained by Dictionaries, a Judge Rules that No Word, or Word Play, is Inadmissible*, N.Y. TIMES, Mar. 27, 1992, at B16.

178. See http://howappealing.law.com/20q/2004_03_01_20q-appellateblog_archive.html (last visited Mar. 15, 2008) (interview of Judge Bruce M. Selya by appellate practitioner Howard Bashman).

179. Defined as something that ends or settles a matter: A decisive blow or answer. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2161 (1993). A Westlaw search conducted on March 1, 2008, revealed that Judge Selya used this word in approximately fifty-seven decisions, most recently in *United States v. Jiminez*, 512 F.3d 1, 4 (1st Cir. 2007).

180. Defined as “cold, chill, chilly.” 1 OXFORD ENGLISH DICTIONARY 312 (2d ed. 1989); see, e.g., *Correia v. Fitzgerald*, 354 F.3d 47, 52 (1st Cir. 2003).

181. Longiloquence is defined as speaking at great length. NEW SHORTER OXFORD, *supra* note 8, at 1624; see, e.g., *Vargas-Ruiz v. Golden Arch Development, Inc.*, 368 F.3d 1, 2 (1st Cir. 2004).

182. Defined as cut short, shorten, abridge. NEW SHORTER OXFORD, *supra* note 8, at 612; see, e.g., *Matos ex rel. Matos v. Clinton Sch. Dist.*, 367 F.3d 68, 70 (1st Cir. 2004).

183. *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1009 (1st Cir. 1988).

184. *Id. passim*.

meaning “basic truth”—to make his readers’ comprehension as un-abecedarian as possible.

Judges who wish to demonstrate the breadth and depth of their vocabulary by peppering their opinions with words that send the reader rushing for the nearest unabridged dictionary would be better advised to exercise their intellect with crossword puzzles and competitive Scrabble.

Passives, nominalizations, subject complements, and flowery language conceal reasoning. Well-written opinions leave no mandate vague. Judges should use language that increases the reader’s ability to understand the court’s reasoning and its consequences, not language that leaves the reader uncertain and doubtful.

G. PLAGIARISM

Extensive reliance on legal authority marks a pure opinion. Using lots of legal authority is not unethical: the authority an opinion cites bolsters its legitimacy. But judges—especially purists, who use numerous sources in their opinions—must be wary of the fine line between citation and plagiarism. Judicial plagiarism occurs when judges write opinions that use material from copyrighted sources, such as law reviews, but neglect to credit their sources.¹⁸⁶ Plagiarism is literary theft and is regarded in certain fields, most notably academia and journalism, as unethical.¹⁸⁷ To violate copyright law, the new work must “substant[ially]” incorporate copyrighted material.¹⁸⁸ Because of the nature of opinion writing, in which different concepts from different sources must be combined to form the opinion, it is unlikely that judges will use source material substantial enough to violate copyright laws. At most, judicial plagiarism takes place when judges use a few sentences from a source and fail to credit the source. Judges must be cautious of using copyrighted sources, including case headnotes, which are not binding authority and should not be cited.¹⁸⁹

Courts have uniformly condemned plagiarism, regardless whether the culprits are students, lawyers, doctors, or professors.¹⁹⁰ Even a judge who plagiarized a

185. *Id.* at 1015.

186. Dursht, *supra* note 2, at 1253.

187. *Id.* at 1254 (“[S]tudents who plagiarize may be subject to such disciplinary sanctions as the withholding of a college degree, expulsion, and censure. Professionals have had their licenses revoked, employees have been dismissed, lawyers have been publicly censured, and professors have been suspended and dismissed.”) (footnotes omitted).

188. Laurie Stearns, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CAL. L. REV. 513, 528 (1992).

189. *See* Matthew Bender & Co., Inc. v. West Pub. Co., 240 F.3d 116, 120 (2d Cir. 2001).

190. *See, e.g., In re Hinden*, 654 A.2d 864, 865-66 (D.C. 1995) (affirming public censure of attorney for plagiarizing treatise); *Klinge v. Ithaca College*, 634 N.Y.S.2d 1000 (Sup. Ct. 1995) (affirming loss of professor’s tenure for plagiarism); *Alsabti v. Bd. of Registration in Medicine*, 536 N.E.2d 357 (Mass. 1989) (revoking license of doctor who plagiarized articles); *Napolitano v. Trustees of Princeton Univ.*, 453 A.2d 279, 284 (N.J. Super. Ct. Ch. Div. 1982) (withholding student’s degree for plagiarizing).

law-review article was condemned for his actions.¹⁹¹ A court held that the judge violated the *Model Code*, even though the *Code* does not address plagiarism, because the judge's actions "erode[d] public confidence in the judiciary."¹⁹² Plagiarism in judicial opinions detracts directly from the legitimacy of the judge's ruling and indirectly from the judiciary's legitimacy.

Although judges must cite sources, the line becomes blurred when the issue is plagiarism from legal briefs that litigants submit. An argument exists that "lifting" language from a public document filed with the court should be permitted because legal documents are not copyrighted material. The argument further goes that the litigants want the court to adopt their language and reasoning. The contrary argument is that to preserve the appearance of neutrality, judges should compose opinions using their own language and reasoning so that the litigants can see that the court considered the arguments and had its own thoughts. This article does not suggest that purist judges are more likely—inadvertently or not—to plagiarize. Rather, it is more of a consideration for purists than for impure writers because purists tend to cite more legal authority than impurists.

H. RELIANCE ON QUOTATIONS

Limited use of quotations is relevant for the purist opinion writers, who can overuse them for the same reasons they might overly rely on authority: To mask independent thought and evade responsibility for their decisions. Quotations should be relevant and short.¹⁹³ The reader wants to know what the judge thinks, how the judge analyzed the cases, and how the judge weighed the facts. Quotations hinder judges from writing what they think. Judges should "[q]uote [only] essentials, memorable sound bites, succinct things others have said better than [they] can, authoritative sources, and anything in dispute."¹⁹⁴ Other than those limited uses of quotations, judges should expunge all others from their opinions.

When judges limit their use and length of quotations, quotations can be helpful. Quotations help prove that the argument is reliable and that the reader need not consult the source of the information to confirm the reliability of the statements made. Quotations are sometimes more authoritative, especially when the words come from a higher court, than a paraphrased statement.¹⁹⁵ But too many quotations detract from the opinion's authoritativeness. Overusing quotations reveals a writer's lack of analysis.

191. See *In re Brennan*, 447 N.W.2d 712, 713-14 (Mich. 1989).

192. *Id.*

193. Gerald Lebovits, *You Can Quote Me: Quoting In Legal Writing—Part I*, 76 N.Y. St. B.J., May 2004, at 64, 64.

194. *Id.*

195. See *id.*

Sources for quotations should also be reliable and lend weight to the opinion. An individual a judge chooses to quote must be reputed to be “principled, intelligent, sincere, and knowledgeable.”¹⁹⁶ Conversely, judges should refrain from quoting obscure sources. The reader will then be left questioning the source and the judge’s reasons for using it.

To ensure that quotations are not ignored, judges should integrate a quotation into the writing with a sentence before it to introduce the quotation and a sentence following it to explain the quotation or to place it in context. When used properly, quotations can add authority and connect to precedents. When used improperly, quotations make the opinion confusing, make it seem as though the judge did not consider the issues, and make the reader ignore the quotation.

I. METADISOURSE

Purists should guard against verbiage, especially metadiscourse. Metadiscourse is “cliché-driven discourse about discourse.”¹⁹⁷ Metadiscursive writers inform their audience about what they are writing when they should simply get to the point. Infamous phrases include “as a matter of fact,” “bear in mind that,” “I would venture to suggest that,” “it can be said that,” or “it goes without saying that.”¹⁹⁸ Metadiscourse takes up space and adds nothing to a judicial opinion.

Metadiscourse also detracts from the opinion’s authoritativeness. Compare “It is horn-book law that government actors may not discriminate on the basis of race” with “Government actors may not discriminate on the basis of race.” The latter sentence is direct. The former is muted by the throat-clearing phrase at the beginning. The American Bar Association condemned overwrought and overstated metadiscourse in a report written mostly by Ninth Circuit Judge (and previously Washington Supreme Court Chief Justice) Frederick G. Hamley:

Avoid expressions such as “a cursory examination is sufficient” or “this point need not long detain us.” The losing lawyer will feel the examination has been too cursory and that the court should have detained itself a little longer. The phrase “no citation of authority is needed” is redundant. If the citation of authority is not needed the informed reader will know it. But where this expression is used many will suspect that a citation was really needed but could not be found.¹⁹⁹

Opinions should be quiet. Judges should be confident that the opinion’s meaning and relevance are powerful without needing any introductory phrase.

Metadiscourse can further convey the wrong message. Judges often use

196. *Id.*

197. Gerald Lebovits, *Writers on Writing: Metadiscourse*, 74 N.Y. St. B.J., Oct. 2002, at 64, 64 [hereinafter Lebovits, *Metadiscourse*].

198. *See id.*

199. ABA Committee Report, *supra* note 78, at 37.

metadiscourse to show their audience that they have carefully considered the issue by using phrases like “a thorough review of the record,” “a complete review,” or “a careful review.” One would hope that all decisions are considered carefully so that there would be no need to highlight that the judge thought about the case. Highlighting metadiscourse has a negative effect. It sounds “hollow, contrived, and overly defensive—and at best “readers may find them offputting.”²⁰⁰

Instead of talking about how they analyzed the facts, judges should present relevant facts candidly. Instead of talking about how they researched the law extensively, judges should discuss the law extensively. Instead of relaying how carefully they considered the issues, judges should analyze the law thoroughly.²⁰¹

J. DOCTRINES AND MAXIMS

A pure opinion’s formalism dramatically increases when the court relies on maxims or doctrines without the reasoning to explain them. By their nature, maxims are too vague or broadly drawn to be applied practicably in all cases. In 1887, Lord Esher wrote that “maxims are almost invariably misleading: they are for the most part so large and general in their language that they always include something which really is not intended to be included in them.”²⁰² Even though some of our greatest jurists have written maxims, judges should avoid relying on them reflexively.

A maxim is “a self-evident proposition assumed as a premise in mathematical or dialectical reasoning . . . [or] a pithily-worded [proposition], expressing a general truth drawn from science, law, or experience.”²⁰³ Judge Cardozo created a lasting legal maxim in *Wagner v. International Railway Company* when he wrote that “danger invites rescue.”²⁰⁴ In *Wagner*, two cousins were riding on a train traveling over a trestle. One cousin was thrown from the train through the doors that the train company’s employees left open. The second cousin walked across the trestle to find the body of his cousin and fell in the darkness and injured himself. The trial court’s jury charge allowed the jury to find that the defendant would be negligent only if the plaintiff was acting on the defendant’s specific instructions when he left the train to rescue his cousin. Thus, unless the defendant ordered the plaintiff to leave the train, the plaintiff’s voluntary act of rescue broke the chain of causation. The jury found for the defendant, and the New York Court of Appeals reversed, holding that the defendant’s original negligence in causing the first cousin to fall out sustained a finding of negligence toward the second

200. *Lebovits, Metadiscourse*, *supra* note 197, at 61 (citing SMITH, *ADVANCED LEGAL WRITING*, *supra* note 3, at 137, 151).

201. *See id.*

202. *Yarmouth v. France*, (1877) 19 Q.B.D. 647, 653.

203. *NEW SHORTER OXFORD*, *supra* note 8, at 1720.

204. *See Wagner v. Int’l Ry. Co.*, 133 N.E. 437, 437 (N.Y. 1921).

cousin.²⁰⁵ The court found it reasonably foreseeable that someone might try to rescue the victim of the defendant's negligence because "danger invites rescue."²⁰⁶ Judge Cardozo found that the act of choosing to rescue another is not enough to break the chain of causation of the defendant's original negligence toward the rescuer placed in peril.²⁰⁷

Judge Cardozo acknowledged the dangers of using maxims when he warned against "the extension of a maxim or a definition with relentless disregard of consequences . . ."²⁰⁸ By understanding the context of the maxim "danger invites rescue," we can understand what the maxim means. A person who negligently places another in danger is liable for injuries caused to rescuers because it is foreseeable, and socially desirable, that someone might attempt to rescue the person in peril. If the maxim is taken in the abstract—without explaining the reasoning behind it—it is impossible to understand how to apply the maxim properly.

A maxim is meaningless as precedent unless a judge explains it. The same is true about blindly applying a doctrine. Doctrine is defined as "that which is taught; instruction, teaching; a body of teaching."²⁰⁹ The difference between a doctrine and a maxim is that a doctrine is a general statement of the law, to which there might or might not be an exception. Ethical considerations for doctrines differ from ethical considerations for maxims. Judges must be sure they understand a maxim and use it in the appropriate context. A doctrine, by contrast, is a free-standing general principle of law. Judges must be sure to use doctrines appropriately. A judge may misuse a doctrine if the judge is not diligent in finding exceptions to it. To be ethical, a judge must determine whether using a general doctrine is appropriate and whether any exceptions exist.

Justice Holmes wrote in *Lochner v. New York* that "[g]eneral propositions do not decide concrete cases."²¹⁰ In *Lochner*, the Court considered state law that forbade bakers from working more than forty hours a week.²¹¹ *Lochner* was a baker who worked sixty hours a week.²¹² The New York Court of Appeals found that New York had the authority to pass a law protecting workers.²¹³ In reversing, the United States Supreme Court relied on a doctrine that provides that the Fourteenth Amendment to the United States Constitution protects the absolute

205. *See id.* at 438.

206. *See id.* at 437.

207. *See id.*

208. *Haynes v. N.Y. Cent. R.R. Co.*, 131 N.E. 898, 900 (N.Y. 1921).

209. NEW SHORTER OXFORD, *supra* note 8, at 719.

210. 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

211. *Id.* at 62-63.

212. *Id.*

213. *See People v. Lochner*, 69 N.E. 373, 378-79 (N.Y. 1904), *rev'd*, *Lochner v. New York*, 198 U.S. 45 (1905).

freedom to contract unless a state passes a valid law under its police powers.²¹⁴ The Court defined “police powers” narrowly and limited the concept to laws that prohibit using contracts to engage in unlawful or immoral behavior, including protecting the health or safety of contracting parties.²¹⁵ It found insufficient grounds for the police power to trump the right to enter into contracts freely because other laws existed and ensured that bakers had sanitary workplaces.²¹⁶ Justice Holmes found the majority’s analysis inadequate. In his dissent, he cited other examples in which the Court found a valid exercise of police power in similar circumstances.²¹⁷ Justice Holmes argued that the Court should look to the individual circumstances of the case instead of simply relying on general doctrine.²¹⁸

Justices Cardozo and Holmes recognized the ethical danger in relying on maxims and legal doctrines to resolve issues, rather than discussing their underlying reasoning. Judges, especially the purists, should follow their reasoning: they should cite maxims and generalized doctrines only if they also explain the background and use them in context.

VI. ETHICAL CONSIDERATIONS IN AN IMPURE OPINION

The author of an impure opinion believes that the law should be practical and that an opinion should be accessible. The impure opinion is conversational and candid, flowing not in any rigid, structuralized format but in an explorative one. An impure opinion’s content depends on what the impure writer believes a layperson would consider important. Differences between pure and impure opinions result in different ethical considerations for judges writing in the impure style.

A. GRAMMAR

An impure opinion is marked by an informal tone. A judge who writes impure opinions must not dispense with basic writing principles and conventions to write an accessible opinion. It is undeniable that “[a] careless comma, a stray phrase, [or] a fanciful footnote”²¹⁹ can change the opinion and its principles. Given the nuances and complexities of language, a judge must ensure that an opinion conveys intended meaning and that it does not take on a new meaning when future litigants dissect it.²²⁰ Judges must be wary not only of simple sentences

214. *See* *Lochner v. New York*, 198 U.S. at 53.

215. *Id.* at 53-58.

216. *Id.* at 61-62.

217. *See id.* at 75 (Holmes, J., dissenting).

218. *See id.* at 76 (Holmes, J., dissenting).

219. Kaye, *Wordsmiths*, *supra* note 1, at 10.

220. *Id.*

being too broad and of short sentences narrowing the scope of a rule. They must also be aware of the possible interpretations of the opinion and should correct it for vagueness. An opinion open to different interpretations because of poor grammar is unacceptable. It would be intellectually dishonest if opinions were left intentionally vague.

B. PERSONAL EMBELLISHMENTS

Although impure opinions are not constrained by legalese, over-reliance on precedents, or rigid organization, impurists are likely to embellish their writing with their personal style. Personal embellishments are an enjoyable part of writing: “Few things are more pleasurable in opinion-writing (opinion-reading as well) than encountering exactly the right phrase that perfectly encapsulates both the case holding and the larger principle.”²²¹ The right phrase becomes eternal and almost as recognizable as the opinion itself.²²²

The desire for recognition is not foreign to the judiciary. Many judges write opinions not only to apply the law correctly but also to be remembered for it.²²³ A judge can establish a reputation for personal embellishments. Judges Richard A. Posner, Alex Kozinski, and Samuel B. Kent come to mind. Judge Posner is the presiding godfather of American celebrity judges because of his prodigious writing talents and his melding of law with economic theory.²²⁴ Judge Kozinski has gained fans for his memorable opinions and for his writings on topics like video games and snowboarding.²²⁵ Judge Kozinski is so popular that an unofficial Web site is devoted to his writings.²²⁶ Judge Kent’s comical decisions have found fans, and detractors, in lawyers, who e-mail them to one another.²²⁷

*Republic of Bolivia v. Philip Morris Cos., Inc.*²²⁸ is a favorite opinion of Judge Kent’s fans and a good example of his humor. In *Bolivia*, Judge Kent transferred a case the government of Bolivia had originally brought in Brazoria County, Texas, to the federal district court in Washington, D.C.

The Court seriously doubts whether Brazoria County has ever seen a live Bolivian . . . even on the Discovery Channel. Though only here by removal, this humble Court by the sea is certainly flattered by what must be the worldwide renown of rural Texas courts for dispensing justice with unparal-

221. *Id.* at 11.

222. *See, e.g.,* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 844 (1992) (“Liberty finds no refuge in a jurisprudence of doubt.”).

223. *See* Jenny B. Davis, *The Limelight Rules: Some Celebrity Judges Can’t Help Getting Big Heaps of Attention*, 88 A.B.A. J., Apr. 2002, at 28, 28.

224. *See id.*

225. *See id.* at 29.

226. *See* The Unofficial Judge Alex Kozinski Site, <http://notabug.com/kozinski/> (last visited Mar. 15, 2008).

227. *See* Davis, *supra* note 223, at 28.

228. 39 F. Supp. 2d 1008 (S.D. Tex. 1999).

leled fairness and alacrity, apparently in common discussion even on the mountain peaks of Bolivia!²²⁹

Judge Kent's personal embellishments did nothing more than showcase his attempt at humor.

Not every case presents the opportunity or need to provide an encapsulating quotation. Style is amorphous and constantly changing, but danger arises in constructing "immortal phrases."²³⁰ Phrases that once resonated with generations may "stick[] in the throat" of future readers.²³¹

For example, in explaining the applicability of the bespeaks-caution doctrine in a securities action,²³² one court noted that "[t]he doctrine of bespeak caution provides no protection to someone who warns his hiking companion to walk slowly because there might be a ditch ahead when he knows with near certainty that the Grand Canyon lies one foot away."²³³ This quotation emphasizes that the bespeaks-caution doctrine does not protect issuers if the situation against which the issuer warned is certain to occur and if the warning is insufficient to allow an investor to make a fully informed decision about the investment. Although the quotation may be humorous to a securities or corporate lawyer, to a layperson—or even a practitioner of another type of law—the quotation is a confusing description of a legal concept that could have been described better in simple, non-allegorical terms.

Improper personal embellishments, which usually take the form of catchphrases and melodrama, do not belong in opinions. Despite a desire to make an opinion more accessible by crafting a catchphrase that encapsulates a legal rule, the opinion's ruling or its main point is best summarized by a theme rather than a catchy phrase. Furthermore, melodrama in opinion writing is maddening.²³⁴

C. HUMOR

Humor in the judicial system is not funny. In a judicial opinion, "[I]ghtening wit is typically unenlightening. A judicial opinion demands propriety and

229. *Id.* at 1009 (ellipses in original).

230. Kaye *Wordsmiths*, *supra* note 1, at 11.

231. *Id.*

232. See *In re Prudential Sec., Inc., Ltd. Partnerships Litig.*, 930 F. Supp. 68, 72 (S.D.N.Y. 1996) (explaining that bespeaks-caution doctrine protects security issuers from liability under Security Exchange Commission's Rule 10b-5 if issuer's forward-looking statements are accompanied by meaningful cautionary statements and warnings about investment risks to allow investors to make informed decision about whether to invest).

233. *Id.* at 71-72.

234. For some narcissistic melodrama, see *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 923, 943 (1992) (Blackmun, J., concurring & dissenting) ("I fear for the darkness . . ."; "I am 83 years old. I cannot remain on this Court forever . . ."); *Webster v. Reproductive Health Svcs.*, 492 U.S. 490, 538 (1989) (Blackmun, J., concurring & dissenting) ("I fear for the future.").

professionalism.”²³⁵

The root of the word “humor” is “humus,” which means to bring low, to the ground.²³⁶ Although some pure opinions evince flashes of humor, humor is more common in impure opinions. When a judge uses humor in an opinion, the lawyer or litigant—who is often the target—can do little but accept or appeal the decision.²³⁷ A lawyer or litigant has no opportunity to respond to what is said in an opinion: it is the final word in the case.²³⁸ Even if lawyers or litigants could respond, it is doubtful that they would, given the power judges hold in the courtroom.²³⁹ Professor Prosser felt strongly about avoiding judicial humor: “[T]he bench is not an appropriate place for unseemly levity. The litigant has vital interests at stake. His entire future, or even his life, may be trembling in the balance, and the robed buffoon who makes merry at his expense should be choked with his own wig.”²⁴⁰

Litigants consciously place the court in a position of power to resolve controversies; they expect to be treated fairly and with dignity. Humor can defy both expectations. When litigants or lawyers are the subjects of judicial humor, they may feel that the judge did not take the case seriously or consider the issues in the case thoroughly. The court is in a position of power over the litigant, who has a serious personal stake in the litigation, and judges should not use their position to bring the litigant down.²⁴¹ It is undignified for judges to use their power to make fun of or humiliate litigants.

Humor does nothing to advance the opinion’s reasoning or the force of the law, and those the court attacks may feel the sting for years to come.²⁴² Litigants seek both justice and sensitivity from the court.²⁴³ If one accepts the proposition that a judge who directs biting humor at a litigant or an attorney commits an act of aggression, it is easy to see why humor is offensive. It is not a fair fight: The judge gets to have the first and last word on the matter.²⁴⁴ The subject of the judge’s ridicule has no recourse but to accept the joke and the accompanying humiliation.²⁴⁵ As Justice Smith wrote, “For a judge to take advantage of his

235. Gerald Lebovits, *Judicial Jest: Judicious?*, 75 N.Y. ST. B.J., Sept. 2003, at 64, 64 [hereinafter Lebovits, *Judicial Jest*]. “It’s one thing to have a sense of humor and grace the bench, or to be clever during an after-dinner speech. It’s another to express humor in writing.” *Id.*

236. Richard Delgado & Jean Stefancic, *Scorn*, 35 WM. & MARY L. REV. 1061, 1063 (1994).

237. Rudolph, *supra* note 25, at 191.

238. Lubet, *supra* note 5, at 12.

239. *Id.* at 15.

240. THE JUDICIAL HUMORIST: A COLLECTION OF JUDICIAL OPINIONS AND OTHER FRIVOLITIES vii (William L. Prosser ed. 1952).

241. *Id.*

242. See, e.g., Lubet, *supra* note 5, at 12-13; FEDERAL JUDICIAL CENTER, *supra* note 48, at 22.

243. Nancy A. Wanderer, *Writing Better Opinions: Communicating With Candor, Clarity, and Style*, 54 ME. L. REV. 47, 67 (2002).

244. See *id.*

245. *Id.*

criticism-insulated, retaliation-proof position to display his wit is contemptible, like hitting a man when he's down."²⁴⁶ Judges must be careful to ensure that their style is not offensive and does not make light of the important task they must fulfill.

Some opponents of judicial humor have gone so far as to suggest amending the *Model Code* to proscribe judicial humor as inappropriate.²⁴⁷ But because it has not yet been amended, courts have taken to censuring judges who inappropriately use humor. In one decision, the Supreme Court of Kansas publicly censured a state trial judge for writing a demeaning opinion in rhyme in a criminal case.²⁴⁸

Supporters of humor in judicial opinions argue that humor helps demystify the law.²⁴⁹ They believe that humor "help[s] crystallize a point, put it in context, and breathe life into the set of facts that the law has formalized."²⁵⁰ For example, in *Donelon v. New Orleans Terminal Co.*, Judge Irving Goldberg used humor to explain why the plaintiffs could not pursue state court remedies:

Appellants themselves issued the invitations to dance in the federal ballroom, they chose their dancing partners, and at their own request they were assigned a federal judge as their choreographer. Now that the dance is over, appellants find themselves unhappy with the judging of the contest. They urge us to reverse and declare that "Good Night Ladies" should have played without the partial summary judgment having been granted and without the preliminary injunction having been issued. This we have declined to do, and in so doing we note that this is not The Last Tango for the Parish. Appellants still have an encore to perform and their day in court is not yet over.²⁵¹

Although humor might succeed in rare instances, more often it is a crutch.

Another argument favoring humor is that judges can show a lighter side of the

246. Smith, *supra* note 14, at 210.

247. See, e.g., Baker, *supra* note 51, at 875 (citation omitted).

248. See *In re Rome*, 542 P.2d 676, 685-86 (Kan. 1975). The Court admonished:

Judges simply should not 'wisecrack' at the expense of anyone who is connected with a judicial proceeding who is not in a position to reply Nor should a judge do anything to exalt himself above anyone appearing as a litigant before him. Because of his unusual role a judge should be objective in his task and mindful that the damaging effect of his improprieties may be out of proportion to their actual seriousness. He is expected to act in a manner inspiring confidence that even-handed treatment is afforded to everyone coming into contact with the judicial system.

Id.

249. See Jordan, *supra* note 103, at 700.

250. *Id.* at 700-01; see also Delgado & Stefancic, *supra* note 236, at 1071-72 (noting that many great writers have used humor to "point out flaws and foibles of human nature" and to "chide official figures they saw as abusing their authority").

251. 474 F.2d 1108, 1114 (5th Cir. 1973). Judge Goldberg is known for his humorous analogies and similes. In a case involving Kentucky Fried Chicken and a claim of equity, he wrote that "the bizarre element [in this case] is the facially implausible—some might say unappetizing—contention "that the man whose chicken is 'finger-lickin' good' has unclean hands." *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 372 (5th Cir. 1977). For a discussion of Judge Goldberg's prose, see Jordan, *supra* note 103, at 709-14.

law and humanize a case.²⁵² And some judges argue that humor “adds life to the otherwise rigid format of judicial opinions”²⁵³—a reason a judge might choose to write in an impure style. Some impurists view the law as aggrandizing disputes with legalese. They believe that humor helps reshape the decision, makes it understandable, and keeps it simple.

Most of the time, litigants come to court in their personal capacities to resolve intensely personal matters. Sometimes, however, powerful entities, like large corporations or government agencies, come before the court. Some suggest that when entities use their power to take advantage of others or act inappropriately, the use of humor may be appropriate.²⁵⁴ They argue that using humor to redress abuses of power adds an exclamation point to the court’s admonishment and increases the likelihood that similar abusive conduct will be avoided in the future.²⁵⁵

Various commentators explain that no binding rule applies to humor in opinions. Rather, it can be used in certain circumstances. As Justice Cardozo stated: “In all this I would not convey the thought that an opinion is the worse for being lightened by a smile. I am merely preaching caution.”²⁵⁶

Carving out instances when humor is appropriate only exacerbates the problem. If humor is to be part of an opinion at all, it must not dominate the opinion. That is, “[t]he humor must be brief.”²⁵⁷ But the potential for harm means that the safest course is to eliminate humor from judicial opinions. All litigants deserve to be treated with respect. An impure opinion is already written comprehensibly; the supposed need to use humor to make the opinion more readable and understandable is academic. Humor only reduces the authority of the opinion and the judge. Expressing this same view, Judge George H. Carley wrote a special concurrence to distance himself from a majority opinion of Georgia Court of Appeals:

I cannot join the majority opinion because I do not believe that humor has a place in an opinion which resolves legal issues affecting the rights, obligations, and, in this case, the liberty of citizens. The case certainly is not funny to the litigants. I concur in the judgment only.²⁵⁸

252. See Jordan, *supra* note 103, at 701. In *Stambovsky v. Ackley*, Justice Israel Rubin, in concluding that a house was inhabited by ghosts “as a matter of law” and, accordingly, that its seller must take it back for failing to divulge that fact, remarked that “a very practical problem arises with respect to the discovery of a paranormal phenomenon: ‘Who you gonna’ call?’ as the title song to the movie ‘Ghostbusters’ asks.” 572 N.Y.S.2d 672, 675 (N.Y. App. Div. 1st Dep’t 1991). It is difficult to caution against humor when a court’s comments are benign. Problems arise because judges decide for themselves what humor is benign and what is inappropriate.

253. Jordan, *supra* note 103, at 699-700.

254. *Delgado & Stefancic*, *supra* note 236, at 1095-96.

255. See *id.* at 1096-97.

256. CARDOZO, *LAW AND LITERATURE*, *supra* note 75, at 484, reprinted in 52 HARV. L. REV. at 484.

257. Lebovits, *Judicial Jesting*, *supra* note 235, at 64.

258. *Russell v. State*, 372 S.E.2d 445, 447 (Ga. App. Ct. 1988) (Carley, J., concurring).

Litigation is not funny. Humor serves no purpose in an opinion meant to “create legal precedent and reflect reasoned judgment.”²⁵⁹ Serious opinions and humorous opinions are not separate and distinct; they are different manifestations of style.

D. POETIC OPINIONS

Judges should not construct opinions in the form of poems.²⁶⁰ Although “[p]oetic justice is always entertaining,”²⁶¹ it is “rarely poetic or just.”²⁶² Poetic opinions undermine the key aspect that is central to judicial opinions—they lack “a clearly articulated holding supported by precedent.”²⁶³ Litigants, especially the losing side, may feel as though the court treated their issues and arguments frivolously.²⁶⁴ And the public will conclude that the court spent more time constructing the verses than contemplating the law.²⁶⁵ As Justice Oliver Wendell Holmes observed, “The law is not the place for the artist or poet. The law is the calling of thinkers.”²⁶⁶ Judges should spend more time contemplating the law than creating verses.

Poetry also produces bad law because legal analysis is shortchanged for rhyme.²⁶⁷ Readers are likely to assume that the judge is more concerned about the rhyme than reaching the just result. Indeed, “the appearance of impropriety makes it inappropriate for judges to use verse in their opinions.”²⁶⁸

Despite the problems with using the judicial opinion as a creative writing platform, numerous opinions have been written in rhyme. One New York City Criminal Court judge penned an opinion mimicking Clement Clarke Moore’s

259. Lebovits, *Judicial Jestings*, *supra* note 235, at 64.

260. Some judges are widely known for their poetic opinions. For example, Justice Michael Eakin, currently of the Supreme Court of Pennsylvania, has penned several poetic opinions. *See, e.g.*, *Porreco v. Porreco*, 811 A.2d 566, 575 (Pa. 2002) (Eakin, J., dissenting); *Busch v. Busch*, 732 A.2d 1274 (Pa. Super. Ct. 1999). Judges from varied courts have also included poetry in their opinions. *See United States v. Syufy Enters.*, 903 F.2d 659, 661-63 (9th Cir. 1990) (Kozinski, J.); *United States v. Batson*, 782 F.2d 1307, 1309 (5th Cir. 1986) (Goldberg, J.); *Anderson Greenwood & Co. v. NLRB*, 604 F.2d 322 (5th Cir. 1979) (Goldberg, J.); *In re Love*, 61 B.R. 558 (S.D. Fla. 1986) (Cristol, J.); *Mackensworth v. Am. Trading Transp. Co.*, 367 F. Supp. 373 (E.D. Pa. 1973) (Becker, J.); *Nelson v. State*, 465 N.E.2d 1391, 1391 (Ind. 1984) (Hunter, J.); *Fisher v. Lowe*, 333 N.W.2d 67 (Mich. App. Ct. 1983) (Gillis, J.); *Columbus v. Becher*, 180 N.E.2d 836 (Ohio 1962) (Zimmerman, J.); *Van Kleeck v. Ramer*, 156 P. 1108, 1115 (Colo. 1916) (Scott, J., dissenting).

261. Lebovits, *Poetic Justice*, *supra* note 80, at 48.

262. *Id.*

263. *Id.*

264. *Id.* at 44.

265. *Id.*

266. Oliver Wendell Holmes, CASE & COMMENT, Mar.-Apr. 1979, at 16.

267. *See Kearney*, *supra* note 55, at 608 (“[W]hile the poems may be entertaining, the reasoning and explanation of the law is often deficient.”).

268. *Id.* at 609; *see also Porreco v. Porreco*, 811 A.2d 566, 572 (Pa. 2002) (Zappala, C.J., concurring) (expressing “grave concern that the filing of an opinion that expresses itself in rhyme reflects poorly on the Supreme Court of Pennsylvania”).

“A Visit From St. Nicholas”:

‘Twas Game Six of the Series when out of the sky,
 Flew Sergio’s parachute, a Met banner held high.
 His goal was to spur our home team to success,
 Burst Beantown’s balloon claiming Sox were the best.
 The fans and the players cheered all they did see,
 But not everyone present reacted with glee.
 “Reckless endangerment!” the D.A. spoke stern.
 “I recommend jail—there’s a lesson he’d learn!”
 Though the act proved harmless, on the field he didn’t belong
 His trespass was sheer folly, and undeniably wrong.
 But jail’s not the answer in a case of this sort,
 To balance the equities is the job of this court.
 So a week before Christmas, here in the court,
 I sentence defendant for interrupting a sport.
 Community service, and a fine you will pay.
 Happy holiday to all, and to all a good day.²⁶⁹

The opinion is witty. But its summary of events is more suitable for a magazine.

Poetic opinions sometimes hold no punches in insulting the litigants, even the winning litigants. In *United States v. David Irving*,²⁷⁰ a federal district judge set aside a defendant’s conviction for taking off his wet clothes in a nearly deserted parking lot because the magistrate judge failed to record the proceedings. The defendant’s attorney included the following verse in his papers. The district judge incorporated the verse in his opinion, but it provided little solace to the defendant:

There was a defendant named Rex
 With a minuscule organ for sex.
 When jailed for exposure
 He said with composure,
 De minimis non curat lex.²⁷¹

Parties seeking justice should not become fodder for entertainment in the hands of a judge who would reduce the parties to caricatures.

Those who support, or perhaps merely tolerate, poetic opinions argue that those opinions capture the reader’s attention.²⁷² Similarly, some say that the public might be more likely to read poetic opinions because they find them more

269. See Lebovits, *Poetic Justice*, *supra* note 80, at 48 (citing *People v. Sergio* (N.Y. Crim. Ct. 1986) (Flug, J.), reprinted in *And to All a ‘Play Ball!’*, N.Y. TIMES, Dec. 20, 1986, at 1).

270. Lebovits, *Poetic Justice*, *supra* note 80, at 44 (citing *United States v. Irving*, No. 76-151 (E.D. Cal. 1977) (McBride, J.) (unpublished opinion)).

271. *Id.* The last line is Latin for “the law does not concern itself with trifles.”

272. See Kearney, *supra* note 55, at 603.

accessible.²⁷³ It has also been asserted that writing a poetic opinion requires a judge to be succinct and distill the analysis.²⁷⁴ One benefit to a poetic opinion is that “[t]he subject of the opinion may lend itself to a light touch.”²⁷⁵

Those who are opposed to opinions believe that poetic opinions run the risk of trivializing a grave subject.²⁷⁶ The poetic opinion might grab a reader’s attention, but it will be the verse rather than the opinion’s substance that will get the most attention.²⁷⁷ The Kansas Supreme Court looked at whether a magistrate judge violated the *Model Code* by writing an opinion in verse explaining his decision to place a prostitute on probation for soliciting an undercover police officer.²⁷⁸ The opinion began:

This is the saga of _ _
Whose ancient profession brings her before us.
On January 30th, 1974,
This lass agreed to work as a whore. Her great mistake,
as was to unfold,
Was the enticing of a cop named Harold.²⁷⁹

The court concluded that although the magistrate had the discretion to pen the opinion as a poem, he was not permitted to hold “out [the] litigant to public ridicule or scorn.”²⁸⁰ The court warned that “[j]udicial humor is neither judicial nor humorous.”²⁸¹ Poetic opinions are “verbal narcissism”²⁸² that isolate litigants, are based on limited reasoning, and do not dispense justice. Poems have

273. See, e.g., Robert E. Rains, *To Rhyme or Not to Rhyme*, 16 LAW & LITERATURE 1, 7-9 (2004) (suggesting that the “vice of the verse” is its accessibility to the lawyers rather than the litigants, thus “judges [should] not reason in rhyme”).

274. See Kearney, *supra* note 55, at 605. In her article, Professor Kearney cited then-Judge Eakin’s analysis in *Busch v. Busch*, 732 A.2d 1274, 1278 (Pa. Super. Ct. 1999), in which he sought to distinguish the case from *Ebersole v. Ebersole*, 713 A.2d 103 (Pa. Super. Ct. 1998):

This contrasts with the Ebersole facts
As our case has something that Ebersole lacks.
There, a catch-all phrase lumped all the many
“Financial assets” of the marriage, “if any.”
This aggregation was too vague to be fair,
As one couldn’t tell what assets were there.
No matter how much Mr. Busch may implore us
This isn’t the same as the contract before us.

See Kearney, *supra* note 55, at 605 (quoting, with some alterations, *Busch v. Busch*, 732 A.2d at 1278).

275. Kearney, *supra* note 55, at 603.

276. *Id.* at 613 (stating that a poetic opinion’s trivializing subject matter is dangerous in cases concerning domestic violence, an area of law that has historically received “second-class status”).

277. *Id.* at 614.

278. See *In re Rome*, 542 P.2d 676, 679-80 (Kan. 1975).

279. *Id.* at 680.

280. *Id.* at 685.

281. *Id.* at 685.

282. Kearney, *supra* note 55, at 604.

no place in judicial opinions.

E. RESPECT

More lamentable than humor or poetic opinions is scorn. Impurists need to ensure that through their informal tone, their opinions do not degrade or insult litigants. According to a number of observers, there has been a general “decline of civility in the courts.”²⁸³ As role models for lawyers, judges should not contribute to that lack of civility.²⁸⁴

A judge’s use of scorn suggests that bias might have motivated the judge.²⁸⁵ If a judge describes a claim as inane or a lawyer as inept, the reader will wonder whether the judge was too distrustful to pay close attention to the litigants’ arguments.²⁸⁶

Further, an opinion that makes clear what the court thinks about a particular lawyer will affect the lawyer’s ability to advocate effectively the next time the lawyer appears before the authoring judge.²⁸⁷ A lawyer might pull punches, especially about a unique or novel argument, for fear that the judge will regard the argument as “asinine” or “idiotic.”²⁸⁸ Also, once a lawyer has been scorned in an opinion, the question arises whether the lawyer will be taken seriously in future cases.²⁸⁹ The same holds true for lawyers who have not yet come before a judge with a reputation for humiliating litigants and lawyers. They, too, might be reluctant to advance novel arguments for fear of becoming objects of the judge’s scorn.

Respecting litigants appearing before the court seems to be self-evident. But even the Supreme Court is guilty of breaching this rule.²⁹⁰ Two historical cases aptly illustrate the Court’s use of caustic language against litigants. The first is *Plessy v. Ferguson*.²⁹¹ In *Plessy*, the Court upheld a state provision that required black passengers to ride in “black only” cars, thereby affirming the “separate but equal” treatment of African-Americans.²⁹² The plaintiffs argued that separating passengers by race degraded them and violated their rights under the Fourteenth Amendment to the United States Constitution.²⁹³ Dismissing this argument,

283. See, e.g., Lubet, *supra* note 5, at 14.

284. See Michael Cavendish, *Civility in Written Advocacy*, *BENCHER* (AM. INNS OF CT.), July/Aug. 2005, at 10-11 (“The best teachers of civil behavior and its virtues are our judges.”).

285. Lubet, *supra* note 5, at 14.

286. *Id.* at 14-15.

287. *Id.* at 15.

288. *Id.*

289. *Id.*

290. Worse, according to some, when the Supreme Court employs scorn in its opinions, it is frequently in cases involving disempowered litigants. See Delgado & Stefancic, *supra* note 236, at 1063.

291. 163 U.S. 537 (1896).

292. See *id.* at 551-52.

293. *Id.*

Justice Henry Billings Brown noted that if African-Americans found the railroad's treatment offensive, it was "solely because the colored race chooses to put that construction upon it."²⁹⁴ A second example is *Buck v. Bell*.²⁹⁵ Justice Holmes in that case upheld an order to sterilize a woman asserted to be mentally retarded and the mother of a child who was also mentally retarded.²⁹⁶ Justice Holmes's infamous comment can be found in the conclusion of his curt opinion, in which he remarked that, "three generations of imbeciles are enough."²⁹⁷

Unfortunately, these cases have not dissuaded the Court from continuing to degrade litigants on occasion.²⁹⁸ In *United States v. Sioux Nation of Indians*,²⁹⁹ Chief Justice William H. Rehnquist, in his dissent, objected to the majority's detailed history of the Sioux Nation and its explanation why the Sioux were entitled to compensation for their land.³⁰⁰ Chief Justice Rehnquist's described the Sioux as historically skilled in warfare, robbing, killing, and "'inflict[ing] cruelty without a qualm."³⁰¹ His description had nothing to do with the Sioux Nation's claim. His description served only to bolster his point that the Sioux did not come to the table with clean hands.³⁰²

Rather than attacking the lawyers or litigants directly, some judges attack claims using terms like "'absurd' and 'unsubstantiated, self-serving, contradictory, and inconsistent' to explain their decision."³⁰³ The Court of Appeals for the Fifth Circuit reprimanded one plaintiff for bringing a "patently meritless" case and warned the plaintiff that similar, repeated conduct may warrant "the ultimate denial of access to the judicial system absent specific prior court approval."³⁰⁴ Although the court's language might have been justified in that case, the public in reading only the decision and not considering the reasoning behind it will view the judiciary unfavorably. The public will see the judiciary as unnecessarily harsh. The Fifth Circuit could have reached the same result by stating that "in light of the time and resources the court and defense attorneys expended in

294. *Id.* at 551.

295. 274 U.S. 200 (1927).

296. *Id.* at 205.

297. *Id.* at 207.

298. *See, e.g.,* *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (framing the issue as whether homosexuals have fundamental right to engage in sodomy rather than whether they have a fundamental right to be left alone); *Wyman v. James*, 400 U.S. 309, 321-22 (1971) (upholding law requiring home visitation for providing federal benefits and noting that "what [plaintiff] appears to want from the agency that provides her and her infant son with the necessities for life is the right to receive those necessities upon her own informational terms, to utilize the Fourth Amendment as a wedge for imposing those terms, and to avoid questions of any kind").

299. 448 U.S. 371 (1980).

300. *Id.* at 435 (Rehnquist, C.J., dissenting).

301. *Id.* at 436-37 (Rehnquist, C.J., dissenting) (quoting SAMUEL ELIOT MORISON, *OXFORD HISTORY OF THE AMERICAN PEOPLE* 539-40 (1965)).

302. *Id.* at 435 (Rehnquist, C.J., dissenting).

303. Delgado & Stefancic, *supra* note 236, at 1084 (quoting *Harris v. Marsh*, 679 F. Supp. 1204, 1225, 1267 (E.D.N.C. 1987)).

304. *Jackson v. Carpenter*, 921 F.2d 68, 69 (5th Cir. 1991).

connection with plaintiff's claims, which have no legal basis, the court dismisses the case and orders that the plaintiff use the judicial system only with specific court approval."

Sarcasm, a form of ridicule, also has no place in opinion writing.³⁰⁵ Judges should refrain from using sarcasm to attack litigants, whether directly or—by mocking their claims—indirectly.³⁰⁶ Even amici authors are part of the judicial process and should not be the subject of disrespect.³⁰⁷ Although some scholars argue that mockery can be appropriate when directed at powerful figures and government entities,³⁰⁸ it is always prudent and judicious to give all litigants the same respect.

Judges must be careful to treat distraught litigants, including mentally challenged or even delusional litigants, with respect.³⁰⁹ Delusional litigants are, regrettably, common enough that law-review articles have been written about them.³¹⁰ The issue for the opinion writer—recalling that how a judge writes counts as much ethically as what a judge decides—is how to resolve these claims. Below are some examples of how opinion writers have treated delusional claims:

- After discussing Stephen Vincent Benét's classic short story "The Devil and Daniel Webster," the court considered whether it had jurisdiction over the defendant, Satan.³¹¹
- A persecuted woman who believed she was a cyborg sued Presidents Jimmy Carter and Bill Clinton, and others, for 5.6 billion dollars.³¹² She claimed that the defendants reinstated slavery, played loud rock music, and used airplanes and helicopters to strafe her dorm room. In an extensive opinion, the court dismissed the suit, respectfully but firmly.³¹³

A judge should treat the court system and the litigants with dignity. In doing so, the judge will gain the readers' trust and assure them that all litigants will be treated equally.

Unless a case is about attorney misconduct, judges should also refrain from using their opinions to discipline or chide attorneys. Taking the time to point out

305. James D. Hopkins, *Notes on Style in Judicial Opinions*, 8 TRIAL JUDGES' J., July 1969, at 49, 50 ("[S]arcasm directed toward the parties is seldom in good taste."), reprinted in Robert A. Leflar, *Quality in Judicial Opinions*, 3 PACE L. REV. 579, 586 (1983).

306. See Delgado & Stefancic, *supra* note 236, at 1095; Hopkins, *supra* note 305, at 51.

307. See *Cont'l Ill. Corp. v. Comm'r*, 998 F.2d 513, 515 (7th Cir. 1993) (commenting that "[t]he parties and the amici have favored us with more than two hundred pages of briefs, rich in detail that we can ignore").

308. See generally Delgado & Stefancic, *supra* note 236.

309. See Gerald Lebovits, *The Devil's in the Details for Delusional Claims*, 75 N.Y. ST. B.J., Oct. 2003, at 60, 64.

310. See, e.g., Sean Munger, Comments, *Bill Clinton Bugged My Brain!: Delusional Claims in Federal Courts*, 72 TUL. L. REV. 1809 (1998).

311. See *United States ex rel. Mayo v. Satan & His Staff*, 54 F.R.D. 282, 283 (W.D. Pa. 1971) (Weber, J.). *Satan & His Staff* is the most famous case on the subject, and the most cited.

312. *Tyler v. Carter*, 151 F.R.D. 537, 537-538 (S.D.N.Y. 1993), *aff'd*, 41 F.3d 1500 (2d Cir. 1994).

313. *Id.* at 537, 540.

annoying or unprofessional behavior detracts from the opinion's force and undermines it by devoting part of the opinion to irrelevant facts. A famous example is *Paramount Communications, Inc. v. QVC Network Inc.*, in which the Delaware Supreme Court publicly chastised an attorney for directing some colorful language toward opposing counsel during a deposition.³¹⁴ The court included a transcript of the offending comments and concluded that it was powerless to discipline an attorney not admitted to the Delaware bar. The court stated that it would instead ban the attorney from appearing in Delaware in the future if he did not explain his behavior within thirty days of the issuance of the opinion.³¹⁵ The court believed it had a duty to create a degree of professional courtesy. The reprimand served only to distract from the court's resolution of the controversy.

Another scathing opinion is *Bradshaw v. Unity Marine Corp.*³¹⁶ Judge Kent began by attacking the defendant's brief:

Before proceeding further, the Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact—complete with hats, handshakes and cryptic words—to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions.³¹⁷

Judge Kent then moved on to attack the plaintiff's counsel:

The Court commends Plaintiff for his vastly improved choice of crayon—Brick Red is much easier on the eyes than Goldenrod, and stands out much better amidst the mustard splotched about Plaintiff's briefing. But at the end of the day, even if you put a calico dress on it and call it Florence, a pig is still a pig.³¹⁸

Judge Kent's derision of the lawyers detracted from his resolution of the case. He was seemingly so frustrated by the quality of the lawyers' work that he gave the appearance of deciding the case begrudgingly. Instead of using a different way to let the lawyers know what he thought of them (like ordering them to rewrite their briefs, as one commentator suggested),³¹⁹ the judge opted to attack

314. *Paramount Communications, Inc. v. QVC Network Inc.*, 637 A.2d 34, 52-56 (Sup. Ct. Del. 1994).

315. *See id.* at 56-57.

316. 147 F. Supp. 2d 668 (S.D. Tex. 2001).

317. *Id.* at 670.

318. *Id.* at 671.

319. Lubet, *supra* note 5, at 13.

them. His decision to use the opinion to deliver a harsh reprimand brings into question whether he decided the case fairly.³²⁰

Another example of the judiciary's scolding of attorneys occurred in 1996 when Presiding Judge Daniel P. Anderson of the Wisconsin Court of Appeals wrote a concurring opinion only "to lament the untimely demise of common courtesy in the legal profession."³²¹ The judge pointed out that an attorney's failure to warn opposing counsel that a default judgment would result was an "example of the hostile environment that is the leading cause of the collapse of common courtesy."³²² As in *Paramount Communications*, the court's decision did not hinge on the attorney's behavior, which should have been dealt with in another way.

Opinions are an improper forum to eulogize the demise of courtesy in the legal profession or to change attorneys' behavior before the courts. There are other ways to discipline attorneys, rather than taking them to task in a written opinion. A judge can warn bad lawyers in court, call them into chambers, order them to rewrite their briefs, or sanction them.³²³ Disrespecting lawyers in the opinion detracts from the flow of the opinion. Personal attacks are immaterial to the issues being decided.

Respect and courtesy should likewise exist among judges and extend to judges of other courts and within the same court.³²⁴ An opinion that veers into a personal attack on another judge is often deficient in legal analysis. *Commonwealth v. Robin*³²⁵ provides an example of a personal attack that failed to reveal anything but the judge's contempt for his colleagues. In *Robin*, the Pennsylvania Supreme Court decided that local governments cannot ban Henry Miller's *Tropic of Cancer*.³²⁶ The lone dissenter, Justice John Musmanno, was convinced that the book was obscene and argued that the book's ban should stand.³²⁷ In his opening paragraph, he wrote that his colleagues had done more harm to the people of Pennsylvania than if they had let loose a thousand rattlesnakes.³²⁸

*People v. Arno*³²⁹ is another example of a court's lack of collegiality. There, the majority of the California Court of Appeals wrote that it was necessary to "spell

320. *Id.* at 14.

321. *Miro Tool & Mfg., Inc. v. Midland Machinery, Inc.*, 556 N.W.2d 437, 440 (Wis. Ct. App. 1996) (Anderson, P.J., concurring).

322. *Id.*

323. Lubet, *supra* note 5, at 13.

324. See McGowan, *supra* note 29, at 515-27 (using *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997), and its subsequent history (including internal court memoranda) to retell in-fighting among Ninth Circuit judges through their opinions in this case and concluding that when judges lose sight of the issues at hand they get caught up in personal bickering).

325. *Commonwealth v. Robin*, 218 A.2d 546 (Pa. 1996).

326. See *id.* at 547.

327. *Id.* at 561 (Musmanno, J., dissenting).

328. *Id.* at 547.

329. 153 Cal. Rptr. 624 (Cal. App. 1979).

out” a response to the dissent’s argument in an obscenity case.³³⁰ The majority wrote seven consecutively numbered sentences, the first letters of which spelled out the word “S-C-H-M-U-C-K.”³³¹ The message was childish and delivered childishly.

Appellate judges also lack respect when they ridicule trial judges. The appellate judge may believe that the trial judge misinterpreted the law and wants to let the trial judge know it. The appellate judge may also be motivated by a personal dislike for the trial judge.³³² Both situations have the potential to create ethical problems. In the first instance, the trial court’s decision should be reversed, but the appellate judge should avoid attacking the trial judge.³³³ In the second instance, appellate judges should consider recusing themselves if they are incapable of deciding the case fairly because of their feelings toward the trial judge.³³⁴ When an appellate judge attacks a trial judge, the litigant—who is not responsible for the court’s internal conflicts and probably is unaware of the situation—will likely conclude that the appellate judge decided the case based on the appellate judge’s feelings toward the trial judge and not on the case’s merits.³³⁵

Judges should be mindful of the writings of Second Circuit Judge Calvert Magruder, who wrote that judges “should approach [the] task of judicial review with a certain genuine humility” and “never unnecessarily try to make a monkey of the judge in the court below.”³³⁶ His advice applies to all involved in the judicial process, from other judges, to the attorneys, and to the litigants. A judge must maintain a sense of common courtesy in order to dispense justice fairly and ethically.

F. POPULAR CULTURE

Few laud the use of popular culture—literature, music, movies—in judicial opinions. Opinions serve as precedent and are meant to build on prior cases and to provide a foundation for the future. Planting an opinion in a particular time period by referring to popular culture takes away from the opinion’s decorum and its ability to be a transitory piece of writing, moving from the present to the future and connecting with the past.

Despite the need for opinions to be transitory, many impurist judges fall prey to inserting popular culture, often by use of an analogy. Justice Harry Blackmun fell

330. *Id.* at 628 n.2.

331. *See id.*

332. Palmer, *supra* note 4, at 884.

333. *See* FEDERAL JUDICIAL CENTER, *supra* note 48, at 19.

334. *See* MODEL CODE Canon 3(E)(1).

335. Palmer, *supra* note 4, at 884.

336. Calvert Magruder, *The Trials and Tribulations of an Intermediate Appellate Court*, 44 CORNELL L.Q. 1, 3 (1958).

victim in *Flood v. Kuhn*,³³⁷ in which the Supreme Court listed eighty-eight baseball greats and footnoted two baseball verses in exempting baseball from antitrust laws.³³⁸ There is little doubt that injecting popular culture into opinions makes some opinions easier to comprehend: They are easier to relate to. The need for an opinion to be understood in the present, however, cannot overshadow the need for an opinion to be understood in the future. References to current culture will end up obscuring, rather than clarifying, the opinion. Consider the following passage from *United States v. Dumont*:

The Grateful Dead play rock music. Their style, often called “acid rock” because it mimics the effects some persons obtain after using LSD . . . is attractive to acid-heads. Wherever the Dead appear, there is a demand for LSD in the audience. Demand induces supply. Vendors follow the band around the country; law enforcement officials follow the vendors.³³⁹

These opening lines from Judge Frank H. Easterbrook’s opinion in *Dumont*, while exceptionally clever, are irrelevant to the issues in the case.

Another reason to avoid using popular culture in opinions is to maintain the decorum of the judicial system. The same reasons that counsel against using humor in opinions also suggest that judges must limit, or better yet eradicate, any use of popular culture in their opinions. Using popular culture has resulted in banal opinions that irrelevantly use lines from the Saturday Night Live Wayne’s World skits and the 1992 movie, *Wayne’s World*—“In short, PRIME TIME’s most bogus attempt at removal is ‘not worthy’ and the Defendants must ‘party on’ in state court.”³⁴⁰ Although “mores and culture affect decision making,”³⁴¹ judges should be wary of showcasing their erudition.³⁴² Knowledge about popular culture is different from including it in a judicial opinion.³⁴³ Including popular culture in a judicial opinion will not make the judge more popular or the opinion more memorable for its legal conclusions.

G. AUTHORITY

To make judicial opinions more understandable to the public, impurists limit their citations to legal precedent. The problem with using authority in impure opinions is the opposite of using it in pure opinions. Impurists tend not to cite enough authority; purists tend to cite too much. Fewer citations do not, however, correlate to less reliance on precedent. Precedent is an integral part of a judicial

337. 407 U.S. 258 (1972) (Blackmun, J.).

338. *Id.* at 262, 263 n.4-5.

339. 936 F.2d 292, 294 (7th Cir. 1991).

340. *Noble v. Bradford Marine, Inc.*, 789 F. Supp. 395, 397 (S.D. Fla. 1992) (emphasis in original).

341. Gerald Lebovits, *A Pox on Vox Pop*, 76 N.Y. St. B.J., July/Aug. 2004, at 61, 64.

342. *Id.*

343. *Id.*

opinion. A judge should always articulate the legal principle or test underlying the court's opinion. Often, the principle is established in past cases and simply adopted in the current opinion. Written opinions, as opposed to oral opinions, have many purposes, but the writer "should concentrate on a single goal—to write an opinion supported by adequate authority that expresses the decision and rationale of the court in language and style that generate confidence in the reader that justice has been fairly and effectively administered."³⁴⁴ Judges must include just the right amount of authority in their opinions.

The most important thing the opinion must do is "state plainly the rule upon which the decision proceeds. This is required in theory because the court's function is to declare the law and in practice because the bar is entitled to know exactly what rule it can follow in advising clients and in trying cases."³⁴⁵ In cases of first impression, judges should fashion the principle themselves. Even so, all opinions should contain the sources from which the principle is derived.

Although one school of thought contends that no case has precedential value because all cases can be distinguished from each other,³⁴⁶ most lawyers believe in two coexisting doctrines of precedent: (1) a narrow one to distinguish troublesome decisions; and (2) a broad one to analogize cases to obtain a similar result.³⁴⁷ Judges should be aware of this dichotomy and balance the two doctrines. They should fairly analogize and distinguish cases by affording each comparison the same latitude and reliance.

The Supreme Court has long cautioned against excessive use of precedent:

[T]his court in a very special sense is charged with the duty of construing and upholding the Constitution . . . it ever must be alert to see that a doubtful precedent be not extended by mere analogy to a different case if the result will be to weaken or subvert what it conceives to be a principle of the fundamental law of the land.³⁴⁸

Moreover, the rules from the cases, not the cases themselves, should be emphasized. According to former New York Chief Judge Cuthbert Pound, "judges too often fail to recognize that the decision consists in what is done, not in what is said by the court in doing it."³⁴⁹ The same is true of legal fictions. Judge Robert Keeton advises: "Avoid legal fictions, if possible. If you conclude that precedent requires you to invoke a legal fiction, explain what you are doing and why."³⁵⁰ Nevertheless, an opinion that is easy to understand might still

344. ABA OPINION WRITING MANUAL, *supra* note 7, at 1.

345. 1 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 8b, at 624 (Peter Tillers rev. ed., 1983).

346. See David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 734 (1987) (citing Max Radin, *Case Law and Stare Decisis: Concerning Präjudizienrecht in Amerika*, 33 COLUM. L. REV. 199 (1933)).

347. *Id.* (citing KARL LLEWELLYN, THE BRAMBLE BUSH 74-75 (1951)).

348. *Dimick v. Schiedt*, 293 U.S. 474, 485 (1935).

349. Pound, *supra* note 10, at 282.

350. ROBERT E. KEETON, JUDGING 144 (1990).

receive the public legitimacy it needs without making use of excess precedent. Impurists must maintain legitimacy in the legal profession's eyes. To ensure that an impure opinion maintains legitimacy, impurists must adequately cite and rely on legal precedent.

VII. ETHICAL CONSIDERATIONS IN BOTH PURE AND IMPURE OPINIONS

Every judge, whether purist or impurist, must be aware of the ethical considerations that arise regardless of an opinion's style.

A. PERSUASIVENESS

Opinions must combine honesty with persuasiveness. As Justice James D. Hopkins noted, an "opinion . . . is an essay in persuasion."³⁵¹ Honesty and persuasiveness are not mutually exclusive. The judge's goal is to motivate the reader to agree with the opinion and to give the reader grounds to do so. As Chief Judge Judith S. Kaye of New York stated: "Writing opinions is a lot like writing briefs. Both are, at bottom, efforts to persuade."³⁵² When an opinion is of relative first impression or deviates from precedent, an opinion writer may summarize the holding and then "add[] a literary touch, stressing the policy or other persuasive considerations that call for this conclusion."³⁵³ To write persuasively yet ethically, judges must emphasize content, not the writing itself.

Although judges should write persuasively, they must avoid writing polemics or writing emotionally. As the Supreme Court of California wrote long ago, "An opinion is not a controversial tract, much less a brief in reply to the counsel against whose views we decide. It is merely a statement of conclusions, and of the principal reasons which have led us to them."³⁵⁴ Some opinions "read[] like a lawyer's brief, the worst possible style for a judicial opinion. It discloses this kind of judge for what he is and ought not to be, an advocate."³⁵⁵ Thus, "[a]n ethical judge cannot be a polemicist."³⁵⁶ Opinions are not pulpits or vessels to espouse personal beliefs. Opinions are meant to be reasoned and solemn. It is through reasoning and solemnity that a judge's opinion becomes persuasive.

B. THE FACTS

The most important rule when drafting facts is to ensure that they are accurate.

351. Hopkins, *supra* note 305, at 49, reprinted in Robert A. Leflar, *Quality in Judicial Opinions*, 3 PACE L. REV. 579, 584 (1983).

352. Kaye, *Wordsmiths*, *supra* note 1, at 10; Alan B. Handler, *A Matter of Opinion*, 15 RUTGERS L.J. 1, 2 (1983).

353. WITKIN, *supra* note 79, § 79, at 140.

354. *Holmes v. Rogers*, 13 Cal. 191, 202 (1859) (petition for rehearing).

355. Moses Lasky, *A Return to the Observatory Below the Bench*, 19 SW. L.J. 679, 688-89 (1965).

356. McGowan, *supra* note 36, at 515.

When citing the facts, judges should not rely on the litigants' statements of facts. Instead, judges should verify the record. Litigants, who have an interest in the litigation, may shade facts, and it is unwise for a judge to adopt verbatim the findings of fact that the prevailing party sets forth in its memorandum of law.³⁵⁷ Doing so suggests that the judge did not evaluate the facts independently. Trial judges must engage in fact finding and resolve conflicts between different versions of the facts presented by the testimony or in the litigants' papers. If the court considers only the facts one side presents, the court has already made its decision. When factual conflicts arise, judges must do their best to state the full version of the facts by drawing from both sides' presentations of the facts.

Judges must also take care not to recite irrelevant facts. They serve no purpose except to distract and confuse the reader. The goal, according to Professor Timothy P. Terrell, is to sift, not regurgitate the facts. A poorly organized opinion, he explains,

is usually encumbered with loads of detail—every fact presented seems to find its way into the court's description of the background of the legal dispute Although the urge behind overinclusion is the defensible one of thoroughness, a truly controlled presentation is also *focused*. That impression requires a writer to sift the material of the document rather than simply reproduce all of it and then try to make sense of it all.³⁵⁸

Colorful but legally irrelevant facts, procedure, and evidence cloud an opinion.

Although the recitation of the facts must be accurate and complete, some information should be omitted, like nonessential facts that impinge on the privacy rights of children or non-parties. Judges should also omit grossly graphic sexual scenarios, even when quoting someone else, unless the scenario is critical to the opinion. In *Lason v. State*, an opinion this article will not reprint, one Chief Justice of Florida did not follow that advice.³⁵⁹ Contrast that opinion with the classic *United States v. Thomas*, which considered whether two Navy airmen were guilty of attempting to rape a deceased woman they believed was drunk.³⁶⁰ The court wrote that “[t]he evidence adduced at the trial presents a sordid and revolting picture which need not be discussed in detail other than as necessary to decide the certified issues.”³⁶¹ The court wisely omitted the graphic details.

In addition to a complete, but succinct, rendition of the facts, judges must present a fair version of the facts. Judges must construct and recount facts

357. Kristen Fjeldstad, Comment, *Just The Facts Ma'am—A Review of the Practice of the Verbatim Adoption of Findings of Fact & Conclusions of Law*, 44 ST. LOUIS U. L.J. 197, 197 (2000); see also *In re Las Colinas, Inc.*, 426 F.2d 1005, 1008-09 (1st Cir. 1970).

358. Timothy P. Terrell, *Organizing Clear Opinions: Beyond Logic to Coherence and Character*, 38 JUDGES' J., Spring 1999, at 4, 38.

359. See *Lason v. State*, 12 So. 2d 305, 305 (Fla. 1943).

360. See *United States v. Thomas*, 32 C.M.R. 278 (Ct. Mil. App. 1962).

361. *Id.* at 280.

neutrally. If facts are presented selectively and with characterization, the judge risks applying law to a situation that did not occur.³⁶² A “judge [who] consciously or unconsciously feels that to relate the full relevant truth about a case would weaken the convincingness of a decision . . . ought to question that decision”³⁶³ Presenting facts neutrally ensures that the facts are not skewed to “fit” the opinion’s outcome. Law belongs to the judge, but facts belong to the litigants.

In an exceptional example, former Attorney General and Fifth Circuit Judge Griffin B. Bell wrote that facts “must be stated as favorably as possible to the losing party The opinion lacks judicial advocacy absent the best view of the facts for the losing party.”³⁶⁴ That is not the conventional view. The opinion must address the facts the losing party presents to show the losing side that its position has been considered.³⁶⁵ Thus, Justice Hopkins had “[o]ne cardinal rule: do not omit facts which are stressed by the unsuccessful party or a doctrine which may be at war with the ultimate disposition.”³⁶⁶ But once the opinion writer includes the facts in controversy and states them fairly, the writer need not slant them toward the losing side.

Resolving conflicts in the facts is one of an opinion’s core functions. Facts should not be used merely to set the stage for the opinion. Judges are cognizant of relevant and controlling precedent. Judges will naturally emphasize facts and distinguish the case from unhelpful precedent and emphasize facts and analogize the case to favorable precedents.³⁶⁷ This connection between fact and precedent is a compelling reason for a judge to present facts honestly. Judges must cogently set out facts that also support the view not taken and explain why those counter-facts are not determinative.³⁶⁸ Composing facts as a story is acceptable if that story is told objectively. A well-reasoned opinion considers both sides of an argument and does not tailor facts to make a decision seem more obvious than it actually is. The reason is that “[t]he one-sided approach weakens the [opinion’s] analytical rigor.”³⁶⁹

362. Wald, *Rhetoric of Results*, *supra* note 132, at 1386; *see also* McGowan, *supra* note 29, at 554-55 (commenting that even if “intellectual honesty” does not compel judges to state facts neutrally, then they should care enough to be neutral because their opinions serve as precedent).

363. Palmer, *supra* note 4, at 883.

364. Griffin B. Bell, *Style in Judicial Writing*, 15 J. PUB. L. 214, 216-17 (1966).

365. To ensure that the facts stated in the opinion are accurate, it is important to check fact references in the parties’ briefs against the record, rather than simply to rely on the facts as the litigants in the briefs presented them. *See* FEDERAL JUDICIAL CENTER, *supra* note 48, at 16.

366. Hopkins, *supra* note 305, at 50.

367. Wald, *Rhetoric of Results*, *supra* note 132, at 1387; *see also* Francis, *Faster, Better*, *supra* note 154, at 28 (stating that structures that permit judges to weigh facts have persuasive intent and sometimes makes cases appear comparable to one another when they are not).

368. Wald, *Rhetoric of Results*, *supra* note 132, at 1389.

369. McGowan, *supra* note 36, at 555.

The opinion in *Steffan v. Perry*³⁷⁰ illustrates the problem of presenting facts neutrally. Joseph Steffan was a midshipman-in-training at the Naval Academy who admitted he was a homosexual.³⁷¹ He was given the choice of resigning from the Naval Academy or risk having the Naval Academy's superintendent recommend his discharge.³⁷² Steffan decided to resign, but he sued on constitutional grounds to overturn the regulations under which he would have been discharged.³⁷³ The district court granted summary judgment, and the case was appealed to the Court of Appeals for the District of Columbia.³⁷⁴ The majority recounted the conflict between a gay midshipman and Navy regulations in dry, bureaucratic language. The court took two pages to detail the Navy regulations disqualifying homosexuals from service before it even mentioned Steffan's name.³⁷⁵ In contrast, the dissent began by telling Steffan's story: His outstanding performance in the Naval Academy.³⁷⁶ The Navy regulations did not appear until several pages into the dissenting opinion.³⁷⁷ The varied presentation of the facts lead the reader to different outcomes. Each rendition justifies each outcome. This case, among many others, illustrates that judges should first apply the law to neutral facts. Judges should not characterize the facts to apply to the outcome of the case.

Judges must also present the facts fully because factual skewing and selectivity are not obviously discernable to the reader. If a judge mischaracterizes precedent or misinterprets a statute, the reader can go to the library to question the source. Case records, on the other hand, are not readily available to the public.³⁷⁸ Furthermore, the likelihood of a case being reviewed on appeal over a factual misstatement is rare. The higher the court, the greater the presumption that any error in a decision is attributable to a legal error.³⁷⁹

The opinion should make explicit credibility determinations. A trial judge who hears contested testimony should note that fact by using phrases like "the court finds that," the court "credits the testimony of," and the court "afforded great weight to."³⁸⁰ An appellate opinion should recount the trial judge's findings so that the opinion's reasoning can be put in context. Few things will frustrate a trial judge more than an appellate reversal that either does not recount the trial findings of fact or which distorts the trial facts. Trial and appellate opinions

370. 41 F.3d 677 (D.C. Cir. 1994) (en banc). For a discussion of this case, see Wald, *Rhetoric of Results*, *supra* note 132, at 1386-88.

371. *Steffan*, 41 F.3d at 683.

372. *Id.*

373. *Id.* at 683-84.

374. *See id.*

375. *Id.* at 682.

376. *See id.* at 701 (Wald, J., dissenting).

377. *See id.* at 706-07 (Wald, J., dissenting).

378. Wald, *Rhetoric of Results*, *supra* note 132, at 1389-90.

379. *Id.* at 1390.

380. Wanderer, *supra* note 243, at 56.

should also cite the record when referring to important facts. Because facts are central to opinions, presenting facts honestly is vital to an opinion's outcome and ensures that the public understands the court considered the case objectively.

A judge should also use concrete nouns and vigorous verbs, not abstractions or conclusions, to recite relevant facts. Concreteness provides context and persuades the reader that a result is correct. Being concrete means being specific; it means showing, not telling. As Judge Patricia M. Wald advised, write in "Joe Six-Pack language. You would be surprised how often abstract concepts conceal a failure to come to grips with the precise issues or facts in [a] case."³⁸¹ Writing non-abstractly is what separates great judges from merely competent ones: "The power of vivid statement [is what] lifts an opinion by a Cardozo, a Holmes, a Learned Hand out of the swarm of humdrum, often numbing, judicial opinions, rivets attention, crystallizes relevant concerns and considerations, provokes thought."³⁸²

C. THE CLAIM OR ISSUE DEFINITION

One of the most important aspects of opinion writing is one of the most ineffable. How a judge defines a claim or issue can determine how the judge will decide the claim or issue—and whether the reader will agree with that opinion. As Justice Felix Frankfurter wrote, "[i]n law . . . the right answer usually depends on putting the right question."³⁸³ The right question will make the reader believe that the judge gave the right answer.

In *United States v. Morrison*,³⁸⁴ the Supreme Court considered the constitutionality of the Violence Against Women Act ("VAWA"). The dissent defined the issue as whether society needs to use the federal courts to compensate victims of gender-based violence to punish its perpetrators.³⁸⁵ The majority, which found VAWA unconstitutional, defined the issue as the extent to which the Constitution's Commerce Clause permits federal law to be imposed on the states.³⁸⁶ Both the majority's and the dissent's issue framing makes the reader agree with their assessment. Their issue framing suggests that how the judge comes out depends on how the judge went in.

Part of framing an issue or claim may result in a judge's resolving a case on a point of law neither side argued. The New York Court of Appeals has offered a famous justification for considering issues *sua sponte*: "To say that appellate courts must decide between two constructions proffered by the parties, no matter how erroneous both may be, would be to render automatons of judges, forcing

381. Wald, *How I Write*, *supra* note 14, at 59.

382. RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 136 (1990) [hereinafter POSNER, REPUTATION].

383. *Rogers' Estate v. Comm'r*, 320 U.S. 410, 413 (1943).

384. 529 U.S. 598 (2000).

385. *Id.* at 665.

386. *Id.* at 608-09.

them merely to register their reactions to the arguments of counsel at the trial level.”³⁸⁷

Some great cases have been decided *sua sponte*, including *Erie Railroad Company v. Tompkins*.³⁸⁸ Deciding cases *sua sponte*, however, leads to bitterness among counsel and sometimes even within the court.³⁸⁹ If the litigants do not address a dispositive issue, the judge should consider asking counsel before oral argument to brief or orally argue the issue rather than making a *sua sponte* decision. This technique is consistent with due process, causes little delay, and saves the majority from encountering dissents and considering motions to reargue.³⁹⁰ Requesting additional argument from the litigants also leads judges to write better, more ethical opinions. In the American adversary system of justice, especially at the appellate level, decisions are often only as good as the lawyers who appear before the court.

D. ORDERING CLAIMS AND ISSUES AND THE RULES WITHIN ISSUES

An opinion must resolve claims or issues in a logical order. But opinions need follow no single logical order—every case is different. Below are some guidelines for ordering opinions.

Judges should be wary of deciding claims and issues in the order the litigants present them. Advocates are trained to start with the argument that has the greatest likelihood of success. Judicial-opinion writers have a different agenda. Moreover, “slavishly following the briefs, point by point . . . makes the opinion seem mechanical.”³⁹¹ Adopting the litigants’ organization can suggest that the court did not exercise independent judgment:

A quick, and therefore seductively attractive, way to organize any opinion is to let the parties supply its pieces and order . . . Reasoning by reacting *could* be effective in certain circumstances, but more often it is a sign of judicial despair or fatigue. Some judges seem to believe that this form of organization is the only method for the court to demonstrate appropriate respect for the arguments of the litigants, carefully responding in turn to each side’s points. But respect of this sort does not require the judge to concede the structure of his or her opinion to the parties. Respect is owed not just to the parties, but to the court as well.³⁹²

The goal is for judges to decide claims and issues in a manner befitting the case and the court.

387. *Rentways, Inc. v. O’Neill Milk & Cream Co.*, 126 N.E. 271, 274 (N.Y. 1955).

388. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

389. *See, e.g., id.* at 82 (Butler, J., dissenting); *Rentways*, 126 N.E. at 275 (Conway, C.J., dissenting).

390. For two good discussions of this question, see Albert Tate, Jr., *Sua Sponte Consideration on Appeal*, 9 TRIAL JUDGES’ J., July 1970, at 68; Allen D. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477 (1958-1959).

391. Smith, *supra* note 14, at 206.

392. Terrell, *supra* note 358, at 39.

Judges should decide threshold issues before deciding the merits. A threshold issue is often a procedural one, such as whether the court has jurisdiction to consider the merits. Sometimes a threshold issue is substantive, such as a statute of limitations question. Depending on the ruling, threshold issues can be dispositive.

After resolving threshold issues, judges should put essential matters first, and resolve the large claims or issues before deciding less significant matters. One technique, from the pure opinion, is to use topic sentences and thesis paragraphs to tell readers, up front, how the court will resolve the issue. This technique is particularly valuable in appellate opinion writing: “like the opening paragraph of the opinion, the initial paragraph presenting a point of error may be brought to a close by revealing the appellate court’s conclusion as to whether the trial court reversibly erred on that point.”³⁹³ This pure-style writing rule also applies to opinions that consider multiple issues. If all the claims are equally large, the judge should first resolve the claim that most affects the litigation. Thus, in a criminal appeal in which a defendant seeks a new trial or, in the alternative, a reduced jail sentence, the appellate court should first decide whether to grant a new trial. If the court grants a new trial, it should not consider the request for a reduced sentence.³⁹⁴

A judge must also move logically through statutory or common-law tests. Often a decision depends on whether a litigant satisfied a multi-factor test enumerated in a statute or a seminal case. A writer must resolve the claim in the sequence in which the statute or case laid out the factors. The reader will understand relationships more easily that way, and the writer will avoid awkward cross-referencing. Deciding claims and issues in the order in which they arose facilitates understanding if the claims and issues arose chronologically.

Everything else being equal, judges should resolve issues by a hierarchy of authority: constitutional questions first, then statutory questions, then common-law questions.

E. INNUENDO

An opinion should rely on facts and law—no room exists for assumptions or innuendos. Litigants are defenseless against the opinion writer who imputes impure motives. An example of moralistic assumption-making appears in *Main v. Main*:

393. Douglas K. Norman, *An Outline for Appellate Opinion Writing*, 39 JUDGES’ J., Summer 2000, at 26, 32.

394. From time to time, appellate courts instruct trial judges on how to handle issues at a retrial. It is appropriate for an appellate court, in its discretion, to advise a trial judge so that a difficult question will be resolved correctly or so that an error will not be repeated. Guidance for a retrial “not only simplif[ies] the task of the trial judge but also minimize[s] the chances of another appeal in the case.” WITKIN, *supra* note 79, § 87, at 157.

At the time of the trial plaintiff was 66, and the defendant 42, years of age. Defendant had been twice married, once widowed and once divorced. Plaintiff had been twice married and twice divorced—each time at the suit of his wife. He had subsequently been defendant in an action for breach of promise, and had sought the graces of other women with a fervor not altogether Platonic. The parties did not drift into love unconsciously, as sometimes happens with younger and less experienced couples. Both knew from the start exactly what they wanted. She wanted a husband with money—or money with a husband. He wanted a wife to adorn his house and insure that conjugal felicity of which fate and the divorce court had repeatedly deprived him.³⁹⁵

If the court's assumptions are incorrect, a litigant becomes the innuendo's victim. Innuendo improperly lowers the court's opinion to impressions and gossip rather than law.

F. CANDOR

Candor is an essential component of a judicial opinion. The expectation that litigants candidly present the facts and law before the court requires a similar judicial response. The requirement that judges give reasons for their decisions serves a vital function: constraining the judiciary's exercise of power.³⁹⁶ Some argue that the reasoning in judicial opinions is a "*post hoc* rationalization of a decision determined by instinct or hunch."³⁹⁷ Even if a judge arrives at an outcome instinctively, reasoning must underlie the judge's decision.³⁹⁸ Candor in judicial opinions helps readers comprehend the outcome that the judge determined. Judges like Robert H. Jackson, John Marshall Harlan, and Henry J. Friendly are known for the candor they displayed in acknowledging the difficulties of decision-making and the strength of competing arguments.³⁹⁹ Candor does not automatically ensure that judges will be lauded for their intelligence, style, and craft. But lack of candor, when discovered, reveals a lack of integrity.⁴⁰⁰

Candor has its limits, however. The judicial opinion should never describe the judge's effort to render a fair decision. The public and the litigants presume that the courts are fair. Judge Posner explained: "Many judges voting to uphold

395. *Main v. Main*, 150 N.W. 590, 591 (Iowa 1915) (Weaver, J.) (denying divorce).

396. Shapiro, *supra* note 346, at 737.

397. *See id.* at 737-38.

398. Kevin W. Saunders, *Realism, Ratiocination, and Rules*, 46 OKLA. L. REV. 219, 222 (1993) (quoting Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 278 (1929) ("[A]fter canvassing all the available material at my command, and duly cogitating upon it, [I] give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision")).

399. Shapiro, *supra* note 346, at 740.

400. *Id.* at 741.

statutes that they personally dislike will say so, to make themselves sound more impartial. This is an ethical appeal, but of a somewhat crass and self-congratulatory sort.”⁴⁰¹ To declare the great pains the court endured to achieve fairness is unnecessary and defensive: “[T]o ‘tell all,’ with complete and unmitigated candor, is not always a virtue in judicial opinions or elsewhere. Restraint may also be a virtue for reasons sometimes of decency and sometimes of wise planning.”⁴⁰² The circumstances surrounding the decision-making procedure will not make the opinion any more or less correct than the reasoning the judge uses. Many decisions are hard to make, but judges should not describe how hard it was to make the decision.

Judges should avoid revealing their personal thoughts about the issues in the case in the guise of candor. Composing an opinion with unmitigated candor is not always a virtue in judicial opinions or elsewhere. Justice Oliver Wendell Holmes made an ethical appeal to the reader in *Lochner v. New York* when he wrote: “The case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should study it further and long before making up my mind.”⁴⁰³

Justice Holmes’s point was to show how deliberative he was when faced with an important decision. A judge is presumed to deliberate on each decision carefully. Judges who state how difficult the decision-rendering process was, in an effort to convince the reader of the judge’s hard work and diligence, more often than not leave their readers unpersuaded.

Similarly, judges should not explain to the reader the amount of research that went into deciding the case. Doing so asks the reader to believe the court because of all the work the court put into the opinion. The court should discuss only the results of its legal research. The court will illustrate through written analysis that it worked hard in research and writing. Judges often congratulate themselves for conducting “a thorough review of the record,” “exhaustive research,” and “a close reading” of the papers. Judges sometimes tell their readers that they engaged in “careful deliberation” and engaged in a “complete review” of the record. Expressions of candor should be eliminated.

Do judges use highlighting strategies to assure skeptical readers that they spend their time deciding cases rather than at the golf course? Or do judges use these strategies out of habit? Either way, verbiage that tells a reader that a judge is honest, smart, deliberate, detail-oriented, impartial, articulate, or empathetic has a negative effect.

Judges who tell people that they are fair are fair game for those who would argue that they are unfair. That happened in *Gideon v. Wainwright*, in which Justice Hugo Black, with understated sarcasm, noted in the opinion’s first

401. Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1381 (1986).

402. Leflar, *Judicial Opinions*, *supra* note 57, at 819.

403. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

paragraph that the Florida “Supreme Court, ‘upon consideration thereof’ but without an opinion, denied all relief” to the defendant, who had argued that “[t]he United States Supreme Court says I am entitled to be represented by Counsel.”⁴⁰⁴

Sometimes the judge has a hunch or intuition about how an opinion should come out. Although a hunch may play a role in the decision’s outcome—if the judge’s research warrants it—the opinion must be justified.⁴⁰⁵ Judges usually do not have the luxury of time to research and write thoroughly. Judges who must issue an opinion before being convinced of its correctness should be encouraged by the following observation:

An opinion can withstand any infirmity except vacillation. An umpire who promptly, resolutely, and incorrectly calls a strike when the ball was wide by a mile doesn’t harm the game of baseball; the national pastime could be ruined, however, by an umpire who massaged his chin, then scratched his head, and finally confessed that since he wasn’t sure whether it was a ball or a strike, he might as well call it a two-base hit.⁴⁰⁶

Judges are encouraged to bring finality to disputes even if they are not always certain of the decision. Thus, being candid may, in exceptional cases, require a “tentative” conclusion.⁴⁰⁷ Opinion writers who render tentative conclusions are said to be *dubitante*. A judge who is tentative expresses findings of fact and conclusions of law with reservations. A tentative opinion is a draft opinion issued by a judge prior to the final decision. Many judges are uncomfortable with the idea of issuing tentative opinions: “tentative opinions [are] as welcome[] as a porcupine at a dog show.”⁴⁰⁸

Judges may have a difficult time striking a balance between being honest and giving too much information. Even the most beloved judges have, on occasion, expressed too much candor. For example, in *People v. Davis*, New York Court of Appeals Chief Judge Charles D. Breitel in dissent remarked:

Speaking for myself alone among the dissenters I find capital punishment repulsive, unproven to be an effective deterrent (of which the *James* case [] is illustrative), unworthy of a civilized society (except perhaps for deserters in time of war) because of the occasion of mistakes and changes in social values

404. *Gideon v. Wainwright*, 372 U.S. 335, 337 (1963). Justice Black’s “impure style” opinion in *Gideon* is especially brilliant. He did not have to say in his first paragraph what the issues are or who will win. The imagery from his procedural references suffices to tell the reader what the case is about and who will win and why.

405. Huteson, *supra* note 398, at 280-81.

406. Levitan, *supra* note 40, at 630, 666.

407. For the pros and cons of writing tentative opinions, see Philip M. Saeta, *Tentative Opinions: Letting a Little Sunshine into Appellate Decision Making*, 20 JUDGES’ J., Summer 1981, at 23-24.

408. *Id.* at 24 (quoting Justice Robert S. Thompson) (citing LOS ANGELES TIMES, Aug. 1, 1980, Part V, at 3).

as to what are mitigating circumstances, and the brutalizing of all those who participate directly or indirectly in its infliction.⁴⁰⁹

Several factors can test a judge's limits to candor: Precedents, collegiality, litigants, lawyers, personalities, and politics. Discussing life-and-death struggles over euthanasia and jury nullification, former Yale Law School Dean (and now Second Circuit Judge) Guido Calabresi argued that judges should dissemble when values conflict and the options are tragic.⁴¹⁰ New York University and Cambridge University joint-appointee Ronald Dworkin, perhaps today's leading philosopher of jurisprudence, believes that when legal and moral rights conflict and a judge is faced with making a difficult moral decision, sometimes the judge should lie for the high goal of rendering a just decision.⁴¹¹

G. TONE AND TEMPERAMENT

Judges should always maintain a professional, neutral tone. Regardless of the judge's personal feelings, the tone should stay restrained, patient, dignified, and courteous. As Professor Terrell explains, "style has to do with the relationship of writer to reader, a relationship that can be, for example, authoritarian or collegial or deferential."⁴¹² On the other hand, the "tone of an opinion . . . depends for its legitimacy on autocratic claims to professional authority, or, less arrogantly, on invocations of reasoned discourse, or, even more familiarly, on appeals to simple humanity or fundamental values."⁴¹³ The *Model Code of Judicial Conduct* requires judges to maintain neutrality:

Expressions of bias or prejudice by a judge . . . may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.⁴¹⁴

To maintain the professional tone expected in an opinion, judges must remain impartial.

To avoid sounding antagonistic, the court should not address every point a losing party raises, unless all the issues are necessary to decide the case.

409. 371 N.E.2d 456, 468 n.* (N.Y. 1977) (Breitel, C.J., dissenting).

410. See GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 17-28 (1978).

411. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 326-27 (1978) (noting that when a judge is faced with a case where legal and moral rights conflict, the judge could resign, follow the law, or draft an opinion that is a lie); accord Shapiro, *supra* note 346, at 731.

412. Terrell, *supra* note 358, at 38 ("[S]tyle can be understood as the writer's projection to the reader of the writer's image of his or her professional character.") (citing STEVEN ARMSTRONG & TIMOTHY P. TERRELL, THINKING LIKE A LAWYER: A LAWYER'S GUIDE TO EFFECTIVE WRITING AND EDITING § 8, at 5-10 (1992)).

413. *Id.*

414. MODEL CODE Canon 4(A) cmt.

Addressing each point will “remove the decision from the really vital issues of each case and . . . transform the opinion into a list of rulings on academic legal assertions.”⁴¹⁵ Excessively dwelling on every one of the losing side’s arguments may also doom the opinion to a lengthy dissertation on irrelevant topics. It is critical for judges to explain why the court got it right, not why the loser got it wrong.⁴¹⁶ The losing side’s relevant arguments must be addressed and never dismissed out of hand.⁴¹⁷ In doing so, the court must treat all litigants with dignity.⁴¹⁸

Judges must also ensure that their tone is restrained. Judges must be careful to make sure that their opinion is patient, not arrogant, flippant, or influenced by provocation. At the same time, judges must maintain a dignified tone while never obscuring the real reason for the decision.⁴¹⁹

United States Supreme Court Justices and others have not always maintained a dignified tone. In expressing scornful views about homosexuals, women’s rights, immigrants, or victims of sexual harassment, these judges have allowed their readers to believe that their scorn motivated their legal rulings. Below are examples:

- Relying on values expressed from Roman law to Blackstone to uphold a statute that criminalized sex between consenting adults in private, concurring Chief Justice Warren E. Burger wrote: “To hold that the act of homosexual sodomy is somehow protected as a fundamental right would . . . cast aside millennia of moral teaching.”⁴²⁰
- A majority of the Supreme Court forbade gender-based discrimination in peremptory jury challenges.⁴²¹ The dissenting Justices scoffed that the majority’s decision “is an inspiring demonstration of how thoroughly up-to-date and right-thinking we Justices are in matters pertaining to the sexes (or, as the Court would have it, the genders) and how sternly we disapprove the male chauvinistic attitudes of our predecessors.”⁴²²
- A concurring Justice believed that the National Endowment for the Arts (NEA) discriminated on the basis of viewpoint. According to the concurrence,

It takes a particularly high degree of chutzpah for the NEA to contradict this proposition, since the agency itself discriminates—and is required by law to

415. Wigmore, *supra* note 345, at § 8a, at 617.

416. See Terrell, *supra* note 358, at 39.

417. Wald, *How I Write*, *supra* note 14, at 58.

418. See generally Lubet, *supra* note 5, at 14.

419. See generally Robert A. Leflar, *Honest Judicial Opinions*, 74 N.W. U. L. Rev. 721 (1979).

420. *Bowers v. Hardwick*, 478 U.S. 186, 196–97 (1986) (Burger, C.J., concurring) (“Blackstone described ‘the infamous crime against nature’ as an offense of ‘deeper malignity’ than rape”) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 215 (1775)).

421. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

422. *Id.* at 156 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (opening sentence).

discriminate—in favor of artistic (as opposed to scientific, or political, or theological) expression. Not all the common folk, or even all great minds, for that matter, think that is a good idea. In 1800, when John Marshall told John Adams that a recent immigration of Frenchmen would include talented artists, “Adams denounced all Frenchmen, but most especially ‘schoolmasters, painters, poets, & C.’ He warned Marshall that the fine arts were like germs that infected healthy constitutions.”⁴²³

- At trial, bank employees asserted that a bank vice president caused them emotional distress by falsely accusing them of making “dial-a-porn” toll calls from the bank’s telephones.⁴²⁴ The vice president forced the employees to listen, with others present, to a recording of a call that “presented a woman having sexual relations with a man, and telling him how she wanted him to do it.”⁴²⁵ Deciding that the plaintiffs’ claims were untimely, the court wrote: “Enforced exposure to salacious dialogue notwithstanding, the record establishes no justification for us to rescue these six suitors from their self-dug hole. In calling upon us for extrication, plaintiffs have dialed yet another wrong number.”⁴²⁶

Lamentably, in these famous and infamous opinions, what remains with the reader is not the outcome of the case but the tone in which the outcome was delivered. The tone in these cases says more about the decision-making process than about the law. These passages suggest a bias in the decision-making process.

H. MODESTY, HUMANITY, AND HUMILITY

People who know judges agree that “there have sometimes been martinets upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity.”⁴²⁷ Judicial modesty is hard to master, but modesty must be mastered:

“Most writers are beset by the healthy worry that they won’t be read. The writer-judge suffers no such humbling agony. For a time at least, whatever the judge writes is law; readership not always meek but guaranteed. A tendency to write as though the whole world were waiting. Can pompousness be far away?”⁴²⁸

But judicial pomposity is a wasted effort. Most people care about things more important than judicial opinions: “[F]ew citizens will sit down with a volume of

423. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 597 (1998) (Scalia, J., joined by Thomas, J., concurring) (quoting JOSEPH J. ELLIS, *AFTER THE REVOLUTION: PROFILES OF EARLY AMERICAN CULTURE* 36 (1979)).

424. *Rodriguez-Antuna v. Chase Manhattan Bank Corp.*, 871 F.2d 1, 1 (1st Cir. 1989).

425. *Id.*

426. *Id.* at 3 (Selya, J.).

427. *Bridges v. California*, 314 U.S. 252, 289 (1941) (Frankfurter, J., dissenting).

428. MELLINKOFF, *supra* note 122, at 122.

our opinions, yet many will spend days on jury duty, seek an order of protection in family court, or live in a neighborhood where they see the effects of the criminal justice system's revolving door."⁴²⁹ And pomposity in opinion writing violates the function of justice, which is to offer just solutions, not brilliant opinions, as Piero Calamandrei wrote in his *Eulogy of Judges*:

In the hope of seeing their "brilliant" opinions published in the law reports or having them create favorable impressions when promotion is being considered, there is a danger that some judges will treat the decisions as the point of departure for a brilliant essay rather than a bridge of passage to the just conclusion—the true function of the judicial process. The judge who is intent only upon presenting a casual reader with the delight of a literary masterpiece, instead of offering a just solution to the suffering of the parties, fails to comprehend the holy function of justice

[T]he best judge is the one in whom a ready humanity prevails over cautious intellectualism. A sense of justice, the innate quality bearing no relation to acquired legal techniques, which enables the judge after hearing the facts to feel which party is right, is as necessary to him as a good ear is to a musician; for, if this quality is wanting, no degree of intellectual pre-eminence will afford adequate compensation.⁴³⁰

Judicial opinions are not meant to be literary masterpieces. Nor are they meant as vehicles to display a judge's intelligence. Whatever style a judge chooses to use in a judicial opinion, modesty is essential.

For an example of an immodest opinion, see *Bianchi v. Savage*.⁴³¹ Although the landlord-tenant issue in the case had minimal legal significance, the court treated the issue as if civilization itself depended on the court's ruling. The judge's lack of modesty is endless: (1) the use of the royal "we" and "us"; (2) the capitals; (3) the italics; (4) the italicized capitals; (5) the adverbs and adjectives ("grossly," "unjust"); (6) the Latin in the text ("contra"); (7) the metadiscourse ("we are aware that"); (8) the exclamation mark; (9) the self-congratulatory phrases (not being "blindly" bound by another court); (10) saving time and money; (11) exalting substance over form; (12) the "torch has been passed to us"; (13) "a beginning must be made"; (14) "challenged to tread" on an issue novel to the court; (15) "judicial courage"; (16) the (inaccurate) mention that the case is "of very first impression"; (17) the pretense at modesty (that some have "intellects far greater than ours"); and (18) the excessive degree of confidence in

429. Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts are Run*, 48 HASTINGS L.J. 851, 853 (1997).

430. PIERO CALAMANDREI, EULOGY OF JUDGES 85–86 (1935) (John Clark Adams & C. Abbot Phillips, Jr., trans., 1942) (quoted with some changes in ROBERT A. LEFLAR, APPELLATE JUDICIAL OPINIONS 109 (1974)).

431. 373 N.Y.S.2d 976 (City Ct. White Plains 1975). This opinion, written by an Acting City Judge in New York, should be read in the unofficial version; the State Reporter charitably lowercased the capitals in the Official Reports.

the appellate process (“Appellate Courts will reverse us if we err”):

We are aware this result is contra to *353 Realty Corp. v. Disla*, 81 Misc.2d 68, 364 N.Y.S.2d 676 (1974), but we do not feel bound as a matter of Stare Decisis doctrines to blindly follow the determination of the Civil Court of the City of New York, in the case at bar. To do so here would work a grossly unfair and unjust result on the parties because they would be right back in court litigating what is really only ONE KEY ISSUE in this matter. What a waste of time, talent, money, energy, and exercise in futility that would be all around!

REASONING:

A. This Court is now and always will be concerned with EXALTING SUBSTANCE OVER FORM, and LAW OVER PROCEDURE

C. The Substantive issue before us is one of very first impression in the State of New York. We must not lack the judicial courage to plunge in where intellects far greater than ours have not yet been challenged to tread. It is questionable courage in any event because Appellate Courts will reverse us if we err. A beginning must be made and the torch has been passed to us.⁴³²

In *Bianchi*, the court pretended as if it had gone to a place where no one had ever gone before. Compare the *Bianchi* court’s writing with Justice Holmes’s more modest opening sentence in his dissent in *Haddock v. Haddock*: “I do not suppose that civilization will come to an end whichever way this case is decided.”⁴³³

Judicial pomposity has been the subject of much satire. Mortimer Levitan, in a remarkable piece of legal satire, commented on modesty on the bench.⁴³⁴ Here is an excerpt from his master-work:

Courts, in order to make their products more acceptable, must be endowed with superhuman knowledge, infinite wisdom and virtual infallibility. Everybody, then, should be indoctrinated with the idea that judges possess those supernatural qualities—everybody, that is, except the judges themselves. A judge should always remain sufficiently human so that if he overhears a whispered conversation about a divine figure in a black robe, he’d know instantly that the subject under discussion was not the judiciary.⁴³⁵

Another favorite, from *Iolanthe*, is the Lord Chancellor, who thought highly of himself when he said:

The Law is the true embodiment
Of everything that’s excellent.

432. *Id.* at 978-79.

433. *Haddock v. Haddock*, 201 U.S. 562, 628 (1906) (Holmes, J., dissenting).

434. See Levitan, *supra* note 40, at 630.

435. *Id.*

It has no kind of fault or flaw,
And I, my Lords, embody the Law.⁴³⁶

Judges, however, have faults and flaws. At times they are neither excellent nor the true embodiment of the law, although they may think so.

Scholarship is humility, not the vanity press. Trial judges should cite their own opinions only if they must. On the other hand, appellate courts should quote from and cite their own opinions to show adherence to precedent. T.S. Eliot was right: “Humility is the most difficult of all virtues to achieve.”⁴³⁷ As former Second Circuit Judge Harold R. Medina wrote, “we cannot deny the fact that a judge is almost of necessity surrounded by people who keep telling him what a wonderful fellow he is. And if he once begins to believe it, he is a lost soul.”⁴³⁸

I. DISSENTS AND CONCURRENCES

Unanimity in the law promotes collegiality, reduces the number of motions for reargument, and promotes public confidence.⁴³⁹ Concurrences and dissents should not be written unless a judge has something significant to add beyond personal dissatisfaction with the result of a case.⁴⁴⁰ Oftentimes concurrences are written to obtain a plurality.⁴⁴¹ Although concurrences may be helpful, unexplained concurrences have little value and end up frustrating litigants and readers.⁴⁴²

When judges write dissents, they object to the result reached in the case. The dissent is written for the future in the hope that another court, perhaps an appellate court, will agree with the reasoning: “A sense of urgency and of impending doom is almost a *sine qua non* of the dissenting voice.”⁴⁴³ Dissents fail when they are overly collegial and when the dissent becomes a method of

436. PLAYS & POEMS OF W.S. GILBERT 245 (Random House 1932). According to Judge Posner, the four yellow stripes on each sleeve of Chief Justice Rehnquist’s robe were “inspired by the costume worn by the Lord Chancellor in a production that Rehnquist had seen of Gilbert and Sullivan’s operetta *Iolanthe*.” RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 168 (1999). The suggestion is that the Chief Justice tried to emulate the Lord Chancellor.

437. T.S. Eliot, *Shakespeare and the Stoicism of Seneca*, in SELECTED ESSAYS 130 (Faber & Faber 1964).

438. Harold R. Medina, *Some Reflections on the Judicial Function: A Personal Viewpoint*, 38 A.B.A. J., Jan. 1952, at 107-08.

439. *But see* GEORGE, *supra* note 131, at 234 (“Separate opinions . . . compelled by an abiding belief in an intellectual, factual, or analytical difference, [signify] a healthy judiciary.”).

440. *See generally* Ruth Bader Ginsburg, *Remarks On Writing Separately*, 65 WASH. L. REV. 133 (1990); Alex Simpson, Jr., *Dissenting Opinions*, 71 U. PA. L. REV. 205, 216 (1923) (“[N]o dissent should be filed unless it is reasonably certain a public gain, as distinguished from a private one, will result.”).

441. *See, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 353-54 (1974).

442. Ira P. Robbins, *Concurring In Result Without Written Opinion: A Condemnable Practice*, 84 JUDICATURE 118-19 (2000) (observing that unexplained concurrences in state supreme court cases decided by a plurality have led federal courts to question their precedential value).

443. Wald, *Rhetoric of Results*, *supra* note 132, at 1413.

judicial jabbing.⁴⁴⁴ Model Code Canon 19, at one time urged that dissents be limited, “except in case[s] of conscientious difference of opinion on fundamental principal.”⁴⁴⁵ Although Canon 19 is no longer in the *Model Code*, its message continues to be relevant.

Dissenting and concurring opinions should offer explanations to justify their use. A dissent or concurrence can have a powerful effect on the court’s opinion, and the availability of concurrences and dissents limits judicial advocacy by judges in the majority, fosters judicial accountability, and provides a safety valve for judges to blow off steam.⁴⁴⁶

J. BOILERPLATE LANGUAGE

Judges must write quickly to keep up with ever-increasing caseloads. However, using boilerplate to speed up the opinion-writing process does not solve the problem: “The virtue of [boilerplate] is also their vice. They are a quick, cheap substitute for knowledge and independent thinking.”⁴⁴⁷

Judges should avoid the temptation to write boilerplate decisions even when the case involves a basic, routine issue. A judge recycling language from previous decisions or hallmark cases engages in improper use of boilerplate, raising an opinion’s form over its substance. A judge who uses boilerplate will fail to do justice in the case; the judge should instead write a reasoned decision based on the specific facts before the court. The purpose, audience and style of each judicial opinion may be different. But judges should not conform each case and set of facts to boilerplate decisions: “High-volume courts may wish to codify patterns for efficiency’s sake, but courts should carefully examine standardized language and other fixed language for aim, audience, and style before committing to them.”⁴⁴⁸

Judges should also refrain from relying on language from well-trod cases. The court may be faced with distinguishable facts or novel issues, and judicial efficiency might be perverted when judges use boilerplate. A judge who uses boilerplate might ignore important facts or issues that do not fit within the boilerplate opinion’s four corners. It is unacceptable for a judge to force a case into a boilerplate decision. A judge’s job is to maintain the integrity and vitality of the law. Cookie-cutter decisions leave readers with a sour taste.

444. See Maurice Kelman, *Getting In The Last Word: The Forensic Style In Appellate Opinions*, 33 WAYNE L. REV. 247, 248 (1987).

445. CANONS OF JUDICIAL ETHICS Canon 19 (1924).

446. For two pieces on separate writing, see Hugh R. Jones, *Cogitations on Appellate Decision-Making*, 34 REC. ASS’N B. CITY OF N.Y. 543, 549-58 (1979); Stanley H. Fuld, *The Voices of Dissent*, 62 COLUM. L. REV. 923 (1962).

447. MELLINKOFF, *supra* note 122, at 101 (noting that forms provide “pre-packaged law,” allowing writers to save time. But forms are “taken on quick faith, by the ignorant, the timid, and the too busy—law and all; needed or not”).

448. Elizabeth A. Francis, *The Elements of Ordered Opinion Writing*, 38 JUDGES’ J., Spring 1999, at 8-9.

K. CLEAN-UP PHRASES

Clean-up phrases may suffice in most civil cases. Clean-up phrases include:

“This court has considered appellant’s remaining contentions and concludes that they lack merit [or that no extended discussion is necessary].”

“Because we dismiss the complaint for failure to state a cause of action, we need not reach defendant’s contention that the trial court’s jury charge was erroneous.”

In criminal cases, Judge Aldisert recommends that “whether on direct appeal or collateral review—the better practice is to list the issues that have been rejected by the court without having been discussed. This is important in order for a record to be kept of what the court has considered, no matter how frivolous the contention.”⁴⁴⁹ Many trial and appellate courts enumerate rejected issues or claims. This practice is beneficial for several reasons: It aids state trial and appellate courts assess motions; it helps federal courts on habeas corpus review; and it satisfies defendants, counsel, and the public that the court addressed all the litigants’ contentions. Listing rejected claims takes but a few extra minutes and will not detract from an otherwise elegant opinion.

L. TIMELINESS

Judges have a duty to issue timely decisions. A judge who ignores or fails to issue a timely decision may face disciplinary sanctions or at least administrative correction. One New York State Supreme Court justice faced disciplinary sanctions when he delayed issuing decisions in eight cases, ranging from seven months in a tort case to over nine years in an admiralty case.⁴⁵⁰ The litigants needed to commence proceedings in order to compel the justice to issue the decisions in four of those cases. The New York Court of Appeals noted that the justice’s “handling of the cases” showed his “serious administrative failings.”⁴⁵¹ But the court, over a strong dissent, did not discipline the judge. According to the court, the judge’s actions were “not the kind of derelictions commonly associated with misconduct warranting formal penalties.”⁴⁵² It held that there was “no persistent or deliberate neglect of his judicial duties rising to the level of misconduct.”⁴⁵³

It is hard to fathom why the court did not find that the justice’s actions rose to

449. ALDISERT, *supra* note 64, at 87-88.

450. *In re Greenfield*, 557 N.E.2d 1177, 1177-78 (N.Y. 1990).

451. *Id.* at 1178. The court reasoned that it was the justice’s own optimism in assuming that he could “do more than his share” that led to his predicament. Ultimately, the court reasoned that it was the justice’s stubbornness and perfectionism that contributed to his situation. It was his failure “to ask for help” or to “write a decision which did not meet the high standards which he had set for himself” that led to the excessive delays.

452. *Id.* at 1180.

453. *Id.* at 1178.

the level of “persistent or deliberate” neglect of judicial duties. One reason for the court’s decision might have been that the court sympathized with the justice’s predicament and took into account his experience and commitment. Most believe, however, that judges who fail to issue timely decisions act unethically, and numerous courts have disagreed with the *Greenfield* decision.⁴⁵⁴ Judges must, according to Model Code Canon 3 A(5), dispose of all court business promptly. Late justice is injustice.

VIII. THE ROLE OF LAW CLERKS

Using law clerks to research and draft opinions is a necessity for all judges with clogged calendars.⁴⁵⁵ Most opinion writing has evolved into a process between the judge and the law clerk.⁴⁵⁶ Using law clerks to draft opinions is not unethical, but the judge’s voice and reasoning must resonate through the opinion. The law clerk should not be the arbiter and the judge merely the overseer.⁴⁵⁷

Justice Harlan Fiske Stone allowed his law clerk, Louis Lusky, to write the most significant footnote in Supreme Court history.⁴⁵⁸ Footnote four of *United States v. Carolene Products*, which created the strict-scrutiny standard in constitutional jurisprudence, is a startling example of how law clerks can mold the law.

In his book about the Supreme Court, Chief Justice Rehnquist explained the contributions his law clerks made to the opinion writing process.⁴⁵⁹ He told his law clerk how he voted in conference with the other Justices and then assigned the clerk the task of writing the opinion’s first draft.⁴⁶⁰ The Chief Justice then edited the opinion with the final say on the opinion’s content and language.⁴⁶¹ This process is common among appellate judges. Modern law clerks have the

454. See, e.g., *In re Kilburn*, 599 A.2d 1377, 1378 (Vt. 1991) (collecting cases).

455. See Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 697 (2001); Gerald Lebovits, *Judges’ Clerks Play Varied Roles in the Opinion Drafting Process*, 76 N.Y. ST. B.J., July/Aug. 2004, at 34, 34 [hereinafter Lebovits, *Judges’ Clerks*]. According to Judge Posner, “most judicial opinions are written by the judges’ law clerks rather than by the judges themselves . . .” POSNER, REPUTATION, *supra* note 382, at 148; see also Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1100 (2004) (recognizing “reality of current judicial life that few judges draft their own opinions from scratch”); Wichern, *supra* note 67, at 647 (“Ideally, a presiding judge should write the first draft of an opinion. As caseloads have grown, this ideal has arguably become unattainable.”).

456. Norman, *Dynamics*, *supra* note 6, at 175.

457. See FEDERAL JUDICIAL CENTER, *supra* note 48, at 11; see also WITKIN, *supra* note 79, at § 10, at 16 (“It is the task of stating the reasons for the decision, not the authority to decide, that is delegated.”).

458. See Laura Krugman Ray, *Judging the Justices: A Supreme Court Performance Review*, 76 TEMP. L. REV. 209, 215 (2003).

459. See WILLIAM H. REHNQUIST, *THE SUPREME COURT* 260-63 (rev. ed. 2001).

460. See *id.*

461. See *id.*

power to shape an opinion because they create the first draft.⁴⁶² With the increased responsibility law clerks bear, some see modern judges as administrators who manage judicial work through their law clerks rather than as traditional jurists.⁴⁶³

Opinion writing is collaborative between judge and clerk, but decision-making is not.⁴⁶⁴ Whether the law clerk prepares the initial drafts or the final edits, the entire adjudicative function and decision-making process must remain exclusively with the judge. To maintain control, judges, when using law clerks, should keep in mind the following principles. First, judges should always make sure that they discuss the opinion with the clerk and that the clerk is familiar with the facts underlying the opinion.⁴⁶⁵ A judge who does not keep close tabs on the opinion will be unable to gauge whether the opinion is written correctly. The judge will be able to catch only the most glaring errors.⁴⁶⁶ Second, judges should listen to their clerk's feedback and take the clerk's views seriously.⁴⁶⁷ Listening to the clerk helps strengthen the relationship between the judge and the clerk and encourages an open discussion of the issues involved in the opinion.⁴⁶⁸ Third, notwithstanding the clerk's involvement, "[e]very word and citation must be the authentic expression of the judge's thoughts, views, and findings."⁴⁶⁹

Although the opinion must be the judge's work, it is important for judges who rely on their clerks to keep an open mind and communicate with the clerk. The clerk might not have the judge's experience, but a clerk is doing the research and has greater familiarity than the judge with the facts and law.⁴⁷⁰ Keeping an open dialogue with the clerk ensures that the clerk is free to express views about the opinion, even when the clerk disagrees with the judge.⁴⁷¹ If the clerk happens to be correct, then an open relationship will foster a better opinion. Along similar lines, a judge should not decide the outcome of a case and then force the clerk to write within the confines of that outcome.⁴⁷² The judge must be flexible if it turns

462. Lebovits, *Judges' Clerks*, *supra* note 455, at 35. Because of the involvement of law clerks in drafting and decision making, some consider it unethical for law clerks to write judicial opinions. *See, e.g.*, McGowan, *supra* note 36, at 555 ("Judges should write their own published opinions. They should not have law clerks or anyone else do the writing for them.")

463. *See, e.g.*, Judith Resnik, *Judicial Independence and Article III: Too Little and Too Much*, 72 S. CAL. L. REV. 657, 665 (1999).

464. *See* Norman, *Dynamics*, *supra* note 6, at 175.

465. *Id.* at 176 (focusing on the role of legal staff in appellate courts, but most points in the article are useful for any judge with legal staff).

466. *Id.*

467. *Id.* at 177.

468. *Id.*

469. Lebovits, *Judges' Clerks*, *supra* note 455, at 35; *accord* Kozinski, *supra* note 455, at 1100 (explaining that a judge must "study an opinion closely, deconstruct its arguments, examine key portions of the record and carefully parse the precedents" before the opinion may be called the judge's own).

470. Norman, *Dynamics*, *supra* note 6, at 177.

471. *Id.*

472. *Id.*

out that precedent contradicts the judge's initial thoughts. Judges should delegate work to their clerks if necessary, but the delegation should not result in the clerk's usurping the judge's job.⁴⁷³ Instead, judges should stay abreast of the opinion writing. Litigants, lawyers, and the public expect judges, not clerks, to decide cases.

To avoid the appearance that another individual created the work, a judge should not credit the law clerk's work on an opinion.⁴⁷⁴ In New York, the Law Reporting Bureau has put into effect the Court of Appeals's policy forbidding judges from thanking their law clerks or interns in opinions. The Law Reporting Bureau will not print any part of an opinion that acknowledges the contributions of a law clerk or intern. Before this rule went into effect, judges lauded the clerks' and interns' contributions. For example, in *Wolkoff v. Church of St. Rita*, the judge thanked his summer intern for the contributions he made to the opinion: "The hard work, thorough research and scholarship of Edward Larsen, New York Law School Intern participating in the Richmond County Bar Association Summer Intern Program, is gratefully acknowledged and in large measure credited in the formation of this opinion. Mr. Larsen has the sincere thanks of this Court."⁴⁷⁵ Today, this type of praise could pass for a letter of recommendation.

The opinion in *Acceptance Insurance Company v. Schafner*⁴⁷⁶ is an even more extreme example. There, the judge's contribution to an opinion issued under his name was a footnote stating that the opinion was "prepared by William G. Sommerville, III, Law Clerk, in which the Court fully concurs."⁴⁷⁷ The example is extreme in that the judge acknowledges that he wrote only the footnote to the opinion and that the remaining portion of the opinion was the law clerk's handiwork. This creates a topsy-turvy world—one in which the clerk has been elevated to the position of judge and the judge has been lowered to the position of clerk.

The process borders on the unethical when judges abdicate their judicial responsibility and leave the entire decision in the law clerk's hands either by failing to follow up on the law clerk's research or by failing to edit the law clerk's writing. The judge at this point hands the reigns to an unelected and unappointed court employee. Judges who give the entire duty of writing opinions to law clerks harm the litigants, the legal profession, the public, and themselves.

A judge may use a law clerk, student intern or extern, special master, or referee to assist in opinion writing. A judge may not, however, use an outside expert for that purpose. In *In re Fuchsberg*, an associate judge of the New York Court of Appeals asked law professors to draft his opinions in three cases before the

473. *Id.* at 176-77.

474. *See, e.g., Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524-25 (11th Cir. 1988).

475. *See Wolkoff v. Church of St. Rita*, 505 N.Y.S.2d 327, 334 (N.Y. Sup. Ct. 1986) (Kuffner, J.).

476. 651 F. Supp. 776 (N.D. Ala. 1986) (practice criticized in *Parker*, 855 F.2d at 1524-25).

477. *Id.* at 778.

court.⁴⁷⁸ The judges of the Court of Appeals, who reviewed their colleague's disciplinary complaint, rejected the judge's "explanation that he looked upon the law professors he consulted as 'ad hoc' law clerks."⁴⁷⁹ The court censured the judge and noted that "[t]he substantial incorporation of outside experts' language in a Judge's opinion suggests, without more, that the expert is influencing the decision-making process. To that extent such a practice impairs the public's confidence in the independence and integrity of the judiciary"⁴⁸⁰ The court expressed its hopes that the judge, and others similarly situated, would attend to the ethical canons in the future "and act in a way that does not cast the slightest doubt on the independence, impartiality, and integrity of the judiciary."⁴⁸¹

In another disciplinary proceeding, a Circuit Court Judge from Milwaukee County hired a law professor and friend to write thirty-two opinions. The law professor had extensive discussions with the judge about dispositive motions and assisted the judge in drafting opinions. The Supreme Court of Wisconsin found that the judge violated the former *Code of Judicial Ethics* rule prohibiting a judge from having private communications designed to influence the judge's decision.⁴⁸² The court also found that the judge engaged in "ex parte communications."⁴⁸³ Ultimately, the court found that Judge Tesmer deserved a reprimand for her actions. Judges who engage in similar conduct can and should be reprimanded, censured, or removed from office.

IX. CONCLUSION: WRITING IN THE MIDDLE

Is it more ethical to write in the pure style or the impure style? Where does the answer lie? Purists include Justices Brandeis, Brennan, Cardozo, Frankfurter, and the second Harlan.⁴⁸⁴ Impurists include Justices Black, Douglas, Learned Hand, Holmes, and Jackson.⁴⁸⁵ Although individual tastes differ, one would be hard-pressed to say that any of these judges could not write well. Thus, like many things, the answer lies in the middle. The most effective opinions will incorporate ideas from both the pure and impure styles: an effective, ethical opinion will incorporate the techniques that make impure opinion readable as well as the techniques that make pure opinions detailed sources of legal information.

Judicial opinions should be the result of a dynamic and disciplined interplay of

478. *In re Fuchsberg*, 426 N.Y.S.2d 639, 646 (N.Y. Ct. Jud. 1978) (per curiam).

479. *Id.* at 649.

480. *Id.* at 648.

481. *Id.* at 649.

482. *In re Judicial Disciplinary Proceedings Against Tesmer*, 580 N.W.2d 307, 309 (Wis. 1998) (per curiam).

483. *Id.* at 316.

484. Posner, *Judges' Writing Styles*, *supra* note 80, at 1432.

485. *Id.*

conceptual and empirical analysis.⁴⁸⁶ Nothing breeds more disrespect and contempt for the judiciary than the appearance that a court treated one litigant differently from the other.⁴⁸⁷ At a basic level, an opinion must convince its audience—the judiciary, lawyers, or the public—that the judge considered all points of view and “that opposing evaluations of the case have been understood and seriously weighed.”⁴⁸⁸

Much of the practice of law involves communicating with peers, albeit in a formalized manner.⁴⁸⁹ Judges participate in this dialogue through the words in their opinions. The role of a judicial opinion extends beyond merely functioning as precedent. Judicial opinions now serve as teaching tools for students and lawyers, as primers on law, and as guides for future action. But some ideals have not changed. As stated over 200 years ago, writing opinions “will ensure *a careful examination of the cases, and result in well considered opinions*, because they must come before the jurists of the country and be subjected to the severest criticism.”⁴⁹⁰

To be ethical, judicial opinions must live up to high moral standards. Judges must promote the image of fairness and integrity in the judicial system. Judges must be free of bias and the appearance of bias, treat attorneys and litigants with dignity and respect, and act as role models for the legal profession. Judges should follow these principles in all aspects of their professional lives, especially when writing judicial opinions. Judges must never lose perspective on their place in the larger judicial system. From day to day, a judge might be pressured, angry with the lawyers or litigants, or confronted with an unusual or humorous case. In the process of writing opinions and deciding cases, it is possible to develop bad habits or to forget that a judicial opinion is meant to do more than just resolve a controversy for those before the court in that moment of time. Each judicial opinion contributes to the body of the common law and in some way—small or large—affects the public perception of the judiciary. When judges write, they must have ethics on their minds. Doing so improves the judiciary, the legal profession, and the public’s perception of the judicial branch.

Crafting a judicial opinion that is respectful, well-reasoned, factually honest, and carefully written encourages public respect for the judiciary and acceptance of its opinions.⁴⁹¹ Only the “kind of law that conforms to the ideals of

486. John B. Nesbitt, *The Role of Trial Court Opinions in the Judicial Process*, 75 N.Y. St. B.J., Sept. 2003, at 39-40.

487. *Id.*

488. Wanderer, *supra* note 243, at 53 (quoting Gibson, *supra* note 70, at 124).

489. Nesbitt, *supra* note 486, at 40.

490. *Powers v. City of Richmond*, 893 P.2d 1160, 1195 (Cal. 1995) (Lucas, C.J., dissenting) (citing 2 E.B. Willis & P.K. Stockton, *Debates and Proceedings of the Constitutional Convention of the State of California* 951, col. 1 (1880) (italics in original)) (quoting delegate Wilson during 1879 California Constitutional Convention).

491. Wanderer, *supra* note 243, at 51.

democracy”⁴⁹² will contribute to society’s growth. Every judge assumes the responsibility to ensure that justice is dispensed. For “[i]f the function of opinions is to inform or to persuade, judges have failed unless their words actually convey their ideas to their readers.”⁴⁹³ To fulfill this role effectively, judges must be able to explain where justice lies.

492. *Id.* (quoting Palmer, *supra* note 4, at 885).

493. Wanderer, *supra* note 243, at 61.

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Ethical Judicial Writing — Part I

No judicial function is more important than deciding cases ethically.¹ Judges resolve disputes. They create, apply, and enforce rights and obligations.² Judges affect lives. Society trusts judges to rule fairly and impartially, irrespective of issue or litigant. Judges, who must behave with integrity, professionalism, and respect, must be ethical on and off the bench. Judicial ethics are scrutinized in written opinions. Judges leave their mark in written opinions. An unethically written opinion is a black mark that defines a judge, while the honest, just, well-written opinion is celebrated. This three-part article addresses ethical issues that arise in judicial writing, with a New York focus.

Codes, Rules, Commissions, and Beyond

Judges must write within the bounds of the law and the bounds of ethics. They must look for guidance to the law in the jurisdiction where they preside, but no code or rule addresses judicial opinion writing directly.

Federal judges have their own code of judicial conduct. United States Circuit, District, Court of International Trade, Court of Federal Claims, Bankruptcy, and Magistrate judges must comply with the Code of Conduct for United States Judges.³

The American Bar Association formulated the Model Code of Judicial Conduct in 1972.⁴ The ABA wrote the Model Code, as the preamble explains, so "that judges . . . respect and honor the judicial office as a public trust and strive to enhance and maintain confi-

dence in our legal system."⁵ The New York State Bar Association has adopted the Model Code, known as the New York Code of Judicial Conduct (CJC).⁶

The New York State Constitution provides that "[j]udges and justices . . . shall . . . be subject to such rules of conduct as may be promulgated by the chief administrator of the courts with the approval of the court of appeals."⁷ Pursuant to the State Constitution, Judiciary Law § 212(2)(b) directs the Chief Administrator of the Courts to "[p]romulgate rules of conduct for judges and justices of the unified court system with approval of the court of appeals." The Administrative Board of the Judicial Conference promulgated the Rules Governing Judicial Conduct (RGJC) in 1972.⁸ New York's Chief Administrator of the Courts adopted the RGJC with the Court of Appeals's approval.⁹

The RGJC and the CJC are nearly parallel. The CJC consists of canons and sections. The canons set out broad standards; the sections, delineated under each canon, set out specific rules. Commentaries after each section explain the purpose and meaning of the canons and sections. The RGJC consists of rules, not canons. The Chief Administrator of the Courts has not adopted the CJC's commentaries. Where inconsistencies arise between the RGJC and the CJC, the RGJC prevails, except that the CJC prevails regarding a non-judge candidate for elective judicial office.¹⁰

The Advisory Committee on Judicial Ethics (ACJE) advises New York judges who have ethical questions.¹¹ A

judge who telephones an ACJE member or staff attorney might get some informal, oral guidance, although the member or staff attorney will often recommend that the query be posed in writing. E-mailed inquiries are not accepted. A judge who writes to the ACJE will get a written answer from the full Committee.¹² The ACJE issues confidential opinions and publishes them without identifying information. A judge who follows the ACJE's written advice is presumed to have acted ethically if faced with a complaint to the New York State Commission on Judicial Conduct.¹³

The Commission on Judicial Conduct is the agency authorized "to receive and review written complaints of misconduct against judges, initiate complaints on its own motion, conduct investigations, file Formal Written Complaints and conduct formal hearings . . . subpoena witnesses and documents, and make appropriate determinations as to dismissing complaints or disciplining judges. . . ." ¹⁴ The Commission's staff investigates complaints about "improper demeanor, conflicts of interest, violations of defendants' or litigants' rights, intoxication, bias, prejudice, favoritism, gross neglect, corruption, certain prohibited political activity and other misconduct on or off the bench."¹⁵

The Advisory Committee interprets only the RGJC, not the CJC. The Commission currently considers alleged violations of the RGJC, not the

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CJC, but the CJC may still be a basis for discipline.

The Commission determines whether to admonish or censure judges publicly, remove them from office, or retire them for disability, subject to

undecided within 60 days after final submission and any undecided motion for interim maintenance or child support within 30 days after final submission.²⁰ In summary proceedings like matters in the New York City Civil Court's Housing Part, judges must resolve within 30 days after final submission cases involving nonhazardous

gated only recently and were loosely enforced.²⁷ Numerous courts have since disagreed with *Greenfield*.²⁸ Most commentators believe that judges who issue decisions late act unethically.

Today, the rules requiring judges to report cases are enforced strictly. Court administrators keep close track of undecided cases, remind judges about

An unethically written opinion is a black mark that defines a judge, while the honest, just, well-written opinion is celebrated.

review before the Court of Appeals at the judge's request. The Commission may also issue a confidential letter of dismissal and caution containing suggestions and recommendations after concluding an investigation and instead of a disciplinary proceeding. The Commission may send a confidential letter of caution to a judge when a disciplinary proceeding is sustained.

Lack of knowledge that an act or omission is improper is no defense.¹⁶ But guidance is available. New York advisory opinions can be accessed on Westlaw's NYETH-EO database. New York disciplinary determinations can be obtained from the NYETH-DISP database. New York advisory opinions are inaccessible on LEXIS, but New York disciplinary opinions can be obtained on LEXIS by clicking "States Legal — U.S.," "New York," "Agency & Administrative Materials," and "New York Commission on Judicial Conduct Opinions." Judges and the public may also access ACJE advisory opinions for free on New York's Unified Court System Web site¹⁷ and Commission information, including determinations, on the Commission's Web site.¹⁸

Timeliness

Judges should render justice, but not at the expense of making litigants wait. The RGJC requires judges to "dispose of all judicial matters promptly, efficiently and fairly."¹⁹ In New York, all judges must report to the Chief Administrator of the Courts all cases

or hazardous violations and within 15 days after final submission cases involving immediately hazardous violations or injunctions.²¹

Administrators must remind Supreme Court justices to resolve motions. The deputy chief administrative judge for courts inside and outside New York City must tell the justice that a motion "has been pending for 60 days after final submission."²² If a motion is "unusually complex," the justice may apply to the local administrative judge no later than 20 days after final submission to designate the motion "complex."²³ If the administrative judge agrees, the justice has 120 days to decide the motion.²⁴

In one case, *In re Greenfield*, a New York State Supreme Court justice delayed issuing opinions between seven months and nine years.²⁵ Some litigants were forced to begin proceedings against the justice to compel him to render decisions. Despite a strong dissent, the Court of Appeals declined to sanction him. The court noted that imposing sanctions under the RGJC would be appropriate if a judge purposely concealed delays or failed to cooperate with an administrative judge's efforts to assure that decisions are rendered timely.²⁶ The court found that the justice's actions were not a "persistent or deliberate" neglect of judicial duties that would warrant formal penalties. When *Greenfield* was decided, the rules requiring judges to report late decisions had been promul-

gated only recently and were loosely enforced. A judge uncomfortable with doing so should decide the case differently or on different grounds.²⁹ A judge who recognizes that the real reason for deciding a case is inappropriate should use the occasion to reconsider.

Candor

Candid judges give real reasons for their decisions. A judge uncomfortable with doing so should decide the case differently or on different grounds.²⁹ A judge who recognizes that the real reason for deciding a case is inappropriate should use the occasion to reconsider.

Our democratic process requires reasoned opinions.³⁰ But reasoned opinions aren't necessarily candid. Candid opinions help readers — litigants, lawyers, law students, appellate judges, and the public — understand precedent and outcomes and decide for themselves whether judges are doing their jobs.³¹ A lack of candor reveals a lack of integrity.³²

Candor has its limits, however. Precedent, collegiality, the lawyers' and litigants' personalities, and politics test those limits, and judges should avoid revealing their personal thoughts in the guise of candor.³³

An opinion isn't easy to write.³⁴ The result isn't always pleasant. The law can be complex. It can lead to peculiar results. A judge shouldn't talk about the opinion in the opinion. Judges shouldn't state how difficult the opinion was to write, how much the judge worked on the opinion, or the effort the judge made to ensure a

fair opinion. Justice Oliver Wendell Holmes made an ethical appeal to his readers when he wrote in his dissent in *Lochner v. New York* that “[t]his case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should study it further and long before making up my mind.”³⁵

Judges who say how deliberate, conscientious, hard-working, honest, or smart they are will leave readers unpersuaded. An opinion should resolve issues, not be a vehicle for self-congratulation.

Judges might also be unsure about the opinion’s result. A tentative opinion is a draft opinion that a judge issues seeking comment before the final decision.³⁶ In a dubitante opinion, a judge expresses findings of fact and conclusions of law with reservations.

The public expects judges to decide difficult controversies. Litigants know that one side will lose and the other will win. A judge must deal with the good, the bad, and the ugly. Judges must bring finality to disputes³⁷ and take responsibility for their decisions.³⁸

Humility and Humanity

Some judges get so caught up with their power that they lose sight of their goal: to “be both lawyer and philosopher of the highest grade, blessed with saving common sense and practical experience as well as sound comprehensive learning.”³⁹ Judges should write intelligent, honest, and clear opinions that adhere to ethical and moral principles. Harvard Law Professor Lon Fuller synthesized that rare quality of great judges: “[T]heir fame rests on their ability to devise apt, just, and understandable rules of law . . . [T]hey were able to bring to clear expression thoughts that in lesser minds would have remained too vague and confused to serve as adequate guideposts for human conduct.”⁴⁰ Some non-judges naively believe that judges have supernatural powers. Judges are lost souls when they take to heart the compliments

and honorifics they receive.⁴¹ Judges must never confuse the law’s power with its dignity.

An example of an immodest opinion is *Bianchi v. Savage*.⁴² The court treated the New York landlord-tenant issue in that case as if civilization itself depended on the court’s ruling. The judge’s lack of modesty is endless. He used the royal “we” and “us”; he used capitals, italics, italicized capitals, and exclamation marks. To emphasize, the

An opinion should resolve issues, not be a vehicle for self-congratulation.

judge used adverbs, adjectives, Latin, metadiscourse, and self-congratulatory phrases. Justice Holmes in *Haddock v. Haddock* used a more modest approach when he wrote, “I do not suppose that civilization will come to an end whichever way this case is decided.”⁴³

Judges must rely on their humanity to write opinions that offer just solutions to all. Judges who attempt to write literary masterpieces will lose sight of “the holy function of justice.”⁴⁴ Justice demands just solutions, not brilliant opinions or purple prose.⁴⁵ Judges must not use opinions to display their intelligence. Modesty, humility, and dignity are essential in opinion writing.

Dicta and Public Policy

Judges should be careful about creating or relying on dicta.⁴⁶ Dictum is “[a]n opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision.”⁴⁷ Overusing and misusing dicta lead readers to confuse dicta with findings and holdings. Public confidence in the judiciary isn’t promoted if the public doesn’t understand what the opinion holds and why.

Dictum arises when judges try to resolve too many contentions.⁴⁸ Some issues are more important than others. Some contentions are argued heatedly, but a judge will discover later that the contention isn’t relevant to the ultimate determination. A judge may resolve a somewhat minor issue in a short paragraph or two. Overly considering minor claims detracts from important issues and sounds defensive.⁴⁹

Courts should discuss all the separate grounds for an opinion’s holding. Doing so doesn’t create dicta.⁵⁰ It’s important for lawyers to argue in the alternative; they don’t know whether a judge will reach an argument. But judges who use alternative holdings, as opposed to separate arguments for a single holding, dilute opinions and perplex readers. Readers might mix up findings with ruminations when judges hold in the alternative.

Judges sometimes use dicta to lecture about policies ancillary to the issues before them. Judges may use public policy to supplement, but not supplant, existing legal rules.⁵¹ Judges who disagree with a rule should state why it’s unwise and may appeal to the legislature to change the law.⁵² They must not mislead the reader into believing that policy — not the law — is the basis for the holding.⁵³ To take a landlord-tenant example, a court that considers whether a tenant is entitled to remain in an apartment should decide the case on legal grounds. A judge who discusses homelessness or slumlordism risks letting the reader believe that the case was decided for personal or political reasons. The discussion might also reflect prejudice: It might imply that a party falls into a category not established in the particular case.

Next issue: This three-part column continues with tone, temperament, facts, claims, issues, and standards of review. ■

1. For an excellent review of ethical legal writing for New York practitioners and judges, see Gary D. Spivey & Maureen L. Clements, *The Ethics of Legal Writing*, an unpublished two-part manuscript for a Continuing Legal Education course the authors gave at the New York Court of Appeals in April

2002 and June 2003. Several citations in this article are taken from that manuscript.

2. See generally Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960).
3. See <http://www.uscourts.gov/guide/vol2/ch1.html> (last visited Aug. 4, 2006).
4. See <http://www.abanet.org/cpr/mcjc/toc.html> (last visited Aug. 4, 2006). In December 2005, the ABA issued its Final Draft Report to amend the Model Code. See <http://www.abanet.org/judicialethics/finaldraftreport.html> (last visited Aug. 4, 2006).
5. See http://www.abanet.org/cpr/mcjc/pream_term.html (last visited Aug. 4, 2006).
6. See McKinney's Vol. 29, *Judiciary, available at* http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Code_of_Judicial_Conduct/CJC.pdf (last visited Aug. 4, 2006).
7. N.Y. Const. art. VI, § 20(b)(4).
8. 22 NYCRR Part 100. The RGJC are also available at <http://www.courts.state.ny.us/rules/chief-admin/101.shtml#top> (last visited Aug. 4, 2006).
9. Ann. Rpt., N.Y. St. Comm'n on Jud. Conduct 56 (2005).
10. 22 NYCRR 100.6(E).
11. *Id.* Part 101.
12. Contact the Advisory Comm'n on Jud. Ethics, Office of Ct. Admin., 25 Beaver St., Rm. 1170, New York, N.Y. 10004.
13. *Judiciary Law* § 212(2)(l)(iv). A candidate who complies with an ACJE Judicial Campaign Ethics Subcommittee opinion is less protected than one who complies with a full ACJE opinion. The candidate is inoculated only for one election cycle from a Commission on Judicial Conduct investigation. For advisory opinions for judicial candidates, see Jud. Campaign Eth. Ctr., <http://www.nycourts.gov/ip/jcec/opinions-list.shtml> (last visited Aug. 4, 2006).
14. Ann. Rpt., *supra* note 9, at 55; N.Y. St. Comm'n on Jud. Conduct, *available at* <http://www.scjc.state.ny.us/General%20Information/general.htm> (last visited Aug. 4, 2006). For articles explaining judicial ethics and judicial discipline in New York, see Gerald Stern, *Judicial Error That is Subject to Discipline in New York*, 32 Hofstra L. Rev. 1547 (2004); Gerald Stern, *The Changing Face of Judicial Elections*, 32 Hofstra L. Rev. 1507 (2004); Gerald Stern, *Is Judicial Discipline in New York State a Threat to Judicial Independence?*, 7 Pace L. Rev. 291 (1987); Gerald Stern, *What Claiborne Did*, N.Y. Times, Oct. 20, 1986, at A27. For historical reasons, the Commission's jurisdiction extends to all New York judges but Housing Part judges, who may be disciplined only by the Chief Administrator of the Courts.
15. Ann. Rpt., *supra* note 9, at 56.
16. *In re Feinberg*, 5 N.Y.3d 206, 214-15, 800 N.Y.S.2d 529, 533-34, 833 N.E.2d 1204, 1208-09 (2005) (per curiam).
17. See http://www.courts.state.ny.us/search/ethics_opinions.asp (last visited Aug. 4, 2006).
18. See <http://scjc.state.ny.us> (last visited Aug. 4, 2006).
19. 22 NYCRR 100.3(B)(7).

20. *Id.* 4.1; accord CPLR 4213(c) (requiring judges to render decisions "within sixty days after the cause or matter is finally submitted or within sixty days after a motion under rule 4403, whichever is later, unless the parties agree to extend the time").
21. 22 NYCRR 208.43. Current protocol requires New York City Civil Court judges in the plenary and Housing Parts to submit reports every 30, 60, and 90 days informing administrators of any undecided case.
22. *Id.* 202.8(h)(1) (eff. Oct. 1, 2006).
23. *Id.* 202.8(h)(2)(i).
24. *Id.* 202.8(h)(2)(ii).
25. 76 N.Y.2d 293, 295-96, 558 N.Y.S.2d 881, 882-83, 557 N.E.2d 1177, 1178-79 (1990) (per curiam).
26. See *id.* at 298, 558 N.Y.S.2d at 883, 557 N.E.2d at 1179.
27. *Id.* at 299, 558 N.Y.S.2d at 884, 557 N.E.2d at 1180.
28. See, e.g., *In re Kilburn*, 157 Vt. 456, 457, 599 A.2d 1377, 1378 (1991) (collecting cases).
29. See generally Robert A. Leflar, *Honest Judicial Opinions*, 74 Nw. U. L. Rev. 721 (1979).
30. See generally John B. Nesbitt, *The Role of Trial Court Opinions in the Judicial Process*, 75 N.Y. St. B.J. 39 (Sept. 2003).
31. Nancy A. Wanderer, *Writing Better Opinions: Communicating With Candor, Clarity, and Style*, 54 Me. L. Rev. 47, 49 (2002).
32. For an uncandid opinion, see *People v. Evans*, 85 Misc. 2d 1088, 1093, 1097, 379 N.Y.S.2d 912, 917, 920 (Sup. Ct. N.Y. County 1975) (Greenfield, J.), in which the court, acquitting of rape a defendant who told his accuser "I could kill you; I could rape you; I could hurt you physically," wrote: "So bachelors, and other men on the make, fear not. It is still not illegal to feed a girl a line, to continue the attempt, not to take no for a final answer, at least not the first time."
33. For two melodramatic and perhaps overly candid opinions, see *Webster v. Reproductive Health Svcs.*, 492 U.S. 490, 537, 538 (1989) (Blackmun, J., concurring & dissenting) ("I fear for the future."); *People v. Davis*, 43 N.Y.2d 17, 39 n.*, 400 N.Y.S.2d 735, 747 n.*, 371 N.E.2d 456, 468 n.* (Breitel, C.J., dissenting) (explaining personal opposition to death penalty).
34. Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 Cornell L.Q. 274, 278 (1929) ("[A]fter canvassing all the available material at my command, and duly cogitating upon it, [I] give my imagination play, and brooding over the cause, wait for the feeling, the hunch — that intuitive flash of understanding which makes the jump-spark connection between question and decision . . .").
35. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). For a discussion of Justice Holmes's ethical appeal in *Lochner*, see Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 Va. L. Rev. 1351, 1381 (1986).
36. For the pros and cons of writing tentative opinions, see Philip M. Saeta, *Tentative Opinions: Letting a Little Sunshine into Appellate Decision Making*, 20 Judges' J. 20 (Summer 1981).

37. See Mortimer Levitan, *Professional Trade-Secrets: What Illusions Should Lawyers Cultivate?*, 43 A.B.A. J. 628, 630 & 666 (July 1957) (arguing that judicial opinions shouldn't vacillate).
38. Griffin B. Bell, *Style in Judicial Writing*, 15 J. Pub. L. 214, 218 (1966).
39. Cuthbert W. Pound, *Defective Law — Its Cause and Remedy*, 1 N.Y. St. B. Ass'n Bull. 279, 285 (Sept. 1929).
40. Lon L. Fuller, *An Afterward: Science and the Judicial Process*, 79 Harv. L. Rev. 1604, 1619 (1966).
41. Mortimer Levitan, *Professional Trade-Secrets: What Illusions Should Lawyers Cultivate?*, 43 A.B.A. J. 628, 630 (July 1957).
42. 83 Misc. 2d 1007, 373 N.Y.S.2d 976 (White Plains City Ct. 1975). This opinion, written by an Acting City Judge, should be read in the unofficial version. The State Reporter charitably lowercased the capitals in the Official Reports.
43. 201 U.S. 562, 628 (1906) (Holmes, J., dissenting).
44. Piero Calamandrei, *Eulogy of Judges* 85-86 (1935) (John Clark Adams & C. Abbot Phillips, Jr., trans., 1942) (quoted with some changes in Robert A. Leflar, *Appellate Judicial Opinions* 109 (1974)).
45. For an extreme example of ostentatious writing, see *Goldin v. Artache*, N.Y.L.J., Aug. 26, 1986, at 6, col. 3 (Sup. Ct. N.Y. County) (Wright, J.).
46. Joyce J. George, *Judicial Opinion Writing Handbook* 242 (4th ed. 2000) ("[D]icta in opinions . . . are not encouraged.").
47. *Black's Law Dictionary* 485 (8th ed. 1999).
48. Robert G. Simmons, *Better Opinions — How?*, 27 A.B.A. J. 109, 111 (Feb. 1941).
49. Judges ought not be defensive. As the Supreme Court of California wrote long ago, "An opinion is not a controversial tract, much less a brief in reply to the counsel against whose views we decide. It is merely a statement of conclusions, and of the principal reasons which have led us to them." *Holmes v. Rogers*, 13 Cal. 191, 202 (1859) (Baldwin, J.) (petition for rehearing).
50. See *Woods v. Interstate Realty*, 337 U.S. 535, 537-38 (1949) (Douglas, J.).
51. See 1 John H. Wigmore, *Evidence in Trials at Common Law* § 8a, at 616 (Peter Tellers rev. ed. 1983) (stating that policy should supplement technical legal rules); James D. Hopkins, *Public Policy and the Formation of a Rule of Law*, 37 Brook. L. Rev. 323, 323 (1971) ("To base a decision on the ground of public policy . . . brings into the case . . . the exercise of community control quite apart from statute, judicial precedent or doctrine.").
52. See *People v. Graham*, 55 N.Y.2d 144, 152, 447 N.Y.S.2d 918, 922-23, 432 N.E.2d 790, 794-95 (1982) (Fuchsberg, J.) (noting that parties may appeal to legislature if they're unhappy with statute).
53. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1409 (1995) (suggesting that judges refrain from commenting on "broader political and social policies" unless commentary is about conduct outside court affecting issues in court).

C



Ethical Judicial Writing — Part II*

Last issue the *Legal Writer* offered some suggestions on writing ethical judicial opinions. We continue.

Tone and Temperament

Judges must maintain impartiality, credibility, and objectivity. The Rules Governing Judicial Conduct (RGJC) require judges to promote integrity in the judiciary,¹ to maintain order and decorum in the courtroom,² and to be patient, dignified, and courteous to all.³ Judges must not be advocates: “An ethical judge cannot be a polemicist.”⁴

The RGJC prohibits judges from showing bias or prejudice “based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status.”⁵ Some judges, even United States Supreme Court Justices, have written biased opinions.⁶ In *Plessy v. Ferguson*, for example, Justice Henry B. Brown commented that if segregation offended African-Americans, it was “solely because the colored race chooses to put that construction upon it.”⁷ When the Sioux Nation sued to get land promised by the 1868 Fort Laramie Treaty, a dissenting Justice wrote that “Indians did not lack their share of villainy.”⁸ Judges must refrain

from making any statement that could be construed as biased. They must “identify and understand [t]he[i]r own biases and how they affect [t]he[i]r reaction to a case.”⁹

Judges should likewise refrain from incorporating graphic sexual descriptions into their opinions¹⁰ except as necessary to resolve a case. Opinions should be dignified. They must not cater to voyeurs. In our Internet age, in which the public has access to many more opinions than before, judges should be careful about how and whether to identify individuals unimportant to the litigation.

Judges should treat lawyers and litigants respectfully. Lawyers aren’t always prepared. Sometimes litigants behave poorly or are involved in seemingly humorous situations. Litigants don’t always bring perfect cases. Delusional litigants bring bizarre claims.¹¹ A judge tempted to condemn an unprepared lawyer, berate a nasty or delusional litigant, or ridicule a litigant’s unfortunate situation might use sarcasm,¹² humor,¹³ or scorn¹⁴ to attack or make fun of lawyers and litigants. Attacking lawyers or litigants is unseemly.¹⁵ Humor, sarcasm, and scorn have no place in judicial opinion writing.¹⁶ Judges who write this way undermine “public confidence in the integrity . . . of the judiciary.”¹⁷ As Judge Joyce George wrote, “propriety is at the very core of what a judge writes A judge’s professional responsibilities require him to select carefully the language and phraseology necessary to communicate the decision and not to be humorous at the

litigants’ expense or to satisfy some personal need to be funny.”¹⁸

One Bankruptcy judge from Texas used humor to deny a defendant’s motion as incomprehensible. The judge compared the defendant and his motion “to Adam Sandler’s title character in the movie ‘Billy Madison,’ after Billy Madison had responded to a question with an answer that sounded

**Attacking lawyers
or litigants
is unseemly.**

superficially reasonable but lacked any substance.”¹⁹ Billy Madison, like the defendant in this case, was berated for his stupidity:

[W]hat you’ve just said is one of the most insanely idiotic things I’ve ever heard. At no point in your rambling, incoherent response was there anything that could be considered a rational thought. Everyone in this room is now dumber for having listened to it. I award you no points, and may God have mercy on your soul.²⁰

Judges are different from everyone else in a courtroom. They should decipher rambling, irrational, incoherent thoughts. They should unearth the buried argument, comprehend the incomprehensible, clarify the opaque. They shouldn’t give up easily on a litigant who sounds like Billy Madison. Judges who act disrespectfully to lawyers and litigants will in turn be treated disrespectfully.

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* *Editor’s Note:* An updated version of Judge Lebovits’s November/December 2006 *Legal Writer* column, “Ethical Judicial Writing — Part I,” is available on Westlaw and through the Publications link on our Web site, www.nysba.org.

Treating litigants respectfully means avoiding innuendo. In *Main v. Main*,²¹ a divorce action, an Iowa court attacked a husband for his past failed marriages and the wife for marrying for money. The reader is left wondering whether the court denied the divorce

Litigants question the impartiality of a judge who fails to consider the losing side's facts.

for legal or private reasons. This question recurs with judges who have had negative experiences in legal matters, like an unpleasant divorce or custody case. Judges affected by personal experiences must take precautions against prejudging cases or litigants. They must leave their baggage at the courthouse door.

Litigants don't always see eye to eye with one another. Judges don't always get along with other judges. Judges shouldn't use opinions to criticize other judges, whether on a lower court,²² on a higher court,²³ a dissenting judge,²⁴ or the author of a majority opinion.²⁵ Judges are entrusted to promote public confidence in the legal system. Judges who engage in infighting set a poor example to the public, who will believe that the case was decided because of animosity, not on the merits.

Judges should also avoid writing in formats foreign to opinion writing.²⁶ Some judges have written opinions as poetry²⁷ and prose.²⁸ Others have included fables,²⁹ animal references,³⁰ folksy language,³¹ parody,³² or popular references.³³ One judge disparaged medical-liability law by writing that "the work of the Alabama Legislature in the area of medical liability is a mule — the bastard offspring of intercourse

among lawyers, legislators, and lobbyists, having no pride of ancestry and no hope of posterity."³⁴ Judges who use unusual formats send a message that they take lightly their opinions and their role as judges. Using clever prose or poetry forecloses the best and clearest language. A judge who tries to be a poet can't use all available language and hence creates the appearance that the attempt to be clever had priority over clarity and candor.

A good opinion is credible and impartial.³⁵ A dispute that requires judicial intervention is serious to society and the litigants. Judges owe a duty to deal with litigants' claims.³⁶ They may inject their own style and character in their written opinions. They may include emotional themes, without writing emotionally.³⁷ But an opinion should be written in the format the public expects: It should address the litigant's claims in an organized, reasoned, and honest manner. Deriding litigants, using droll references, and treating the opinion as though it were literature diminishes the opinion's quality.

The Facts

Facts set the stage for a judicial opinion. The law can be applied only to the facts the judge incorporates into a written opinion. It's an ethical problem when a judge fails to include key facts or incorporates too many facts. Judges should use accurate facts and use them accurately.³⁸ Without accurate facts, the ruling will be wrong. A judge who includes too many facts forces the reader to sift through irrelevant ones. That makes the opinion unfocused and results in dictum.³⁹ Irrelevant facts lengthen an opinion and decrease clarity.⁴⁰ A judge who omits important facts will write an erroneous opinion,⁴¹ one that will affect a litigant's ability to appeal. An appellate court can't consider what's absent from the record.

Litigants shade facts to further their interests. Judges may never shade facts. An opinion should make the reader agree with the judge's rationale and conclusion⁴² without crossing the line from persuasion to distortion. Nor

should judges adopt a litigant's version of the facts verbatim⁴³ or fail to verify the facts in the record.⁴⁴ The law belongs to the judge, but facts belong to the parties, who won't forgive a judge who cheats or doesn't think independently.

Judges should incorporate facts helpful to the losing side to strengthen the opinion and assure the reader that the judge considered the relevant facts.⁴⁵ Without facts helpful to the losing side, the court's reasoning might be unsound — the judge couldn't justify the result in the face of the losing side's facts. Litigants question the impartiality of a judge who fails to consider the losing side's facts.

Getting the facts right on appeal is important not only to the litigants but also to the trial judge: "The prime expectation of the trial judge, when his adjudication goes to an appellate court, is that the latter, in its published decision, will make an honest statement of the case."⁴⁶

Claims, Issues, and Standards of Review

Litigants are taught to pose issues persuasively. Judges should "[w]rite a judicious opinion, not a brief [, and s]tate the question to be decided neutrally."⁴⁷ Claims and issues should be introduced by combining law with fact. Only after they frame the issue can judges accept a party's argument. Judges who use headings in an opinion should write them neutrally, too.

Judges shouldn't choose one line of authority over another without explaining why.⁴⁸ When judges don't explain themselves, a reader familiar with the authority ignored will believe that the judge was sloppy, unable to distinguish the authority, or agenda-driven.

As to issues, a trial-court opinion should offer a logical, disinterested explanation of the case for the litigants that allows appellate review.⁴⁹ Intermediate appellate courts review trial-court opinions for correctness and sharpen the issues for further appellate consideration.

An appellate court that reviews a lower-court or agency determination must state the appropriate standard of review, such as “reasonable doubt,” “clear and convincing evidence,” “clearly erroneous,” or “arbitrary and capricious.” The standard should be stated neutrally, followed by a fair application of law to fact. Standards of review, and how they’re written, often determine outcomes. Judges should avoid polarized standards, defined as one line of cases in which one class of litigant (e.g., defendants) prevailed. Polarized standards, which lead to inevitable conclusions, confuse litigants. They allow “the court merely [to] invoke[] the ‘tough’ or ‘easy’ version of the standard of review.”⁵⁰

Next issue: This column continues with judicial writing style, boilerplate, plagiarism, law clerks, and extrajudicial writing. ■

1. 22 NYCRR 100.2(A).
2. *Id.* 100.3(B)(2).
3. *Id.* 100.3(B)(3).
4. David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 *Geo. J. Legal Eth.* 509, 515 (2001).
5. 22 NYCRR 100.3(B)(4).
6. See, e.g., *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 597 (1998) (Scalia, J., concurring) (attacking French immigrants); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 156 (1994) (noting that majority’s decision “is an inspiring demonstration of how thoroughly up-to-date and right-thinking we Justices are in matters pertaining to the sexes (or, as the Court would have it, the genders) and how sternly we disapprove the male chauvinist attitudes of our predecessors.”) (Scalia, J., dissenting); *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring) (“To hold that the act of homosexual sodomy is somehow protected as a fundamental right would . . . cast aside millennia of moral teaching.”); *Buck v. Bell*, 274 U.S. 200, 207 (1927) (Holmes, J.) (affirming sterilization order against mentally challenged woman, stating that “[t]hree generations of imbeciles are enough”).
7. 163 U.S. 537, 551 (1896) (Brown, J.).
8. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 435 (1980) (Rehnquist, J., dissenting).
9. McGowan, *supra* note 4, at 515.
10. See, e.g., *Lason v. State*, 12 So. 2d 305, 305 (Fla. 1943) (Buford, C.J.) (describing sexual encounter graphically); *United States v. Irving*, No. 76–151 (E.D. Cal. 1977) (McBride, J.) (commenting in verse on size of defendant’s sexual organ) (unpublished opinion quoted in George Rose Smith, *A Critique of Judicial Humor*, 43 *Ark. L. Rev.* 1, 14 (1990). Compare those cases with *United States v. Thomas*, 32 *C.M.R.* 278, 280 (Ct. Mil. App. 1962) (Kilday, J.) (“The evidence adduced at the trial presents a sordid and revolting picture which need not be discussed in detail other than as necessary to decide the certified issues.”). See generally Gerald Lebovits, *The Legal Writer, Poetic Justice: From Bad to Verse*, 74 *N.Y. St. B.J.* 48 (Sept. 2002).
11. E.g., *Searight v. New Jersey*, 412 F. Supp. 413, 414 (D. N.J. 1976) (Biunno, J.) (claiming that physician injected plaintiff with radium electric beam that caused voices in plaintiff’s head); *Lodi v. Lodi*, 173 *Cal. App. 3d* 628, 630–31, 219 *Cal. Rptr.* 116, 117–18 (3d Dis’t 1985) (Sims, J.) (deciding case about plaintiff who sued himself for raiding own trust fund). For more on delusional claims, see Gerald Lebovits, *The Legal Writer, The Devil’s in the Details for Delusional Claims*, 75 *N.Y. St. B.J.* 64 (Oct. 2003).
12. E.g., *Bd. of Educ. of Kiryas Joel Vill. Sch. Dis’t v. Grumet*, 512 U.S. 687, 737 (1994) (Scalia, J., dissenting) (using capital letters as sarcasm to attack majority opinion); *Continental Illinois Corp. v. Commr.*, 998 F.2d 513, 515 (7th Cir. 1993) (Posner, J.) (“The parties and the amici have favored us with more than two hundred pages of briefs, rich in detail that we can ignore.”); *Smith v. Colonial Penn Ins. Co.*, 943 F. Supp. 782, 784 (S.D. Tex. 1996) (Kent, J.) (addressing motion to change venue).
13. E.g., *United States v. Prince*, 938 F.2d 1092, 1093 (10th Cir. 1991) (Brorby, J.) (using humor to comment on defendant’s attempt to rid himself of public defender by relieving himself on defender’s table in front of jury); *Republic of Bolivia v. Phillip Morris Cos.*, 39 F. Supp. 2d 1008, 1009–10 (S.D. Tex. 1999) (Kent, J.) (using humor in granting motion to transfer case). One federal judge was so frustrated with the “Gordian knots that the parties have been unable to untangle without enlisting the assistance of the federal courts” that he used the children’s game “Rock, Paper, Scissors” as alternative dispute resolution. See *Avista Mgmt., Inc. v. Wausau Underwriters Ins. Co.* (Presnel, J.) (M.D. Fl.) (June 27, 2006), at <http://www.symtym.com/index.php?/site/category/Humor/> (last visited Aug. 4, 2006). Some will cheer the judge for using humor to discourage the parties from engaging in petty squabbles. Others will condemn the judge for directing the parties to resolve a question based on chance. Cf., *In re Friess*, *Ann. Rpt.*, *N.Y. St. Comm’n on Jud. Conduct* 84 (1984) (Mar. 1983), at 1983 WL 189799, at *3 (removing judge for, in part, using coin flip to make substantive decision); *In re Brown*, 468 *Mich.* 1228, 662 *N.W.2d* 733, 736 (*Mich.* 2003) (censuring judge for same); *In re Daniels*, 340 *So. 2d* 301, 303 (*La.* 1976) (same).
14. E.g., *Bradshaw v. Unity Marine Corp.*, 147 F. Supp. 2d 668, 670–71 (S.D. Tex. 2001) (Kent, J.) (ridiculing attorneys’ briefs); *In re Rome*, 542 P.2d 676, 680–81 (*Kan.* 1975) (per curiam) (reciting poem written by judge who sentenced prostitute to probation).
15. For an opinion in which a village justice appears to have decided a criminal case based in part on his dislike of how a prosecutor handled an unrelated matter, see *People v. Slade*, *N.Y.L.J.*, Oct. 24, 2006, at 24, col. 1 (Nyack Vill. Ct.).
16. E.g., Benjamin N. Cardozo, *Law and Literature and Other Essays and Addresses* 10 (1931), reprinted in 52 *Harv. L. Rev.* 471, 475 (1939), and in 48 *Yale L.J.* 489, 493 (1939), and in 39 *Colum. L. Rev.* 119, 123 (1939) (humor); Richard Delgado & Jean Stefancic, *Scorn*, 35 *Wm. & Mary L. Rev.* 1061 (1994) (scorn); James D. Hopkins, *Notes on Style in Judicial Opinions*, 8 *Trial Judges’ J.* 49, 50 (1969), reprinted in Robert A. Leflar, *Quality in Judicial Opinions*, 3 *Pace L. Rev.* 579, 586 (1983) (“[S]arcasm directed toward the parties is seldom in good taste.”); Adelberto Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 *U. Miami L. Rev.* 693 (1987) (humor); Marshall Rudolph, *Judicial Humor: A Laughing Matter?*, 41 *Hastings L.J.* 175 (1989) (humor); Susan K. Rushing, *Is Judicial Humor Judicious?*, 1 *Scribes J. Legal Writing* 125 (1990) (humor); George Rose Smith, *A Primer of Opinion Writing, for Four New Judges*, 21 *Ark. L. Rev.* 197, 210 (1967) (humor). For more about sarcasm, humor, and scorn, see Gerald Lebovits, *The Legal Writer, Judicial Jestings: Judicious?*, 75 *N.Y. St. B.J.* 64 (Sept. 2003).
17. 22 NYCRR 100.2(A).
18. Joyce J. George, *Judicial Opinion Writing Handbook* 334 (4th ed. 2000).
19. *Factac, Inc. v. King*, No. 05-56485-C (Bankr. W.D. Tex. Feb. 21, 2006) (Clark, J.), available at http://www.txwb.uscourts.gov/opinions/opdf/05-56485-lmc_King.pdf (last visited Aug. 4, 2006).
20. *Id.*
21. 168 *Iowa* 353, 356, 150 *N.W.* 590, 591 (1915) (Weaver, J.).
22. E.g., *Akers v. Sellers*, 114 *Ind. App.* 660, 662, 54 *N.E.2d* 779, 780 (*Ind.* 1944) (Crumpacker, C.J.) (en banc) (attacking trial court’s decision).
23. E.g., *Salt Lake City v. Piepenburg*, 571 P.2d 1299, 1299–1300 (Utah 1977) (Ellett, C.J.) (attacking U.S. Supreme Court’s obscenity standard), *disavowed by State v. Taylor*, 664 P.2d 439, 448 n.4 (Utah 1983).
24. E.g., *People v. Arno*, 90 *Cal. App. 3d* 505, 514 n. 2, 153 *Cal. Rptr.* 624, 628 n.2 (2d Dis’t 1979) (Thompson, J.) (directing at dissent seven consecutively numbered sentences, with first letters spelling “S-C-H-M-U-C-K”).
25. E.g., *Webster v. Reprod. Health Srvs.*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring) (stating that majority “cannot be taken seriously”).
26. See generally Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 *U. Chi. L. Rev.* 1421 (1995).
27. E.g., *In re Love*, 61 *Bankr.* 558, 558 (S.D. Fla. 1986) (Cristol, J.); *Mackensworth v. American Trading Transp. Co.*, 367 F. Supp. 373, 374 (E.D. Pa. 1973) (Becker, J.); *Nelson v. State*, 465 *N.E.2d* 1391, 1391 (*Ind.* 1984) (Hunter, J.); *Wheat v. Fraker*, 107 *Ga. App.* 318, 318, 130 *S.E.2d* 251, 252 (1963) (Eberhardt, J.). For more, see Gerald Lebovits, *The Legal Writer, Poetic Justice: From Bad to Verse*, 74 *N.Y. St. B.J.* 48 (Sept. 2002).
28. E.g., *State v. Baker*, 644 P.2d 365 (Idaho Ct. App. 1982) (Burnett, J.) (writing opinion like murder mystery); *Cordas v. Peerless Transp. Co.*, 27 *N.Y.S.2d* 198 (City Ct. N.Y. County 1941) (Carlin, J.) (writing opinion like pulp fiction).
29. E.g., *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 274 (1974) (Douglas, J., concurring) (appending Gourmond fable to opinion); *Hatfield v. Bishop Clarkson Mem. Hosp.*, 701 F.2d 1266, 1272 (8th Cir. 1983) (Lay, C.J., dissenting) (imitating Aesop’s fable).
30. E.g., *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982) (Fay, J.) (using fish references in case about fraudulently selling shrimp), *cert. denied*, 459 U.S. 1170 (1983); *Miles v. City Council of Augusta*, 551 F. Supp. 349 (S.D. Ga. 1982) (Bowen, J.) (using cat

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references in case about taxing cat's earnings), *aff'd*, 710 F.2d 1542, 1544 (11th Cir. 1983) (per curiam).

31. *E.g. State v. Knowles*, 739 S.W.2d 753, 754 (Mo. Ct. App. 1987) (Nugent, J.) ("Old Dave Baird, the prosecuting attorney up in Nodaway County, thought he had a case against Les Knowles for receiving stolen property, to-wit, a chain saw, so he ups and files on Les").

32. *E.g., Schenk v. Comm'r*, 686 F.2d 315, 316 (5th Cir. 1982) (Goldberg, J.) (parodying Ecclesiastes 3:1); *Allied Chemical Corp. v. Hess Tankship Co. of Delaware*, 661 F.2d 1044, 1046 (5th Cir. 1981) (Brown, J.) (parodying opening line from Edward George Earle Bulwer-Lytton's 1830 novel *Paul Clifford*: "It was a dark and stormy night.").

33. *E.g., City of New York v. U.S. Dep't of Commerce*, 739 F. Supp. 761, 762 (E.D.N.Y. 1990) (McLaughlin, J.) (opening opinion with Bible lesson); *Carter v. Ingalls*, 576 F. Supp. 834, 835 (S.D. Ga. 1983) (Bowen, J.) (using Star Wars reference to express frustration about pro se defendants). One British judge even added his own code in a case about the *Da Vinci Code*. See http://www.hmcourts-service.gov.uk/images/judgment-files/baigent_v_rhg_0406.pdf (last visited Aug. 4, 2006). For more about popular references in opinions, see Gerald Lebovits, *The Legal Writer, A Pox on Vox Pop*, 76 N.Y. St. B.J. 64 (July/Aug. 2004).

34. *Hayes v. Luckey*, 33 F. Supp. 2d 987, 995 n.16 (N.D. Ala. 1997) (Smith, J.).

35. See generally William A. Bablitch, *Reflections on the Art and Craft of Judging*, 37 *Judges' J.* 40, 40 (Winter 1998) (discussing principled decision making).

36. 22 NYCRR 100.2(A) (requiring judges to act with integrity).

37. Bablitch, *supra* note 35, at 40 (noting that opinions should "neither [be] laden with emotion nor totally bloodless").

38. Moses Lasky, *A Return to the Observatory Below the Bench*, 19 *Sw. L.J.* 679, 689 (1965) ("[H]onesty allows no leeway in [a judge's] statement of facts, for they are not his.").

39. Timothy P. Terrell, *Organizing Clear Opinions: Beyond Logic to Coherence and Character*, 38 *Judges' J.* 4, 38 (Spring 1999) ("Although the urge behind overinclusion is the defensible one of thoroughness, a truly controlled presentation is also focused.").

40. For more about writing shorter opinions, see Gerald Lebovits, *The Legal Writer, Short Judicial Opinions: The Weight of Authority*, 76 N.Y. St. B.J. 64 (Sept. 2004).

41. See Anthony D'Amato, *Self-Regulation of Judicial Misconduct Could be Mis-Regulation*, 89 *Mich. L. Rev.* 609, 619 (1990) (noting that one of worst things judges can do is ignore or misstate facts).

42. Judith S. Kaye, *Judges as Wordsmiths*, 69 N.Y. St. B.J. 10, 10 (Nov. 1997) ("Writing opinions is a lot like writing briefs. Both are, at bottom, efforts to persuade."); accord Alan B. Handler, *A Matter of Opinion*, 15 *Rutgers L.J.* 1, 2 (1983).

43. Although this practice is disapproved, "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous," *Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985), or if the court didn't exercise independent judgment,

see Kristen Fjelstad, Comment, *Just the Facts, Ma'am — A Review of the Practice of the Verbatim Adoption of Findings of Fact and Conclusions of Law*, 44 *St. Louis U. L.J.* 197 (2000).

44. *In re Las Colinas, Inc.*, 426 F.2d 1005, 1008 (1st Cir. 1970) (McEntee, J.); Merrill E. Otis, *Improvements in Statement of Findings of Fact and Conclusions of Law*, 1 *F.R.D.* 83, 85 (1940-1941).

45. Am. B. Ass'n, Section of Jud. Admin., Cttee. Report, *Internal Operating Procedures of Appellate Courts* 31 (1961) ("[A] lawyer may forgive a judge for mistaking the law. But not so if his facts are taken away from him . . .").

46. William J. Palmer, *Appellate Jurisprudence as Seen by a Trial Judge*, 49 *A.B.A. J.* 882, 883 (Sept. 1963).

47. Robert E. Keeton, *Judging* 143 (1990).

48. Ruggero J. Aldisert, *Opinion Writing* 7 (1990) (stating that judges err when they don't explain why they choose one line of authority over another).

49. See generally Dwight W. Stevenson & James P. Zappen, *An Approach to Writing Trial Court Opinions*, 67 *Judicature* 336 (1984).

50. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 *U. Chi. L. Rev.* 1371, 1394 (1995).

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Ethical Judicial Writing — Part III

For the past two issues, the *Legal Writer* offered suggestions on writing ethical judicial opinions. We continue.

Writing Style

A good opinion “expresses the decision and rationale of the court in language and style that generate confidence in the reader that justice has been fairly and effectively administered.”¹ Judges may make their opinions readable: “[A] judicial opinion need not be a dull, stereotyped, colorless recital of facts, issues, propositions, and authorities but can be good writing and make good reading.”² Memorable opinions with literary style best communicate the law. Nevertheless, a satisfactory “objective is not a literary gem but a useful precedent, and the opinion should be *constructed* with good words, not plastered with them.”³

Judges must avoid pitfalls common to all legal writing. Nominalizations and the passive voice add unnecessary words that hide substance and allow a judge to escape or downplay responsibility for a decision.⁴ Hiding the subject, or actor, can both deceive and make sentences abstract. Nominalizations turn nouns into verbs. One way to spot some nominalizations is to watch for an “of” or a word ending in “ion”: “He committed a violation of the Penal Law.” *Becomes*: “He violated the Penal Law.” Passives place the action’s object before the actor. Look for the word “by”: “Opinions are written by judges.” *Becomes*: “Judges write opinions.” It’s unethical to use a blank, or double or nonagentive, passive to hide an important actor or to misdirect

the reader.⁵ Example: “A mistake was made.” *Becomes*: “This court made a mistake.”

Metadiscourse is written throat-clearing, a needless preface to a substantive point. It introduces what the writer plans to write: “For all intents and purposes, the defendant disregarded the court’s order.” *Becomes*: “The defendant disregarded the court’s order.” Phrases like “bear in mind that,” “that is to say,” “it is the court’s conclusion that,” “the court recognizes that,” “it is well settled that,” “after careful consideration,” “it appears to be the case that,” and “it is hornbook law that” are metadiscursive. Metadiscourse is pedantic and condescending.⁶ Without saying that they’re getting to the point, and especially without saying how well they researched or how seriously they considered the case, judges should get to the point, research fully, and consider the case carefully.

Judges should also refrain from writing pretentiously or overusing adjectives, adverbs, clichés, and overdeveloped metaphors. The opinion should leave the judge’s personality in the background and focus on logical analysis. Likewise, judges shouldn’t try to impress readers with vocabulary.⁷ Forcing readers to look up words lessens clarity and insults readers. Judges should also avoid writing in Latin or French if a simple English equivalent is available. So, too, should judges avoid legalisms. As New York’s Chief Judge Judith S. Kaye put it, “First, we need to make sure that our communications are accessible. For sitting judges, this starts with sensitive courtroom behavior

and speaking clearly — in English, not in Latin, not in French, and not in pettifog . . . We need to say what we mean in a way that people can understand.”⁸

Judges who use sexist language offend both genders. Some states — New York included⁹ — require that opinions be gender neutral. A judge who uses gender-neutral language will appear fair. Once again, Chief Judge Kaye said it best: “[G]ender-neutral writing is not only a good habit but also an easy one to acquire and internalize.”¹⁰

Trial judges shouldn’t to use “I” or “we.” “I” is inappropriate because it’s informal, placing the judge on the same level as the winning side. A trial judge writing an opinion shouldn’t use “we”; the word is inaccurate. It’s better to write “the court” or “this court.” Using “we” is appropriate only at the appellate level, where more than one judge will contribute to the opinion. “I” is acceptable in concurring and dissenting opinions. Concurrences and dissents aren’t the court’s ruling but the individual author’s argument.

Boilerplate Opinions

Faced with ever-increasing caseloads, judges are tempted to rely on the same cases or language to resolve issues encountered repeatedly. Boilerplate saves time. It’s convenient. But a judge who relies on boilerplate might not pay attention to facts and issues particular to the case. A boilerplate opinion can ignore issues. It can amount to nothing more than an ill-advised judicial shortcut.¹¹ Writing quickly is

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important,¹² but the litigants' interests shouldn't be sacrificed for judicial economy. Missing an issue because a judge used form precedent or form language is inexcusable. It causes litigants expense, delay, and anguish.

Judges, who must keep an open mind, should consider each case anew, even if the issues seem familiar. Judges who pen boilerplate opinions signal their laziness, and "[a] court must constantly be the alert against mental laziness. The decision suggested by habit might not be the right one."¹³

nature judgments, orders, and decrees, but "no authority . . . countenances the preparation of the opinion by the attorney for either side. That practice involves the failure of the trial judge to perform his judicial function."²⁰ The other extreme occurs when a judge decides a case without reading the lawyers' papers.²¹

The rules prohibiting plagiarism affect extrajudicial writing as well. A Michigan judge was publicly censured for not acknowledging passages from one article and for incorporating without attribution portions of another.²²

Judges may use language from case law or a lawyer's brief if they cite

written opinion reflects a judge's skill and temperament. Every word and citation must be the judge's authentic voice. A judge shouldn't credit the law clerk's work. In New York, the Law Reporting Bureau (LR B) has put into effect the Court of Appeals's policy forbidding judges from thanking their law clerks or interns in opinions: The LRB won't publish the acknowledgment. Before this rule went into effect, many judges lauded clerk and intern contributions.³⁰ Some still do.

A judge may use a law clerk, student intern or extern, special master, or referee to assist in opinion writing. A judge may not use an outside expert,

Judges, who must keep an open mind, should consider each case anew, even if the issues seem familiar.

Plagiarism

Plagiarism is "the unauthorized use of the language and thoughts of another author and the representation of them as one's own."¹⁴ Judges who don't attribute fairly act unethically. No specific code or rule exists on this topic, but two New York rules are implicated. First, the Rules Governing Judicial Conduct (RGJC) require judges to act "in a manner that promotes public confidence in the integrity and impartiality of the judiciary."¹⁵ Second, the RGJC requires judges to "be faithful to the law and maintain professional competence in it."¹⁶

Judges may not steal words, intentionally or otherwise.¹⁷ They must avoid obvious and intentional plagiarism: copying headnotes or quoting without crediting. Sometimes judges plagiarize by copying language from a lawyer's brief. A famous example is from Chief Justice John Marshall in *M'Culloch v. Maryland*.¹⁸ He used Daniel Webster's words as his own: "An unlimited power to tax involves, necessarily, a power to destroy."¹⁹

A court that copies commits reversible error if in doing so it doesn't exercise independent thought. Judges may direct attorneys to submit for sig-

the source when paraphrasing or use quotation marks and attribution when words are taken verbatim. The opposite of plagiarism is scholarship: It's scholarship to cite the starting point from which the judge's idea was derived.

Law Clerks

It's ethical for judges to rely on law clerks to research and help draft opinions.²³ Although doing so is an accepted judicial practice,²⁴ judges must be wary about potential dangers. The RGJC requires judges to perform their duties diligently.²⁵ Diligence doesn't mean delegating a task and forgetting about it. Even if the clerk plays a large role writing the decision, the judge must always take a hands-on approach.

Judges should give their clerks direction.²⁶ If the clerk believes that the judge is mistaken, the judge should listen to the clerk and adjust the opinion, if necessary.²⁷ This process should continue throughout the research and writing. The judge should edit the clerk's drafts for style, research, and substance.²⁸

Regardless how much the law clerk contributed to the decision, the judge is responsible for the result.²⁹ A well-

such as a law professor, to write the opinion.³¹ Judges who let court outsiders write for them can be reprimanded, censured, or removed from office.

Extrajudicial Writing

Judges may write things other than judicial opinions if the writing doesn't cast doubt on their ability to act impartially, affect the court's dignity, or interfere with judicial performance.³² Judges are prohibited from writing about pending or impending cases, whether about the merits, the facts, the litigants, or the attorneys.³³ The RGJC doesn't expressly prohibit judges from commenting on cases they've decided, but judges should avoid doing so.³⁴ Unlike statutes, which legislative history clarifies, an opinion is self-contained. A judge's extrajudicial comments shouldn't guide future courts.³⁵ Controversy on this issue arose recently when a New York Family Court judge on the verge of retiring wrote a *New York Law Journal* commentary criticizing the Appellate Division, Second Department, for reversing one of his decisions.³⁶

The RGJC provides that "[a] judge shall not lend the prestige of judicial office to advance the private interests

of the judge or others.”³⁷ The Advisory Committee on Judicial Ethics has issued several advisory opinions about extrajudicial writing that advances private interests.

Judges face ethical dilemmas when they write personal recommendations that give the appearance of partiality. Judges should mark “personal and unofficial” on whatever letter isn’t part of the court’s official business, and they should avoid writing unsolicited letters.

That said, New York judges may write recommendation letters on behalf of a law-school or job applicant³⁸ or an attorney who seeks admission to an 18-B panel.³⁹ A judge may recommend a former assistant district attorney for private employment.⁴⁰ A judge may recommend a court employee seeking work in another court.⁴¹ A Criminal Court judge may not write a recommendation on behalf of a law student to a district attorney whose assistants appear before the judge.⁴² A judge may authorize a job candidate to list the judge as a reference; a judge may also respond to a district attorney’s request for information about the candidate.⁴³ A judge may recommend a candidate with a “To Whom It May Concern” letter⁴⁴ that the judge gives the candidate. A judge may also serve as a reference for attorneys seeking employment with a law firm that doesn’t appear before the judge and is located outside the judge’s jurisdiction.⁴⁵ A judge may write a character letter for a co-op application.⁴⁶ A judge shouldn’t write a recommendation for a police officer who will likely be a witness in a case before the judge.⁴⁷ A judge is prohibited from giving a reference letter to a bank on behalf of a friend seeking a loan.

Judges may not lend their office’s prestige to further a friend’s private business interests.⁴⁸ Or their own interests: Judges shouldn’t use judicial stationery for private matters.

Judges may teach, write, and speak on the law, the legal system, and the administration of justice and be compensated for doing so.⁴⁹ But judges shouldn’t give continuing legal educa-

tion instruction to associates of a law firm, even if the law firm doesn’t have pending cases before the judge.⁵⁰ This behavior “associate[s] the judge with the competence of a private law firm and would serve the exclusive interests of that firm . . . rather than the common professional interests of a heterogeneous, unconnected group of lawyers, who . . . might be the beneficiaries of a judge’s lecture on legal practice, e.g., at a bar association program.”⁵¹

A judge may publish fictional works but, again, may not publicly comment on pending or impending cases, even if a judge uses fictitious names to protect the innocent or guilty.⁵² Judges may write a book review but may not endorse the book: Judges “may not provide a quot[ation] about a book for the purpose of its being used in the book jacket in conjunction with its sale. Such activity would involve a judge in the commercial and promotional aspects of marketing and . . . is prohibited.”⁵³

Judges must also be careful about publicly commenting on the law. Judges may not comment on a legal issue that might come before them or state a political view that might call their impartiality into question.⁵⁴ It’s also improper for a judge to attack higher-court decisions. Doing so detracts from confidence in the judiciary and casts doubt on the judge’s ability to follow precedent.⁵⁵ Still, judges may — and should — write to explain substantive law and procedure and comment on issues facing the judiciary, such as judicial-writing ethics.⁵⁶

Conclusion

A judge’s behavior on the bench might be forgotten. Not so a judge’s writing. Being ethical is critical for judges. They set examples for lawyers and laypersons. They decide cases and expound on the law. Written opinions reflect a judge’s values — and society’s values. Judges must never forget the special role entrusted to them. They must never forget to do what’s right within the bounds of the law and the law of ethics. Judges who stay within

Judges should not write pretentiously or overuse adjectives, adverbs, clichés, and overdeveloped metaphors.

these bounds have done their jobs. For doing their jobs well, they will be venerated. The judiciary, the litigants, and society are better for it. ■

1. Am. B. Ass’n — Appellate Judges Conference, *Judicial Opinion Writing Manual* 1 (1991).
2. Bernard E. Witkin, *Manual on Appellate Court Opinions* § 103, at 202–03 (1977).
3. *Id.* at § 103, at 204–05 (emphasis in original).
4. Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdictional Opinions*, 46 U.C.L.A. L. Rev. 75, 97–99 (1998).
5. Steven Stark, *Why Lawyers Can’t Write*, 97 Harv. L. Rev. 1389, 1392 (1984). Courts understand that the passive voice can deceive. See, e.g., *J & A Vending, Inc. v. J.A.M. Vending, Inc.*, 303 A.D.2d 370, 373, 757 N.Y.S.2d 52, 55 (2d Dep’t 2003) (mem.) (“This attorney’s use of the passive voice, a grammatical device that conceals as much as it reveals, betrays an unwillingness to identify . . .”).
6. Gerald Lebovits, *The Legal Writer, Writers on Writing: Metadiscourse*, 74 N.Y. St. B. J. 64 (Oct. 2002).
7. See David Margolick, *Sustained by Dictionaries, a Judge Rules that No Word, or Word Play, is Inadmissible*, N.Y. Times, Mar. 27, 1992, at B16; Howard Bashman, *20 Questions for Circuit Judge Bruce M. Selya of the U.S. Court of Appeals for the First Circuit*, available at http://20q-appellateblog.blogspot.com/2004_03_01_20q-appellateblog_archive.html (last visited Aug. 4, 2006). Judge Selya is famous for using in his decisions what he calls “neglected” words — including “sockdolager,” “algid,” “longiloquent,” and “decurtate.”
8. Judith S. Kaye, *Rethinking Traditional Approaches*, 62 Albany L. Rev. 1491, 1497 (1999).
9. See N.Y. St. Jud. Cttee. on Women in the Courts, *Fair Speech: Gender Neutral Language in the Courts* (2d ed., N.Y. St. Unified Ct. Sys. 1997); N.Y. St. Law Reporting Bureau, *Official Edition New York Law Reports Style Manual* § 12.1, at 65–66 (2002 ed.) (Tanbook), available at www.courts.state.ny.us/reporter/Styman_Menu.htm (last visited Aug. 4, 2006). For more, see Gerald Lebovits, *The Legal Writer, He Said — She Said: Gender-Neutral Writing*, 74 N.Y. St. B.J. 64, 64 (Feb. 2002).
10. Judith S. Kaye, *Perspective, A Brief for Gender-Neutral Brief-Writing*, N.Y.L.J., Mar. 21, 1991, at 2, col. 3.
11. See David Mellinkoff, *Legal Writing: Sense & Nonsense* 101 (1982) (noting that forms offer “pre-packaged law . . . taken on quick faith by the

ignorant, the timid, and the too busy — law and all; needed or not.”); Moses Lasky, *Observing Appellate Opinions from Below the Bench*, 49 Cal. L. Rev. 831, 837 (1961) (observing that form opinions can lead to judicial shortchange).

12. See generally Elizabeth Ahlgren Francis, *A Faster, Better Way to Write Opinions*, 4 Judges’ J. 26 (Fall 1988).

13. William L. Reynolds, *Judicial Process in a Nutshell* 63 (2d ed. 1991).

14. Webster’s Universal College Dictionary 604 (1997).

15. 22 NYCRR 100.2(A).

16. *Id.* 100.3(B)(1).

17. See generally Jaime S. Dursht, *Judicial Plagiarism: It May be Fair Use But is it Ethical?*, 18 Cardozo L. Rev. 1253 (1996).

18. 17 U.S. 316, 327 (1819).

19. Daniel J. Kornstein, *Legal Writing for Litigators* (N.Y. County L. Ass’n CLE, Feb. 4, 2004), available at http://nycla.org/index.cfm?section=CLE&page=DVD---CD_Detail&itemID=149.

20. *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719, 724–25 (4th Cir. 1961) (quoted in *Bright v. Westmoreland County*, 380 F.3d 729, 732 (3d Cir. 2004)).

21. See generally Daniel J. Kornstein, *No Ruling Without Reading!*, N.Y.L.J., Feb. 2006 (Mag.), at 48, 48.

22. See *In re Brennan*, 433 Mich. 1204, 447 N.W.2d 712 (1989).

23. See Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 Brook. L. Rev. 685, 697–98 (2001) (noting that law clerks write most decisions); Richard A. Posner, Cardozo: A Study in Reputation 148 (1990) (same); Abby F. Rudzin & Lisa Greenfield Pearl, *Ten Brief-Writing Don’ts — The Judicial Clerk’s Perspective*, 85 Ill. B.J. 285, 285 (1997) (same). For more about law clerks and opinion writing, see Gerald Lebovits, Reflection, *Judges’ Law Clerks Play Varied Roles in the Opinion Drafting Process*, 76 N.Y. St. B.J. 34 (July/Aug. 2004). In New York, “law clerks” work for Court of Claims judges and elected Supreme Court justices. All other law clerks are “court attorneys.” For the ethical differences between law clerks and court attorneys, see Gerald Lebovits, *Outside Counsel, Judicial Ethics, Law Clerks and Politics*, N.Y.L.J., Oct. 21, 1996, at 1, col. 1.

24. A. Leo Levin & Michael E. Kunz, *Thinking About Judgeships*, 44 Am. U. L. Rev. 1627, 1640–42 (1995).

25. 22 NYCRR 100.3.

26. Douglass K. Norman, *Legal Staff and the Dynamics of Appellate Decision Making*, 84 *Judicature* 175, 175, 177 (2001) (stating that clerk should receive initial guidance from judge).

27. Peter N. Thompson, *Confidentiality in Chambers: Is Private Judicial Action the Public’s Business*, 62 *Bench & B. Minn.* 14, 17 (Feb. 2005) (noting that law clerks “are sounding boards for tentative opinions and legal researchers who seek authorities that affect decision”) (quoting *Hall v. Small Business Admin.*, 695 F.2d 175, 179 (5th Cir. 1983) (Rubin, J.)).

28. See Norman, *supra* note 26, at 175 (stating that after reviewing draft, judge should ask clerk to

make changes ranging from grammatical corrections to major rewrite).

29. Fed. Jud. Ctr., *Judicial Writing Manual* 11 (1991) (explaining that opinion must be judge’s work, no matter how capable clerk is).

30. *Wolkoff v. Church of St. Rita*, 132 Misc. 2d 464, 473, 505 N.Y.S.2d 327, 334 (Sup. Ct., Richmond Co. 1986) (Kuffner, J.); *Acceptance Ins. Co. v. Schafner*, 651 F. Supp. 776, 777 (N.D. Ala. 1986) (Lynne, J.), *practice condemned in Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988).

31. *In re Fuchsberg*, 43 N.Y.2d (j) (y), 426 N.Y.S.2d 639, 648 (Opn. of Censure — Ct. on Jud. 1978) (per curiam); *In re Judicial Disciplinary Proceedings Against Tesmer*, 219 Wis. 2d 708, 580 N.W.2d 307 (1998) (per curiam). Judges may, however, consult experts *ex parte* if, after they receive the expert’s report, they share the report with the litigants. Cf. Advisory Comm’n on Jud. Ethics Op. 04-88, N.Y.L.J., May 20, 2005, at 7, col. 1 (requiring Drug Court judges to inform parties of contents of *ex parte* communications from court personnel).

32. 22 NYCRR 100.4(A)(1), (2) & (3).

33. N.Y. St. Advis. Cttee. on Jud. Eth., *Formal Op.* at 00-115 (Jan. 25, 2001); William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 *Geo. J. Legal Ethics* 589, 598–99 (1989) (discussing extrajudicial commentary from standpoint of Model Rules of Judicial Conduct).

34. Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 *Hofstra L. Rev.* 703, 713 (1997) (stating that although RGJC doesn’t prohibit commenting about cases that judge already decided, doing so is unwise).

35. Ross, *supra* note 33, at 602.

36. See Guy P. DePhillips, *Family Court Cares*, N.Y.L.J., May 18, 2006, at 2, col. 3. Three attorneys responded by attacking the judge. See Richard J. Montelione, *How to Influence a Higher Court*, N.Y.L.J., June 7, 2006, at 2, col. 6; Daniel L. Greenberg, *Judge Was Wrong on the Merits*, N.Y.L.J., May 31, 2006, at 2, col. 6; James Edward Pelzer, *Judge’s Attack on Appellate Court is Inappropriate*, N.Y.L.J., May 25, 2006, at 2, col. 5.

37. 22 NYCRR 100.2(C).

38. *Formal Op.* 88-10 (Vol. I).

39. *Id.* at 96-32 (Vol. XIV). Under County Law art. 18-B, courts appoint 18-B attorneys to represent litigants financially unable to hire their own attorneys.

40. *Id.* at 94-36 (Vol. VII).

41. *Id.* at 90-46 (Vol. V).

42. *Id.* at 88-53 (Vol. II).

43. *Id.*

44. *Id.*

45. *Id.* at 01-114.

46. *Id.* at 98-103.

47. *Id.* at 01-37; 22 NYCRR 100.2(C).

48. *Id.* at 89-15.

49. 22 NYCRR 100.4(B); 100.4(H)(1); *Formal Op.* 96-143 (Vol. XV), 90-204 (Vol. VII).

50. *Formal Op.* 01-31.

51. *Id.*; see also 22 NYCRR 100.2(C) (requiring judge in all judicial activities to avoid impropriety and its appearance).

52. *Formal Op.* 01-31.

53. *Id.* at 97-133.

54. Kaye, *supra* note 34, at 712–13; accord Republication Party of Minn. v. White, 536 U.S. 765 (2002) (finding Minnesota’s Code of Judicial Conduct Canon announce clause unconstitutional under First Amendment because clause forbade candidates for judicial election to announce their views on disputed legal and political issues). Another recent controversy arose when a New York judge wrote a fictional book, *Hot House Flowers*. Some critics contend from the book’s allusions and metaphors “that immigrants might not be receiving a fair shake in his courtroom.” Thomas Adcock, *Judge’s Book on Illegal Aliens Draws Ire*, N.Y.L.J., Dec. 1, 2006, at 1, col. 3.

55. Ross, *supra* note 33, at 624–34.

56. See Barbara E. Reed, *Tripping the Rift: Navigating Judicial Speech Fault Lines in the Post-White Landscape*, 56 *Mercer L. Rev.* 971, 996 (2005) (noting judges’ “affirmative duty to speak on the record about certain types of issues, and to help educate the public about the role and function of the judiciary and the courts”).

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This Land is Your Land?

*Eminent Domain's Public
Use Limitation*

by David C. Wilkes and John D. Cavallaro

Also in this Issue

What's ERISA All About?
Scaffold Law Liability
Class Warfare – Part II
Remembering *Brown*



Legal-Writing Ethics — Part I

Ethics permeate every part of a lawyer's professional life, including legal writing.¹ Few law schools teach ethics in the context of legal writing for more than a few moments here and there, but all should.² A lawyer's writing should embody the profession's ethical ideals. Courts and disciplinary or grievance committees can punish lawyers who write unethically. This article notes some of the ethical pitfalls in legal writing.

Rules Lawyers Must Know

Most lawyers know the American Bar Association's Model Rules. Law students in ABA-approved law schools learn them,³ and New York State Bar applicants study them to pass the Multistate Professional Responsibility Examination (MPRE). But New York, together with California, Iowa, Maine, Nebraska, Ohio, and Oregon, has not adopted the Model Rules. New York lawyers must be familiar with the New York State Bar Association's Lawyer's Code of Professional Responsibility, first adopted in 1970 and last amended in 2002, which differs from the Model Rules.⁴

The State Bar's Code is divided into three parts: the Disciplinary Rules as adopted by the four departments of the New York State Supreme Court's Appellate Division, the Canons, and the Ethical Considerations. The Disciplinary Rules set the minimum level of conduct to which lawyers must comport, or face discipline. The Canons contain generally accepted ethical principles.⁵ The Ethical Considerations provide aspirations to which lawyers are encouraged to strive but that are not

mandatory.⁶ The Disciplinary Rules, the Canons, and the Ethical Considerations, together with court rules, guide lawyers through ethical issues that affect their writing as advocates and advisors.

New York's Disciplinary Rules are promulgated as joint rules of the Appellate Division,⁷ which is charged with disciplining lawyers who violate the Disciplinary Rules. A lawyer whose writing falls below the standards set in the Disciplinary Rules might face public or private reprimand, censure, or suspension or disbarment. The Disciplinary Rules are not binding on federal courts in New York State.⁸ But because the federal district courts in New York have

who assert meritless claims. Courts also sanction to make whole the victims of harassing or malicious litigation.¹²

Lawyer's Role as Advocate

The first question lawyers must ask themselves is whether they should handle a particular case or client. New York lawyers have a gatekeeping role to prevent frivolous litigation. Lawyers must decline employment when it is "obvious" that the client seeks to bring an action or argue a position to harass or injure or when the client seeks to argue a position without legal support.¹³

When is it "obvious" that a claim lacks merit? One factor is whether the lawyer claims to specialize in a practice area and therefore should have known

The duties to client and court might create a conflict lawyers must resolve before putting pen to paper — or finger to keyboard.

incorporated by reference the Disciplinary Rules into their local rules,⁹ federal courts will discipline lawyers who violate them.

Courts, too, can sanction lawyers for misconduct.¹⁰ To avoid being sanctioned for deficient legal writing, lawyers must know the pertinent law and facts of their case, the court's rules about the form of papers, and the Disciplinary Rules.¹¹ Court-ordered sanctions differ from disciplinary action. They can range from costs and fines on lawyers or their clients, or both, to publicly rebuking lawyers. Courts sanction lawyers to discourage wasting judicial resources on litigation that lacks merit and to punish lawyers

that an action was meritless. One New York court sanctioned for making frivolous arguments two defense lawyers who had held themselves out as specialists.¹⁴ The court stated that sanctions were appropriate because the lawyers knew that their arguments were frivolous but still wasted the court's time and their client's and the plaintiff's time and money.¹⁵ The Appellate Division, Third Department, eventually disbarred one of the defense attorneys for making the same frivolous arguments in eight cases.¹⁶

Lawyers whose potential client litigates for a legitimate purpose must

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then decide whether they can represent the client effectively. Lawyers have an ethical responsibility to be prepared and competent to represent a client.¹⁷ A lawyer incompetent to represent a client may decline employment, associate with a lawyer competent to represent the client, refer the matter to a competent lawyer, or tell the client that the lawyer needs to spend time studying a legal issue or practice area. This rule has teeth. For not verifying

contrary fact and law to insure that the court commits no injustice.²⁵

Failing to find controlling cases reflects poorly on the lawyer's skill as an advocate and jeopardizes the client's claims.²⁶ Courts are unsympathetic to lawyers who bring claims that, in light of controlling authority, should not be brought. The case law on this point is legion.²⁷

Lawyers must cite cases that continue to be good law. They may not conceal from the court that a case they cite has been reversed or overruled, even if it was on other grounds. Citing

sanctions from a New York federal district court.³² The court scheduled a hearing to determine whether the lawyer's misstatement occurred intentionally or due to her "extremely sloppy . . . reading" of the case.³³ To make a point, and possibly to humiliate, the court ordered the lawyer to bring her supervisor to court "to discuss the overall poor quality of the defendants' brief."³⁴

Lawyers must cite cases honestly.³⁵ They must cite what they use and use what they cite.³⁶ They mustn't pass off a dissent for a holding.³⁷ The cases

To make a point, and possibly to humiliate, one court ordered the lawyer to bring her supervisor to court "to discuss the overall poor quality of the defendant's brief."

another's writing and research, local counsel,¹⁸ co-counsel,¹⁹ and supervising attorneys²⁰ risk court sanction and discipline.

A lawyer who accepts employment must represent the client zealously.²¹ Lawyers also owe a duty to the court to be candid about the law and the facts of a case.²² The duties to client and court might create a conflict lawyers must resolve before putting pen to paper — or finger to keyboard.

Research

Lawyers must avoid the pitfalls of under-preparation. Poor research wastes the court's time and the taxpayer's money. It also wastes the client's time and resources.²³ Lawyers must know the facts of the case and the applicable law. Knowing fact and law adverse to their clients' interests helps lawyers advise their clients and argue their cases. Lawyers must know adverse facts and law for ethical reasons, too. A lawyer must cite controlling authority directly adverse to the client's position if the lawyer's adversary has failed to cite that controlling authority.²⁴ Lawyers who move *ex parte* or seek an order or judgment on a default must further inform the court fully about

reversed cases or overruled principles is a sure way to lose the court's respect. In one example, a federal district court in Illinois chastised the lawyers for failing to make sure that the cases they cited still controlled.²⁸ In response to the lawyers' statement that the court's public disapproval would damage their reputation, the court stated that the reprimand's effect on their reputations "is perhaps unfortunate, but not, I think, undeserved."²⁹

Argument

Ethical writing is more persuasive than deceptive writing.³⁰ Disclosing adverse authority, even when the lawyers' opponents haven't raised it, can diffuse its effects and increase confidence in the lawyers' other arguments. Lawyers who don't address adverse authority risk the court's attaching more significance to that authority than it might otherwise deserve. The more unhappy a lawyer is after finding adverse authority, the wiser it is to address it.³¹

It's not enough to find controlling authority. To argue competently, a lawyer must also know what the case or statute stands for. One defense lawyer who misinterpreted an important case in her brief faced possible

must also conform to what the lawyers argue they stand for. Thus, a federal district court in New York ordered a plaintiff's lawyer to show cause why it shouldn't sanction him for, among other briefing mistakes, citing four cases that didn't support his argument.³⁸ The lawyer's mistake was to cite four cases not resolved on the merits.³⁹

A lawyer may argue a position unsupported by the law to advocate that the law be extended, limited, reversed, or changed. It chills advocacy to sanction for what, in hindsight, is frivolous litigation. But as one New York court explained, frivolous litigation is "precisely the type of advocacy that should be chilled."⁴⁰

Lawyers must also argue clearly. Unclear arguments increase the possibility that courts might err. One Missouri appellate court explained that briefs that don't competently explain a lawyer's arguments force the court either to decide the case and establish precedent with inadequate briefs or to fill in through research the gaps left by deficient lawyering.⁴¹ Rejecting the idea that it should do the lawyers' research for them, the court dismissed the appeal.⁴²

To embody the profession's ethical ideals, lawyers' writing must be accurate and honest. Citing authority is common sense; authority bolsters argument. But citing can be a must: some lawyers have incurred sanctions and reprimands for arguing positions without citing legal authority at all.⁴³

Civility

Lawyers should be courteous to opposing counsel and the court.⁴⁴ Appellate lawyers may attack the lower court's reasoning but not the trial judge personally.⁴⁵ Never may a lawyer make false accusations about a judge's honesty or integrity.⁴⁶ Many courts have sanctioned lawyers for insulting their adversaries or a lower court. In one case, the Appellate Division, First Department, sanctioned a lawyer for attacking the judiciary and opposing counsel.⁴⁷ The court found that the lawyer's behavior "pose[d] an immediate threat to the public interest."⁴⁸

Ghostwriting

The American Bar Association, while condemning "extensive" ghostwriting for pro se litigants, has found that disclosing ghostwriting is not required if the lawyer only "prepare[s] or assist[s] in the preparation of a pleading for a litigant who is otherwise acting pro se."⁴⁹ But the Association of the Bar of the City of New York's Committee on Professional and Judicial Ethics has concluded that lawyers may not prepare papers for a pro se client's use in litigation "unless the client commits . . . beforehand to disclose such assistance to both adverse counsel and the court."⁵⁰ At least two federal district judges in New York have disapproved of ghostwriting.⁵¹

So many judicial opinions trash lawyers for their writing that until *The Legal Writer* resumes next month with Part II of this column, it's apt for lawyers and judges to consider this:

Reading these cases, we might experience a bit of schadenfreude — being happy at the misfortune

of some other lawyer (especially a prominent or rich one). We might feel a bit superior, if we are confident that we would not have made that particular mistake. Then again, we might be humbled if we realize that we could, very easily, have made that very same mistake. And then we wonder: did the judge have to be so very clever in pointing out the lawyer's incompetence? Was the shaming necessary?⁵²

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1. For an excellent review of ethical legal writing for New York practitioners and judges, see Gary D. Spivey & Maureen L. Clements, *The Ethics of Legal Writing*, an unpublished two-part manuscript for CLEs the authors gave at the New York Court of Appeals in April 2002 and June 2003. Several citations in this two-part column are taken from that manuscript. For a text on ethics and legal writing, see Drake University Law School Professor Melissa H. Weresh's *Legal Writing: Ethical and Professional Considerations*, which Lexis/Nexis will publish in late 2005.

2. See Donna C. Chin et al., *One Response to the Decline of Civility in the Legal Profession: Teaching Professionalism in Legal Research and Writing*, 51 Rutgers L. Rev. 889, 895 (1999) (recommending that law schools teach professionalism in legal writing); Beth D. Cohen, *Instilling an Appreciation of Legal Ethics and Professional Responsibility in First Year Legal Writing Courses*, 4 Perspectives 5 (1995) (same); Margaret Z. Johns, *Teaching Professional Responsibility and Professionalism in Legal Writing*, 40 J. Legal Educ. 501 (1990) (same); Melissa H. Weresh, *Legal Writing Symposium, Fostering a Respect for Our Students, Our Specialty, and the Legal Profession: Introducing Ethics and Professionalism into the Legal Writing Curriculum*, 27 Touro L. Rev. 427 (2005) (same).

3. ABA Standards of Approval of Law Schools 302(b) (2001).

4. The New York Code differs from the ABA's Model Rules in substance and style. The Model Rules, for example, allows lawyers to reveal a client's confidential information to prevent "death or substantial bodily harm"; New York's Code doesn't. Another difference is that the New York Code includes the Canons and the Ethical Considerations but the Model Rules don't.

5. See, e.g., Code of Professional Responsibility Canon 1 (Jan. 1, 2002) ("A lawyer should assist in maintaining the integrity and competence of the legal profession."), available at http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/

[Lawyers_Code_of_Professional_Responsibility/LawyersCodeOfProfessionalResponsibility.pdf](#) (last visited June, 1 2005).

6. See, e.g., *id.* EC 2-2 ("[L]awyers should encourage and participate in educational and public relations programs . . .").

7. See 22 NYCRR 1200.1 *et seq.*

8. E.g., *The Cadle Co. v. Demadeo*, 256 F. Supp. 2d 155, 156 (E.D.N.Y. 2003).

9. E.D.N.Y. L.R. 1.5(b)(5); N.D.N.Y. L.R. 83.4(j); S.D.N.Y. L.R. 1.5(b)(6); W.D.N.Y. L.R. 83.1(b)(6).

10. New York: 22 NYCRR 130-1.1(a). Federal: Fed. R. Civ. Pro. 11(c); Fed. R. App. P. 38.

11. See Judith D. Fischer, *The Role of Ethics in Legal Writing: The Forensic Embroiderer, The Minimalist Wizard, and Other Stories*, 9 Scribes J. of Legal Writ. 77, 78-79 (providing many examples of courts sanctioning lawyers for failing to abide by court and disciplinary rules).

12. *Kernisan v. Taylor*, 171 A.D.2d 869, 870, 567 N.Y.S.2d 794, 795 (2d Dep't 1991) (mem).

13. DR 2-109(a)(1), (2) (22 NYCRR 1200.14(a)(1), (2)).

14. See *Providian Nat'l Bank v. McGowan*, 179 Misc. 2d 988, 1000, 687 N.Y.S.2d 858, 866 (Civ. Ct. Kings County 1999), *modified mem.*, 186 Misc. 2d 553, 554, 720 N.Y.S.2d 709, 709-10 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2000).

15. See *id.*, 687 N.Y.S.2d at 866.

16. *In re Capoccia*, 275 A.D.2d 804, 809, 712 N.Y.S.2d 699, 703 (3d Dep't 2000) (per curiam). Advancing false claims is improper. *Kushner v. DBG Prop. Inv., Inc.*, 793 F. Supp. 1161, 1181 (S.D.N.Y. 1992); *In re Babigian*, 247 A.D.2d 817, 817-18, 669 N.Y.S.2d 686, 686-87 (1998) (per curiam).

17. DR 6-101(a)(2) (22 NYCRR 1200.30(a)(2)).

18. *Long v. Quantex Resources, Inc.*, 108 F.R.D. 416 (S.D.N.Y. 1985).

19. *Pravic v. U.S. Indust.-Clearing*, 109 F.R.D. 620 (E.D. Mich. 1986).

20. DR 1-102(a)(2) (22 NYCRR 1200.3(a)(2)).

21. DR 7-101 (22 NYCRR 1200.32).

22. For a history of lawyers' conflicting roles as advocates and court officers, see Christopher W. Deering, *Candor Toward the Tribunal: Should an Attorney Sacrifice Truth and Integrity for the Sake of the Client?*, 31 Suffolk U.L. Rev. 59, 66-74 (1997).

23. See *Roeder v. Islamic Rep. of Iran*, 195 F. Supp. 2d 140, 184-85 (D.D.C. 2002), *aff'd*, 333 F.3d 228 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 2836 (2004).

24. DR 7-106(b)(1) (22 NYCRR 1200.37(b)(1)).

25. *Id.*; DR 1-102(a)(5) (22 NYCRR 1200.3(a)(5)).

26. See, e.g., Wayne Schiess, *Ethical Legal Writing*, 21 Rev. Litig. 527, 534 (2002) (giving examples of consequences for poor research).

27. See, e.g., *Schults v. Bentley Nev. Corp.*, 966 F. Supp. 1549, 1563 (D. Nev. 1997); *Peterson v. Foote*, 1995 WL 118173, at *8 n. 25, 1995 U.S. Dist. LEXIS 3391, at *30 n. 25 (N.D.N.Y. 1995); *Pierotti v. Torian*, 81 Cal. App. 4th 17, 20, 96 Cal. Rptr. 2d 553, 566 (2000); *McCoy v. Tepper*, 261 A.D.2d 592, 593, 690 N.Y.S.2d 678, 679 (2d Dep't 1999) (mem); *Savoca v. Reilly*, 111 A.D.2d 493, 494, 488 N.Y.S.2d 876, 877 (3d Dep't 1985); *Estate of A.B.*, 1 Tuck 247 (N.Y. Sur. Ct. 1866); Marguerite L. Butler, *Rule 11 Sanctions and a*

Lawyer's Failure to Conduct Competent Legal Research, 29 Cap. U.L. Rev. 681 (2002).

28. See *Gould v. Kemper Nat'l Ins. Co.*, 1995 WL 573426, at *1, 1995 U.S. Dist. LEXIS 14102, at *2 (N.D. Ill. 1995).

29. *Id.* at *4, 1995 U.S. Dist. LEXIS 14102, at *13.

30. Nancy Lawler Dickhute, *Playing By the Rules: Dealing Effectively With Adverse Authority in Writing a Brief*, Neb. Lawyer 34 (Sept. 2003).

31. Geoffrey Hazard & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 3.3:206 (3d. ed. 2001).

32. See *Hernandez v. N.Y.C. Law Dep't Corp. Counsel*, 1997 WL 27047, at *14, 1997 U.S. Dist. LEXIS 620, at *43 (S.D.N.Y. 1997).

33. *Id.*

34. *Id.* at *14 n.11, 1997 U.S. Dist. LEXIS 620, at *43 n.11.

35. *United States v. Jolly*, 102 F.3d 46, 50 (2d Cir. 1996); *People v. Whelan*, 165 A.D.2d 313, 324 n.3, 567 N.Y.S.2d 817, 824 n.3 (2d Dep't); *In re Cicio v. City of N.Y.*, 98 A.D.2d 38, 40, 469 N.Y.S.2d 467, 468-69 (2d Dep't 1983) (per curiam); Ronald V. Sinesio, *Imposition of Sanctions Upon Attorneys or Parties for Miscitation or Misrepresentation of Authorities*, 63 A.L.R.4th 1199 (1998); H. Richard Uviller, *Zeal and Frivolity: The Ethical Duty of the Appellate Advocate to Tell the Truth About the Law*, 6 Hofstra L. Rev. 729 (1978).

36. Paul Axel-Lute, *Legal Citation Form: Theory and Practice*, 75 Law Lib. J. 148, 149 (1982).

37. *Sobol v. Capital Mgmt. Consultants, Inc.*, 102 Nev. 444, 446, 726 P.2d 335, 337 (Nev. 1986) (per curiam).

38. See *USA Clio Biz, Inc. v. N.Y.S. Dep't of Labor*, 1998 WL 57176, at *2, 1998 U.S. Dist. LEXIS 783, at *6-7 (E.D.N.Y. 1998).

39. *Id.*, 1998 U.S. Dist. LEXIS 783, at *7.

40. *Gordon v. Marrone*, 155 Misc. 2d 726, 732, 590 N.Y.S.2d 649, 653 (Sup. Ct. Westchester County 1992), *aff'd*, 202 A.D.2d 104, 111, 616 N.Y.S.2d 98, 102 (2d Dep't 1994), *appeal denied*, 84 N.Y.2d 813, 647 N.E.2d 453, 623 N.Y.S.2d 181 (1995).

41. See *Richmond v. Springfield Rehab. & Healthcare*, 138 S.W.3d 151, 154 (Mo. App. 2004).

42. *In re Knight*, 264 App. Div. 106, 34 N.Y.S.2d 810 (1st Dep't 1942) (per curiam); *In re Schwartz*, 202 App. Div. 88, 195 N.Y.S. 513 (1st Dep't 1922); *Goldreyer v. Shalita*, 152 N.Y.S. 1002 (App. Term 1st Dep't 1915) (per curiam).

43. E.g., *DeWilde v. Guy Gannett Publ'g Co.*, 797 F. Supp. 55, 56 n.1 (D. Me. 1992) (reprimanding lawyer who made unsupported arguments in reply brief); *Chapman v. Hootman*, 999 S.W.2d 118, 124 (Tex. App. 1999) (same).

44. Donald H. Green, *Ethics in Legal Writing*, 35 Fed. Bar News & J. 402, 405 (1988) (discussing incivility in legal profession).

45. Douglas R. Richmond, *Appellate Ethics: Truth, Criticism, and Consequences*, 23 Rev. Litig. 301, 327 (2004).

46. DR 8-102(b) (22 NYCRR 1200.43(b)).

47. See *In re Truong*, 2 A.D.3d 27, 30, 768 N.Y.S.2d 450, 453 (1st Dep't 2003) (per curiam).

48. *Id.*; cf. *In re Justices of the App. Div., First Dep't v. Erdmann*, 33 N.Y.2d 559, 559-60, 301 N.E.2d 426, 427, 347 N.Y.S.2d 441, 441 (1973) (per curiam) (finding that isolated instances of lawyer's disrespect outside court not subject to discipline).

49. Am. Bar Ass'n, Comm. on Eth. & Prof. Resp., Informal Op. 1414, *Conduct of Lawyer Who Assists Litigant Appearing Pro Se* (1978).

50. Ass'n Bar City N.Y., Comm. on Prof. & Jud. Eth., Op. 1987-2 (1987), available at <http://www.abcny.org/Ethics/eth1987-2.htm> (last visited July 6, 2005); see also N.Y. St. Bar Ass'n Op 613 (1990).

51. See *Klein v. H.N. Whitney, Goadby & Co.*, 341 F. Supp. 699, 702 (S.D.N.Y. 1971) (noting that court ought not countenance pro se litigant's undisclosed legal assistance); *Klein v. Spear, Leeds & Kellogg*, 309 F. Supp. 341, 342-43 (S.D.N.Y. 1970) (noting that undisclosed representation of pro se litigant "smacks of the gross unfairness that characterizes hit-and-run tactics").

52. Mary Whisner, *When Judges Scold Lawyers*, 96 Law Lib. J. 557, 558 (2004) (endnote omitted).

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Journal



To Fly, or Not to Fly...

How the CPLR got me flying

by David D. Siegel

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Legal-Writing Ethics — Part II

The Legal Writer continues from last month, discussing ethical legal writing.

The Facts

Lawyers must set out their facts accurately. They may never knowingly give a court a false fact,¹ especially a false material fact. Giving a court a false material fact can subject the lawyer to court-ordered and disciplinary sanctions.² In an illustrative case, the Appellate Division, Second Department, suspended a lawyer for five years for repeatedly providing courts with false facts.³

To write ethically and competently, lawyers must communicate the factual basis of their clients' claims and defenses. One federal district court in New York noted that two types of substandard fact pleadings can lead to dismissal or denial: (1) a pleading written so poorly it is "functionally illegible" and (2) a pleading so "baldly conclusory" it fails to articulate the facts underlying the claim.⁴ As the Ninth Circuit explained, "[a] skeletal 'argument,' really nothing more than an assertion, does not preserve a claim. Especially not when the brief presents a passel of other arguments Judges are not like pigs, hunting for truffles buried in briefs."⁵

Lawyers must choose which facts to include in their pleadings. Omitting important adverse facts is not necessarily dishonest.⁶ Lawyers may omit facts adverse to the client's position and focus on the facts that support their arguments. It might be poor lawyering or even malpractice to inform the court of all the cases' pertinent facts. A criminal-defense lawyer, for example, can be disbarred for telling the court the client is guilty without the client's consent.

But lawyers who omit facts lose an opportunity to mitigate adverse facts. Being candid with the court about facts adverse to the client's position, moreover, gives credibility to the lawyer's arguments. And the court is more likely to consider the lawyer's other arguments credible.

To prove they are using facts honestly, lawyers must cite the record.⁷ They may not add to their record on appeal new facts not part of the record before the trial court. Thus, the Appellate Division, Second Department, sanctioned two lawyers for including new information in their record on appeal and then certifying that their record was "a true and complete copy of the record before the motion court."⁸

Writing Style

A lawyer's writing must project ethos, or credibility and good moral character: candor, honesty, professionalism, respect, truthfulness, and zeal.⁹ To evince good character, lawyers should write clearly and concisely.¹⁰ They should avoid using excessively formal, foreign, and legalistic language. They should also avoid bureaucratic writing. Bureaucratic writers confound their readers with the passive voice and nominalizations.

The active voice: "The plaintiff signed the contract." The passive voice: "The contract was signed by the plaintiff." The double-passive voice: "The contract was signed." Think: "Mistakes were made." A lawyer who uses that phrase is hiding the name of the person who made the mistake. The passive voice is wordy. The double-passive voice omits an important part of a sentence — the "who" in "who did what to whom" — a necessary feature unless the object of a sentence is more important than the subject.

Nominalizations are verbs turned into nouns. Nominalization: "The police conducted an investigation of the crime." No nominalization: "The police investigated the crime." Nominalizations are wordy and make sentences difficult to understand. They can also make writing abstract and conclusory.

Lawyers who combine the passive voice with nominalizations are poor communicators. Worse, they might be trying to disguise, confuse, or warp.¹¹ The following illustrates how vague writing damages a lawyer's effectiveness and credibility: "The court clerk has a preference for the submission of documents." To correct the sentence, the lawyer writer must do three things. First, remove the two nominalizations. The sentence becomes: "The court clerk *prefers* that documents be *submitted*." Second, remove the double-passive. Who submits? The judge? The police? Without the double passive, the sentence becomes: "The court clerk prefers that litigants submit documents." Third, explain. What documents? Submit them where? With the explanation, the sentence might read: "The court clerk prefers that litigants file motions in the clerk's office."

Subject complements also deceive readers. They appear after the verb "to be" and after linking verbs like "to appear" and "to become." "Angry" is the subject complement of "The judge became angry." This construction hides because it does not explain how the judge became angry. Compare "Petitioner's claim is procedurally barred" with "Petitioner is procedurally defaulted because he did not preserve his claim."

Lawyers shouldn't use role reversal to disguise what happened. A lawyer who reverses roles moves the object of the sentence to the first agent or subject in the sentence. Compare: "Police Shoot and Kill New Yorkers During Riot" with "Rioting New Yorkers Shot Dead."¹²

Skeptical courts can easily spot obfuscation. In one such case, the Tenth

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Circuit noted that the appellees' "creative phraseology border[ed] on misrepresentation."¹³ The court also noted that incoherent writing is "not only improper but ultimately ineffective."¹⁴

Lawyers shouldn't use adverbial excessives like "obviously" or "certainly." Overstatement is unethical while understatement persuades. In that regard, shouting at readers with bold, italics, underlining, capitals, and quotation marks for emphasis raises ethical concerns of overstatement.¹⁵ Nor should lawyers use cowardly qualifiers like "generally" or "usually" to avoid precision.

Courts must dispose of motions and cases quickly. Courts might sanction lawyers for wasting the court's time with poor writing. As one court sarcastically put it when faced with incoherent pleadings, "the court's responsibilities do not include cryptography."¹⁶

Plagiarism

Lawyers must not present another's words or ideas as their own. Doing so deceives the reader and steals credit from the original writer. Plagiarism, prohibited in academia, can affect a lawyer's ability to practice. In one case, the Appellate Division, Second Department, censured a lawyer dismissed from law school for plagiarizing half his LL.M. paper who failed to disclose his dismissal in his bar application.¹⁷ In another, the Appellate Division, First Department, censured a lawyer who plagiarized the writing sample he submitted as part of his application for the Supreme Court (18-B) criminal panel for indigent defendants.¹⁸

Lawyers reuse form motions and letters, law clerks write opinions for their judges, and some judges incorporate parts of a litigant's brief into their opinions.¹⁹ But plenty remains of the obligation to attribute to others their contributions, thoughts, and words.

To avoid plagiarizing, lawyers should cite the sources:

- On which they relied to support an argument;

- From which they paraphrased language, facts, or ideas;
- That might be unfamiliar to the reader;
- To add relevant information to the lawyer's argument;
- For specialized or unique materials.²⁰

Courts don't forgive lawyers who plagiarize.²¹ A federal district court in Puerto Rico, for example, reprimanded a lawyer who copied verbatim a majority of his brief from another court's opinion without citing that opinion.²²

Lawyers must quote accurately.²³ A reader who checks a quotation and finds a misquotation will distrust everything the lawyer writes.²⁴ To quote accurately, lawyers must use quotation marks, even if the lawyer omits or changes some words. Lawyers must use ellipses to note omissions and put changes in brackets.²⁵ The key to honest writing is to use quotation marks when quoting even a few key words and then to cite. That's the difference between scholarship and plagiarism.

Lawyers must not substitute practice forms for their professional judgment. While not plagiarism, it's bad lawyering to rely on forms or boilerplate. One federal district court in New Jersey sanctioned a lawyer for reproducing without analysis a complaint from a Matthew Bender practice form.²⁶ As part of the sanction, the court ordered the lawyer to attend either a reputable continuing-legal-education class or a law-school class on federal practice and procedure and civil-rights law.²⁷ The court concluded that despite the availability of practice forms and treatises, lawyers are "expected to exercise independent judgment."²⁸

Court Rules

Most courts have rules that govern the length and format of papers. Under the Second Circuit's Local Rule 32, a brief must have one-inch margins on all sides and not exceed 30 pages.²⁹ New York State courts have their own rules.³⁰ State and federal courts in New York and elsewhere may reject papers

that violate the courts' rules regarding font, paper size, and margins.

Lawyers shouldn't cheat on font sizes or margins. And they must put their substantive arguments in the text, not in the footnotes. In one illustrative case, the Second Circuit declined to award costs to a successful appellant whose attorney "blatantly evaded" the court's page limit for briefs by including 75 percent of the substantive arguments in footnotes.³¹ Lawyers must edit and re-edit their work to set forth their strongest arguments in the space allowed. A court may, in its discretion, grant a lawyer leave to exceed page limits. Conversely, lawyers shouldn't try to meet the page limit with irrelevancies or unnecessary words for bulk.³²

Lawyers who ignore court rules risk the court's disdain.³³ Worse, the court can dismiss the case.³⁴ The Ninth Circuit did just that when an appellant disregarded its briefing rules.³⁵ The appellant's lawyers submitted a brief that didn't cite the record or provide the standard of appellate review. Instead, the brief exceeded the court's word-count limit and cited cases without precedential value.³⁶ The lawyers also submitted a reply brief that had no table of contents or table of authorities.³⁷ The court stated that despite the appellant's poorly written briefs, it examined the papers and decided that appellants were not entitled to relief on the merits.³⁸ Other than to comment on the lawyers' ethics and briefing errors, the court didn't explain its reasoning for dismissing the appeal.³⁹

Even if a court doesn't have rules about a brief's format and length, lawyers shouldn't burden the court with prolix writing. In a 1975 New York Court of Appeals case decided before the court instituted rules to regulate brief length, the court sanctioned a lawyer who submitted a 284-page brief about issues "neither novel nor complex."⁴⁰ To illustrate the brief's absurdity, the court broke down the number of pages it devoted to each issue, including 50 pages for the facts,

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126 for one argument, and 4 to justify the brief's length.⁴¹

Lawyer's Role as Advisor

Lawyers must mind the Disciplinary Rules when advising a supervising attorney or a client. Lawyers are often asked to prepare memorandums for a supervising attorney or a client directly. A memorandum is intended to predict objectively how the law will be applied to the facts of the client's case, not to persuade the reader what the law should be. A memorandum must take a position, but it must also provide the strongest arguments for and against the client's position. A skewed memorandum is no strategic or planning tool.

Lawyers mustn't give unsolicited advice to non-clients. Publicly discussing the law, however, is essential to understanding how the law works and applies. The Disciplinary Rules allow lawyers to write about legal topics, but they forbid lawyers to give unsolicited advice to non-clients.⁴² A lawyer who participates in an on-line chat, for example, should notify the other participants that the discussion doesn't create a lawyer-client relationship, that none of the communications are confidential, and that the advice is general in nature and not intended to provide specific guidance. The notice should contain unequivocal language that non-lawyers will understand.

Clients pay the bills. They can use their economic influence to pressure lawyers to break the law or violate a Disciplinary Rule. A lawyer is prohibited from assisting a client to engage in unlawful or fraudulent conduct.⁴³ A lawyer can choose to refuse to aid or participate in conduct the lawyer believes is unlawful, even if there's some support for the argument that the conduct is legal.⁴⁴ The Disciplinary Rules recognize that when clients place their lawyers in an ethical quandary, and when it is unclear whether the lawyer will be advising a client to commit legal or illegal conduct, the lawyer should err on the side of not advising rather than face possible disciplinary action.

Conclusion

Ethics permeates all aspects of the legal profession. The way a lawyer writes can establish the lawyer's reputation as ethical and competent. Reputation is a lawyer's most precious asset. By embodying the profession's ethical ideals in their writing, lawyers will insure that their reputation remains positive and increase the possibility that their clients will prevail in litigation. ■

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1. DR 7-102(a)(5) (22 NYCRR 1200.33(a)(5)).
2. 22 NYCRR 130-1.1(c)(3).
3. See *In re Abrahams*, 5 A.D.3d 21, 22-27, 770 N.Y.S.2d 369, 371-75 (2d Dep't 2003) (per curiam), appeal dismissed, 1 N.Y.3d 619, 808 N.E.2d 1273, 777 N.Y.S.2d 13 (2004).
4. See *Duncan v. AT&T Communications, Inc.*, 668 F. Supp. 232, 234 (S.D.N.Y. 1987).
5. *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (citation omitted).
6. Except when the other side is absent. See Part I of this column.
7. Margaret R. Milsky, *Ethics and Legal Writing*, 85 Ill. B.J. 33, 34 (1997) (noting that citing record enhances lawyer's credibility).
8. *DeRosa v. Chase Manhattan Mtge. Corp.*, 15 A.D.3d 249, 249, 793 N.Y.S.2d 1, 2 (1st Dep't 2005) (mem.).
9. Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 122 (2002).
10. Wendy B. Davis, Writing Clinic, *An Attorney's Ethical Obligations Include Clear Writing*, 72 N.Y. St. B.J. 50, 50 (Jan. 2000) (calling clear legal writing an ethical obligation).
11. George Orwell, *The Politics of Language*, in 4 *The Collected Essays: Journalism and Letters of George Orwell* 165-69 (1968).
12. Laura E. Little, *Hiding With Words: Obfuscation, Avoidance, and Federal Jurisdictional Opinions*, 46 UCLA L. Rev. 75, 101 (1998).
13. *Wilson v. Meeks*, 52 F.3d 1547, 1558 (10th Cir. 1995).
14. *Id.*
15. See *United States v. Snider*, 976 F.2d 1249, 1251 n.1 (9th Cir. 1992) (Kozinski, J.) (referring to brief's bold-faced font, capital letters, and quotation marks for emphasis, the court wrote that "[w]hile we realize counsel had only our welfare in mind in engaging in these creative practices, we assure them that we would have paid no less attention to their briefs had they been more conventionally written").
16. *Duncan*, 668 F. Supp. at 234.
17. See *In re Harper*, 223 A.D.2d 200, 201-02, 645 N.Y.S.2d 846, 847 (2d Dep't 1996) (per curiam).
18. *In re Steinberg*, 206 A.D.2d 232, 233, 620 N.Y.S.2d 345, 346 (1st Dep't 1994) (per curiam) (citing DR 1-102(a)(4) (22 NYCRR 1200.3 (a)(4)); see also

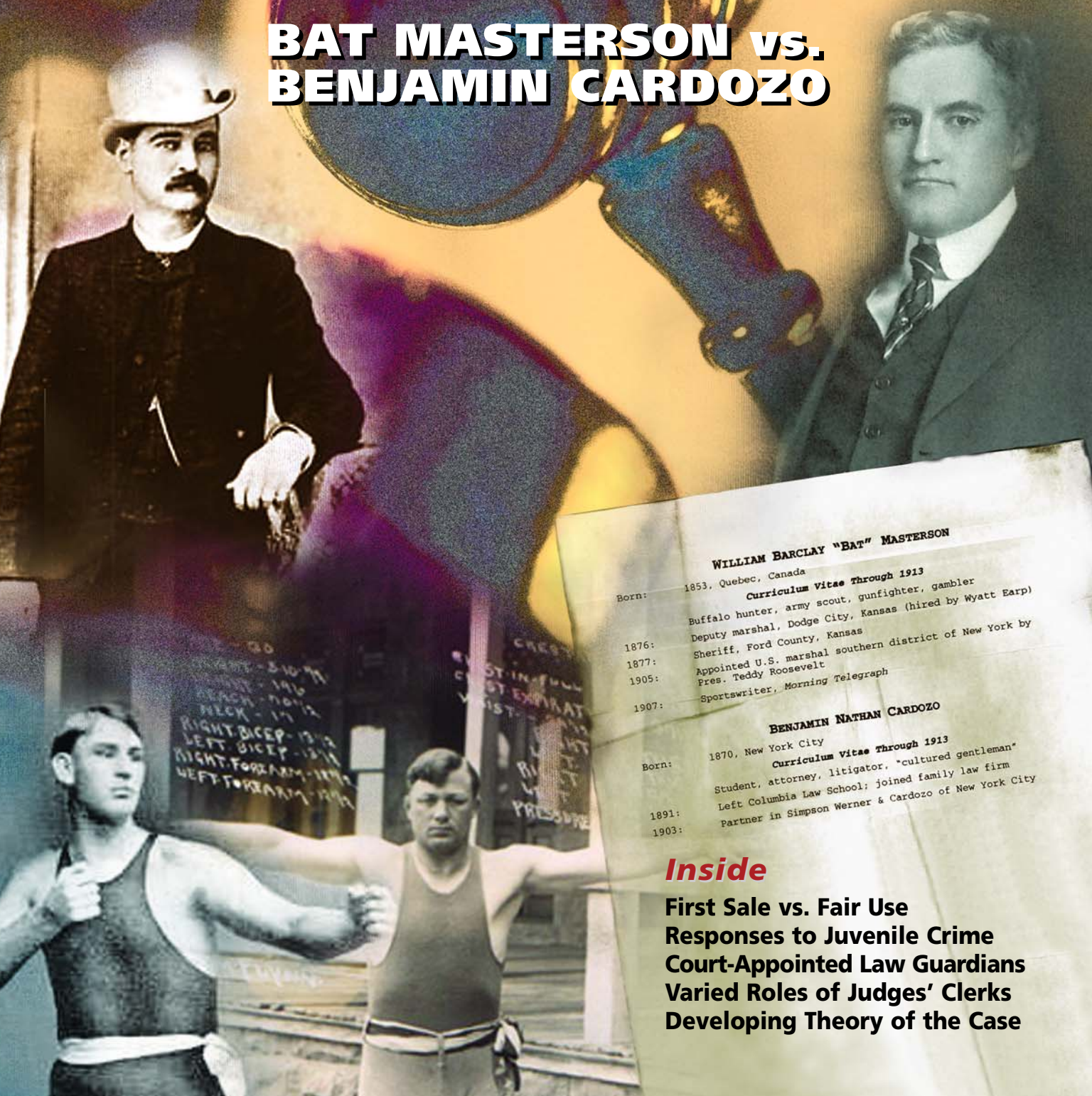
Kingvision Pay Per View, Ltd. v. Wilson, 83 F. Supp. 2d 914, 916 n.4 (W.D. Tenn. 2000) (noting that lawyer failed to give credit to source).

19. Linda H. Edwards, *Legal Writing Process, Analysis, and Organization* 10 (2002).
20. Terri LeClercq, *Failure to Teach: Due Process and Law School Plagiarism*, 49 J. Legal Educ. 236, 245 (1999).
21. See, e.g., Wayne Scheiss, *Ethical Legal Writing*, 21 Rev. Litig. 527, 538-39 (2002) (documenting courts reprimanding lawyers for plagiarism).
22. See *Pagan Velez v. Laboy Alvarado*, 145 F. Supp. 2d 146, 160-61 (D.P.R. 2001).
23. See generally Gerald Lebovits, Legal Writer, *You Can Quote Me: Quoting in Legal Writing — Part I*, 76 N.Y. St. B.J. 64 (May 2004); Gerald Lebovits, Legal Writer, *You Can Quote Me: Quoting in Legal Writing — Part II*, 76 N.Y. St. B.J. 64 (June 2004).
24. See Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 Suffolk U. L. Rev. 1, 30-31 (1997) (providing example of courts sanctioning lawyers for misquoting).
25. Louis J. Sirico, Jr., *A Primer on Plagiarism*, Second Draft 11 (May 1988).
26. See *Clement v. Pub. Serv. Elec. & Gas Co.*, 198 F.R.D. 634, 635-36 (D.N.J. 2001); see also *DeWilde v. Guy Gannett Publ'g Co.*, 797 F. Supp. 55, 56 n.1 (D. Me. 1992) (reprimanding attorney for copying opposing counsel's memorandum of law).
27. See *Clement*, 198 F.R.D. at 636.
28. *Id.*
29. Local Rule 32(a), available at <http://www.ca2.uscourts.gov/Docs/Rules/LR32.pdf> (last visited June 20, 2005).
30. See, e.g., 22 NYCRR 500.1(k) (Ct. App.); 600.10(a)(1) (1st Dep't); 670.10.1(f) (2d Dep't); 800.8(a) (3d Dep't); 1000.4(h) (4th Dep't).
31. See *Varda, Inc. v. Ins. Co. of N. Am.*, 45 F.3d 634, 640 (2d Cir. 1995).
32. Thomas R. Haggard, *Good Writing as Professional Responsibility*, 11 S.C. Law. 11, 11 (May/June 2000).
33. See, e.g., *La Reunion Francaise, S.A. v. Halbart*, No. 96-CV-1445, 1998 WL 1750128, at *1 n.1 (E.D.N.Y. Sept. 28, 1998) (expressing court's disfavor with plaintiff's using "microscopic font and half-inch margins" to circumvent page limit); *LaGrange Mem'l Hosp. v. St. Paul Ins. Co.*, 317 Ill. App. 3d 863, 876, 740 N.E.2d 21, 32 (2000) (reprimanding lawyers for exceeding page limits).
34. See, e.g., *Richmond v. Springfield Rehab. & Healthcare*, 138 S.W.3d 151, 154 (Mo. App. S.D. 2004) (dismissing case because lawyer's briefs did not conform to court's rules); *Frazier v. Columbus Bd. of Educ.*, 70 Ohio St. 3d 1431, 1431, 638 N.E.2d 581, 582 (Ohio 1994) (same).
35. See *N/S Corp. v. Liberty Mut. Ins. Co.*, 127 F.3d 1145, 1146-47 (9th Cir. 1997).
36. *Id.* at 1146.
37. *Id.*
38. See *id.* at 1147.
39. *Id.*
40. *Slater v. Gallman*, 38 N.Y.2d 1, 4-5, 339 N.E.2d 863, 864-65, 377 N.Y.S.2d 448, 450-51 (1975).
41. See *id.* at 5 n.1, 339 N.E.2d at 865 n.1, 377 N.Y.S.2d at 450 n.1; accord *Stevens v. O'Neill*, 169 N.Y. 375, 376, 62 N.E. 424, 424 (1902) (per curiam) (commenting on how typewriters rather than pens allow verbosity).
42. DR 2-104(e) (22 NYCRR 1200.9(e)).
43. DR 7-102(a)(7) (22 NYCRR 1200.33(a)(7)).
44. DR 7-101(b)(2) (22 NYCRR 1200.32(b)(2)).

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Journal

BAT MASTERSON vs. BENJAMIN CARDOZO



WILLIAM BARCLAY "BAT" MASTERSON
Born: 1853, Quebec, Canada
Curriculum Vitae through 1913
Buffalo hunter, army scout, gunfighter, gambler
1876: Deputy marshal, Dodge City, Kansas (hired by Wyatt Earp)
1877: Sheriff, Ford County, Kansas
1905: Appointed U.S. marshal southern district of New York by Pres. Teddy Roosevelt
1907: Sportswriter, Morning Telegraph

BENJAMIN NATHAN CARDOZO
Born: 1870, New York City
Curriculum Vitae Through 1913
Student, attorney, litigator, "cultured gentleman"
1891: Left Columbia Law School; joined family law firm
1903: Partner in Simpson Werner & Cardozo of New York City

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Judges' Clerks Play Varied Roles In the Opinion Drafting Process

BY GERALD LBOVITS

In 1875, Massachusetts Chief Justice Horace Gray hired a law-school graduate to be his secretary. The Chief Justice paid the young man — whom he called a puisne¹ judge — from his own pocket. A few years after the Chief Justice was elevated to the Supreme Court, the United States government decided to pay for a clerk for each Justice.² Most Justices hired stenographers, but Justice Gray continued to hire young law graduates.

In 1919, after the government decided to pay for typists and a clerk, the other Justices began to hire recent law graduates. Thus began in federal court the institution of law clerks,³ which became common in federal court in 1936, when district judges were allowed to use law clerks, and widespread since 1959, when certifications of need for district judges were no longer required.⁴

What Law Clerks Do

Law clerks, the generic title used in this article, are integral to the decision-making process, both federally and in every state court of record. They “are not merely the judge’s errand runners. They are the sounding boards for tentative opinions.”⁵ Law clerks do “time-consuming and essential tasks: checking the record, checking citations, performing legal research, and writing first drafts . . . Law clerks are indispensable to the judges, enabling them to focus on the decision itself and the refinement of the decision in writing.”⁶ Dan White, the satirist, explains the law clerk’s role this way: “All judicial clerks do the same thing, namely, whatever their judges tell them to do.”⁷

Law clerks are extensions of their judges. Whatever they do reflects on their judges. Good law clerks will excel at research, writing, administering the docket, and conferencing cases if in a trial part. Good law clerks maintain all personal and judicial confidences, play devil’s advocate with and be confidants to the judge, leave the decision making to the judge, save the judge from committing errors, and commit few of their own. A poor law clerk “dislikes library work, or . . . is unhappy unless agitating for a cause, or . . . is addicted to the telephone or cannot stand solitude.”⁸

Law Clerk Confidentiality

A maxim for law clerks is that what happens in chambers stays in chambers. Rarely while they work for judges have law clerks been known to share secrets. History records only one notorious example.⁹ In 1919, Justice Joseph McKenna’s law clerk was accused of leaking word of the decision in *United States v. Southern Pacific Co.*¹⁰ The clerk’s alleged co-conspirators profited from insider trading. When the plot was uncovered, the clerk resigned and was indicted for “conspiracy to defraud the Government of its right of secrecy concerning the opinions.” The clerk argued that no law forbade his supposed conduct, but his motion to dismiss was denied, as was his appeal to the D.C. Circuit and his petition for certiorari to the Court of his former employ.¹¹ The prosecution, however, eventually moved to dismiss the charges. Everything else about this affair is shrouded in mystery, except this: When the clerk, later a successful Washington baker, died at 83, he was cremated, and his ashes were “strewn on court property . . . under the cover of darkness.”¹²

Current law clerks may not reveal current confidences, but may they discuss their duties after they retire? The conventional wisdom is that law clerks must take confidences to the grave.¹³ But dozens of the nation’s most eminent attorneys and judges have written in surprising detail about their judges and the role they and their judges played in cases of national consequence.¹⁴ Law-clerk disclosure has turned into a “long-



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bachelor’s degree from Carleton University and law degrees from Ottawa, Tulane and New York University law schools.

standing historical tradition that has developed over the past sixty years.”¹⁵

A law clerk to Justice Robert Jackson was once accused of betraying confidences about other law clerks.¹⁶ In an article that created a firestorm of protest and support, then-Mr. William Rehnquist wrote that “a majority of the clerks I knew [showed] extreme solicitude for the claims of communists and other criminal defendants.”¹⁷ Apparently recovered from that controversy, then-Justice Rehnquist later wrote a beautiful portrayal of his judge in an article that disclosed no confidences.¹⁸

One can write about experiences as a law clerk and divulge nothing secret. For a piece of this kind from a two-year New York Court of Appeals clerk, see an article by Mario M. Cuomo.¹⁹

Law-Clerk Writing

According to a federal judge who knows, “most judicial opinions are written by the judges’ law clerks rather than by the judges themselves.”²⁰ Law clerks often write first drafts: “It is an ill-kept secret that law clerks often do early drafts of opinions for their judges.” Law-clerk opinion writing comes as no surprise to those who work in the courts: “It is widely recognized . . . that law clerks now draft many of the decisions that emanate from . . . chambers.”²¹ By their writing, law clerks play a role in decision making: “[M]any judges, if not most, require their law clerks to draft opinions for motions before the judges even skim the briefs. . . . [M]any motions present a close call. The person who gets to take the first crack at it (*i.e.*, the law clerk) may influence the outcome.”²² The outcome is influenced because “[h]e who wields the pen on the first draft . . . controls the last draft.”²³

Law clerks, especially at the appellate level, also write bench memorandums.²⁴ The bench memorandum, or report, may include the following: A concise statement of the facts, with a verification of the litigants’ statements of fact by reference to the record; a statement of the issues in contention; the litigants’ arguments on the issues, verifying the authorities; an analysis of the issues and the law; a list of questions that inquiry at oral argument might resolve; a recommendation on whether the court should decide the matter with a full, *per curiam*, or memorandum opinion; and a draft *per curiam* or memorandum opinion if the law clerk recommends either following a screening process.

The precise format of the bench memorandum depends on the court’s tradition, but the memorandum should emphasize the relevant issues and be impartial,

critical, and thorough — but not so thorough that the judges might as well have read the briefs and the record before oral argument. The law clerk’s goal is to familiarize the court with the case before oral argument and to focus a judge who wishes to do further research. It is appropriate for neutral, objective clerks to state their views pre-argument. The court may, and often does, disagree with the clerks’ views after oral argument and additional study. Moreover, “the only mission of a [memorandum] opinion is to inform the parties why the court is deciding as it is and to assure them that the court consid-

ered and understood the case. . . . Staff in these cases can relieve the judges of the initial drafting job, simple though it may be, thereby freeing judge time for the other demands of the court’s business.”²⁵

Is law-clerk writing good or bad for the administration of justice? According to D.C. Circuit Judge Patricia M. Wald, “judges who write every word of their own opinions (except for a few certifiable geniuses) do not produce works of markedly greater clarity, cogency, or semantic skill. The opposite is more likely true. . . . I for one would not return to the days when law clerks sharpened pencils and checked citations; the present system for deciding cases could not sustain that development.”²⁶

Some believe that a rule should be enacted to make it unethical for law clerks to write judicial opinions.²⁷ Most believe, however, that law-clerk writing is good for the courts.²⁸

The Interplay Between Law Clerk And Judge in Opinion Writing

Much law clerk-judge writing is collaborative.²⁹ But whether the law clerk prepares the initial drafts or the final edits, the entire adjudicative function and decision-making process must remain exclusively with the judge. The litigants’ rights and public confidence in the judiciary demand no less. Even if the law clerk writes every word of a particular opinion, the judge must agree with and understand every one of those words as if the judge alone wrote each word. Every word and citation must be the authentic expression of the judge’s thoughts, views, and findings. This requirement forces judges to review, with an eye toward editing, every opinion but the most routine, mundane, and brief draft.

In the end, “no matter how capable the clerk, the opinion must always be the judge’s work.”³⁰ That is because “[w]e lose the judge’s processed involvement when technically proficient law clerks write the opin-

**“All judicial clerks do the same thing, namely, whatever their judges tell them to do.”
— Dan White**

Law Clerks in New York

The position of law clerk in New York has been authorized for some judges since 1909.¹ New York clerks are appointed differently from federal law clerks and play somewhat different, larger roles.

Like federal clerks, New York clerks should be selected with care. The judge-clerk relationship is “the most intense and mutually dependent one . . . outside marriage, parenthood, or a love affair.”² But unlike federal judges, who typically appoint recent law-school graduates and mostly ask them to serve one- or two-year terms, New York judges tend to appoint experienced attorneys and retain them for lengthy durations as career court employees. New York practitioners and judges alike appreciate the maturity and wisdom that an experienced law clerk brings to a busy state court.

A federal clerkship has more status than a New York clerkship, but New York clerks are paid far better and in the main enjoy decidedly greater responsibilities, especially in the trial courts. Federal clerks can earn top salaries when they leave their judges, but New York clerks often secure job opportunities for which their federal counterparts must wait years: The New York judiciary is filled with law clerks who went directly from their clerkships to the bench, either by appointment or election.

In New York, court attorneys are called law clerks when they work for a Court of Claims judge or are the personal appointment of an elected

Supreme Court justice. Otherwise, they are court attorneys — from the court attorneys in the New York City Civil Court’s Housing Part, to the pool attorneys in Supreme Court, to the court attorneys to the Chief Judge of the State of New York. Law clerks and court attorneys used to be called, respectively, law secretaries and law assistants.

Central staff court attorneys of the Court of Appeals answer to the Chief Judge and the court rather than to any particular Associate Judge. Court attorneys in the Appellate Division and the Appellate Term answer to the Presiding Justice of the Department or Term. Court attorneys assigned to a trial-term judge answer first to their judge, then to their supervising and administrative judges, and ultimately to the person who appoints them: the Deputy Chief Administrative Judge for New York City Courts or the Deputy Chief Administrative Judge for Courts Outside New York City. Law clerks are hired and fired by their justices alone.³ Trial Term court attorneys not assigned to a judge answer to their chief court attorney, then to their administrative judge, and ultimately to their respective Deputy Chief Administrative Judge.

The distinction between personally appointed law clerks and court-appointed court attorneys affects law clerks’ and court attorneys’ ethical obligations in terms of political activity,⁴ a fact of life in New York because many judges are elected from law-clerk ranks.

1. See N.Y. Judiciary Law §§ 166, 173 (Laws of 1909, Ch. 35), which gave Supreme Court justices the power to appoint confidential attendants and confidential law assistants.
2. Patricia M. Wald, *Selecting Law Clerks*, 89 Mich. L. Rev. 152, 153 (1990).
3. *In re Blyn v. Bartlett*, 39 N.Y.2d 349, 359–60, 348 N.E.2d 555, 560–61, 384 N.Y.S.2d 99, 104–105 (1976) (per curiam). A personally appointed clerk to an elected Supreme Court justice need not even be a lawyer. *In re Gilligan v. Procaccino*, 27 N.Y.2d 162, 166–68, 263 N.E.2d 385, 385–87, 314 N.Y.S.2d 985, 987–88 (1970).
4. See Gerald Lebovits, *Judicial Ethics, Law Clerks and Politics*, N.Y.L.J., Oct. 21, 1996, at 1, col. 1 (examining New York’s Rules of the Chief Judge (governing nonjudicial-employee conduct) and the Rules of the Chief Administrator of the Courts (governing judicial conduct) as they apply to law clerks and court attorneys).

ions and the judge understands his role more as a decision maker and editor, if that, than as a writer.”³¹ Although judges delegate “the task of stating the reasons for the decision, not the authority to decide . . . , the justice must make the final version his own opinion, because he is responsible for what it says.”³² Thus, “the strongest control over staff personnel in their dealings with the judges is an ordinary sense of personal relationships. The judge is the boss. What he says and does

are the final mandates on an issue . . . ”³³ Third Circuit Senior Judge Aldisert gives this advice to his clerks: “You were not selected by me to be a ‘yes man.’ . . . [Yet] when the decision is in, that is it.”³⁴

Crediting Law Clerks and Law Students

Federal case law, including Supreme Court case law, is filled with textually relevant judicial acknowledgments that law clerks performed legal research.³⁵ But a

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judge should never acknowledge that a law clerk or judicial intern (often called “extern”) wrote the opinion. Doing so makes it appear that someone other than the judge decided the case. Reversal and remand to a different judge might be warranted if a judge credits a law clerk’s “preparation of this opinion.”³⁶ If a federal judge thanks an intern for assisting in writing an opinion, the West Group will print that appreciation.³⁷ So will the *New York Law Journal* if a New York State judge does so. A Westlaw check disclosed a surprising 146 published opinions (82 in the First Department, 64 in the Second Department) from 1990 to March 2004, in which the *Law Journal* printed acknowledgments to student interns from New York State judges.

Judicial interns, especially those who receive law-school academic credit for their work, are now accepted features in the courthouse.³⁸ Judges who thank their interns do so out of kindness to students who, mostly without pay, make a significant contribution. What is kind to the interns, however, is unkind to the litigants and the public. This is not to suggest that judges not use interns to help with opinions. To the contrary, judges and their law clerks improve legal education and sometimes their opinions when they assign research, writing, and editing tasks to interns, so long as the judge and the law clerk monitor all student work closely. But crediting the intern makes it appear that the court delegated its decision-making obligations to an unaccountable law student.

A higher authority forbids what the *New York Law Journal* and the West Group permit. For the past decade, the New York State Law Reporting Bureau has put into effect a Court of Appeals policy in which the State Reporter will not print judicial acknowledgments to law clerks or interns. This policy suggests that judges who want to thank their clerks and interns reconsider their impulse, however well meaning. Before the Court announced that policy, the New York State Official Reports occasionally printed irrelevant acknowledgments that law students provided “research assistance” “in the preparation of this opinion.”³⁹

Law-Clerk Cheating

Heaven forbid, a law clerk must never slip language or references past a judge. That happened in *United States v. Abner*,⁴⁰ which contains multiple allusions to the songs and albums of the Talking Heads rock band. The law clerk included these references to get free Talking Heads concert tickets. To no one’s dismay, law clerks have been fired for including non-judge-approved writing in judicial opinions. Judge Jerry Buchmeyer⁴¹ tells the story of the soon-to-be-dismissed law clerk in *State v. Lewis*.⁴² Without consulting a judge, the clerk added a

lawyer’s lament, written as a fictional “reporter,” to the Kansas official reports:

Statement of Case, by Reporter
This defendant, while at large,
Was arrested on a charge
Of burglarious intent,
And direct to jail he went.
But he somehow felt misused,
And through prison walls he oozed,
And in some unheard-of shape
He effected his escape.

* * *

LEWIS, tried for this last act,
makes a special plea of fact:
“Wrongly did they me arrest,
As my trial did attest,
And while rightfully at large,
Taken on a wrongful charge.
I took back from them what they
From me wrongly took away.”

* * *

Opinion of the Court. PER CURIAM:
We — don’t — make — law. We are bound
To interpret it as found.
The defendant broke away;
When arrested, he should stay.
This appeal can’t be maintained,
For the record does not show
Error in the court below,
And we nothing can infer.
Let the judgment be sustained —
All the justices concur.

Nor may a judge use an outside expert — as opposed to an intern, law clerk, special master, or referee — to assist in opinion writing.⁴³ As the New York Court of Appeals wrote in *In re Fuchsberg*, “law clerks often contribute substantially to the preparation of opinions. [But] [w]e cannot accept respondent’s explanation that he looked upon the law professors he consulted as ‘ad hoc’ law clerks.”⁴⁴

First Amendment Rights

May a law clerk refuse to draft an opinion? In *Sheppard v. Beerman*, a law clerk to a Supreme Court, Queens County, justice declined to draft an opinion that, the clerk claimed, would result in “railroading” a defendant. The justice fired the clerk in December 1990 after the clerk called him a “son of a bitch” and “corrupt.” The clerk sued the justice under 42 U.S.C. § 1983. District Judge I. Leo Glasser of the Eastern District of New York twice granted the justice’s motions to dismiss the complaint. Citing the law clerk’s free-speech rights, however, the Court of Appeals for the Second Circuit

reversed — twice.⁴⁵ From a unanimous *Sheppard II*: “[T]he relationship between a judge and clerk is one based upon trust and faith. . . . But the First Amendment protects the eloquent and insolent alike.”⁴⁶

In early 2002, Judge Glasser granted the now-retired justice’s summary-judgment motion, which the justice filed after he and others, including his two children, were subjected to 31 depositions.⁴⁷ In early 2003, in *Sheppard III*, the Second Circuit affirmed, “[g]iven the explosive exchange between Beerman and Sheppard and Sheppard’s inability to produce any evidence supporting his claim of improper motive,”⁴⁸ and the Supreme Court denied certiorari in late 2003.⁴⁹ The 13-year saga thus ended on a First Amendment analysis, but not on whether a law clerk may refuse to write an opinion.

Advice to Law Clerks and Practitioners

Law clerks have neither the judge’s commission nor the judge’s experience. Some clerks tend to overwrite; they include the irrelevant because they are unsure about what is important and because they might not have been at oral argument.

Practitioners can overcome a possible obstacle by making it easy for clerks to read and understand their papers — thus making it easy for the court to rule for them. Getting to the point quickly, applying law to fact succinctly, attaching photocopies of key precedents and statutes (for trial judges), making clear what relief is requested, and countering the other side’s points in writing as opposed to leaving them for oral argument are among the good habits practitioners should consider, not only for judges but especially for their clerks.

For judges and their clerks, communication is one answer to assuring quick and accurate decision making and opinion writing. Here is another for clerks. Law clerks, who come and go, must learn a valuable talent: how to emulate their judge’s writing style. Writing is connected to personality. Personality is reflected in the tone of the writing. Personality traits and writing styles do not change easily or overnight. Judges have preferences. Law clerks should learn them. Learning them maintains consistency, lets the judge adjudicate rather than edit for style, and, no small benefit, improves the law clerk’s writing. The best ways to learn the judge’s writing style is to study the judge’s opinions and to profit in future cases from the judge’s edits to current drafts.

Law clerks do not only write, whether opinions or jury charges. They also work with the public, whether it is scheduling cases or settling them. Law clerks are their judges’ alter egos. Clerks are imbued with the sense that they are more than their judges’ lawyers. As the Fifth Circuit put it, “Clerks are privy to the judge’s thoughts

in a way that neither parties to the lawsuit nor his most intimate family members may be.”⁵⁰ Clerks expect litigants and lawyers to deal with them as if they are dealing with the judge. Practitioners should realize that treating a member of the court family disrespectfully will not advance their cause. And clerks, who are subject to many of the same ethical rules as judges,⁵¹ must treat litigants and lawyers with the respect, competence, and intelligence with which the judge with the mandate must treat all.

1. Pronounced “puny.”
2. See 24 Stat. 254 (1886).
3. To study the history and current role of law clerks in America, see Paul R. Baier, *The Law Clerks: Profile of an Institution*, 26 Vand. L. Rev. 1125 (1973); George D. Braden, *The Value of Law Clerks*, 24 Miss. L.J. 295 (1953); Heather Bupp-Habuda, *Law Clerk’s Ethical Boundaries*, 38 Fed. B. News & J. 213 (1991); Norman Dorsen, *Law Clerks in Appellate Courts in the United States*, 26 Modern L. Rev. 265 (1963); John G. Kester, *The Law Clerk Explosion*, 9 Litig. 20 (1983); Cornelius J. Moynihan, Jr., *Ghostwriters in the Courts*, 17 Litig. 37 (1991); John B. Oakley & Robert S. Thompson, *Law Clerks and the Judicial Process: Perceptions of the Qualities and Functions of Law Clerks in American Courts* (1980); Richard A. Posner, *The Federal Courts: Crisis and Reform* 102–119 (1985); Nadine J. Wichern, Comment, *A Court of Clerks, Not of Men: Serving Justice in the Media Age*, 49 DePaul L. Rev. 621 (1999); Eugene A. Wright, *Observations of an Appellate Judge: The Use of Law Clerks*, 26 Vand. L. Rev. 1179 (1973). A book-length volume about law clerks by 15 prominent judges, academics, politicians, and journalists is found in *Law Clerks: The Transformation of the Judiciary*, 3 Long Term View: A Journal of Informed Opinion (1995).
4. J. Daniel Mahoney, *Law Clerks: For Better or Worse*, 54 Brooklyn L. Rev. 321, 325–26 (1988).
5. *Hall v. Small Business Admin.*, 695 F.2d 175, 179 (5th Cir. 1983) (Rubin, J.).
6. Jefferson Lankford, *Judicial Law Clerks: The Appellate Judge’s “Write” Hand*, Arizona Att’y 19, 21 (July 1995).
7. D. Robert White, *The Official Lawyer’s Handbook* 71 (1983).
8. Robert Braucher, *Choosing Law Clerks in Massachusetts*, 26 Vand. L. Rev. 1197, 1199 (1973).
9. This story is told best in Chester A. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 Or. L. Rev. 299, 310 (1961), and John B. Owens, *The Clerk, The Thief, His Life as a Baker: Ashton Embry and the Supreme Court Leak Scandal of 1919*, 95 Nw. U. L. Rev. 271 (2000).
10. 251 U.S. 1 (1919).
11. See *Embry v. United States*, 257 U.S. 655 (1921).
12. David J. Garrow, “The Lowest Form of Animal Life”? *Supreme Court Clerks and Supreme Court History*, 84 Cornell L. Rev. 855, 849 n.27 (1999) (book review).
13. See Comment, *The Law Clerk’s Duty of Confidentiality*, 129 U. Pa. L. Rev. 1230 (1981).
14. For an illuminating look at the extent to which former Supreme Court law clerks have disclosed confidences, see Garrow, *supra* note 12 (reviewing Edward Lazarus, *Closed Chambers: The First Eyewitness Account of the*

- Epic Struggles Inside the Supreme Court (1998), and Dennis J. Hutchinson, *The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White* (1998) (footnotes in title omitted)).
15. Garrow, *supra* note 12, at 893.
 16. See William H. Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. News & World Rep., Dec. 13, 1957, at 74.
 17. *Id.*
 18. See William H. Rehnquist, *Robert H. Jackson: A Perspective Twenty-Five Years Later*, 44 Albany L. Rev. 533 (1980).
 19. *The New York Court of Appeals: A Practical Perspective*, 34 St. John's L. Rev. 197 (1980).
 20. Richard A. Posner, *Cardozo: A Study in Reputation* 148 (1990).
 21. Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 Brooklyn L. Rev. 685, 697 (2001).
 22. Abby F. Rudzin & Lisa Greenfield, *Ten Brief-Writing Don'ts — The Judicial Clerk's Perspective*, 85 Ill. B.J. 285, 285 (1997).
 23. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1384 (1995).
 24. For advice on writing a bench memorandum, see Alvin B. Rubin & Laura B. Bartell, *Law Clerk Handbook: A Handbook for Law Clerks to Federal Judges* 143–44 (Fed. Jud. Ctr. rev. ed. 1989); Richard B. Klein, *Opinion Writing Assistance Involving Law Clerks: What I Tell Them*, 34 Judges' J. 33 (1995).
 25. Daniel J. Meador, *Appellate Courts: Staff and Process in the Crisis of Volume* 49 (1974).
 26. Wald, *supra* note 23, at 1384.
 27. See David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 Geo J. Legal Eth. 509, 555 (2001) ("Judges should write their own published opinions. They should not have law clerks or anyone else do the writing for them.").
 28. See, e.g., Alex Kozinski, *Making the Case for Law Clerks*, 3 The Long Term View: A Journal of Informed Opinion 55 (1995).
 29. Douglas K. Norman, *Legal Staff and the Dynamics of Appellate Decision Making*, 84 Judicature 175, 175 (2001). To avoid the dangers of allowing pool, or central staff, attorneys to produce "no judge" opinions, see an article by (later recalled) California Chief Justice Rose E. Bird, *The Hidden Judiciary*, 17 Judges' J. 4 (1978). To make effective use of law clerks in opinion writing while preventing bureaucratic, or committee, writing, see a piece by Second Circuit Judge J. Daniel Mahoney, *supra* note 4, and another by an Arkansas Supreme Court justice, George Rose Smith, *A Primer of Opinion Writing for Law Clerks*, 26 Vand. L. Rev. 1203 (1973).
 30. Federal Judicial Center, *Judicial Writing Manual* 11 (1991).
 31. William Domnarski, *In the Opinion of the Court* x (1996).
 32. Bernard E. Witkin, *Manual on Appellate Court Opinions* § 10, at 16 (1977).
 33. Jack Leavitt, *The Yearly Two Foot Shelf: Suggestions for Changing Our Reviewing Court Procedures*, 4 Pacific L.J. 1, 17 (1973).
 34. Ruggero J. Aldisert, *Duties of Law Clerks*, 26 Vand. L. Rev. 1251, 1256–57 (1973).
 35. See *Conroy v. Aniskoff*, 507 U.S. 511, 527–28 (1993) (Scalia, J., concurring) (noting that legislative history "examined and quoted" was "unearthed by a hapless law clerk to whom I assigned the task"); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 318 n.5 (1977) (Stevens, J., dissenting) (noting his law clerk's statistical analysis); *Noto v. United States*, 76 S. Ct. 255, 258 n.4 (1955) (Harlan, J.) (noting that data came from the record "or from the research of my Law Clerk").
 36. See, e.g., *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988) (Gibson, J.) (mandating recusal of federal district judge who credited his law clerk in a footnote), *cert. denied*, 490 U.S. 1066 (1989).
 37. See, e.g., *Veras v. Strack*, 58 F. Supp. 2d 201, 201 n.1 (1999) (Baer, J.) (acknowledging student intern); *Masayesva for & o/b/o Hopi Indian Tribe v. Zah*, 816 F. Supp. 1387, 1393 n.* (D. Ariz. 1992) (Carroll, J.) (acknowledging law clerk).
 38. See generally Gerald J. Clark, *Supervising Judicial Interns: A Primer*, 36 Suffolk U. L. Rev. 681 (2003); Rebecca A. Cochran, *Judicial Externships: The Clinic Inside the Courthouse* (2d ed. 1999).
 39. See *In re Application of the Dist. Att'y of Queens County*, 132 Misc. 2d 506, 512 n.5, 505 N.Y.S.2d 293, 297 n.5 (Sup. Ct. Queens County 1986) (Rotker, J.); *People v. Sadacca*, 128 Misc. 2d 494, 501 n.3, 489 N.Y.S.2d 824, 830 n.3 (Sup. Ct. N.Y. County 1985) (Rothwax, J.). One reported opinion went even further: "The hard work, thorough research and scholarship of Edward Larsen, New York Law School Intern participating in the Richmond County Bar Association Summer Intern Program, is gratefully acknowledged and in large measure credited in the formation of this opinion. Mr. Larsen has the sincere thanks of this Court." *Wolkoff v. Church of St. Rita*, 132 Misc. 2d 464, 473, 505 N.Y.S.2d 327, 334 (Sup. Ct. Richmond County 1986) (Kuffner, J.).
 40. 825 F.2d 835 (5th Cir. 1987) (Garza, J.).
 41. *Criminal Law: The Escape*, 45 Tex. B.J. 541, 542 (Apr. 1982).
 42. 19 Kan. 260 (1878).
 43. See, e.g., *In re Judicial Disciplinary Proceedings Against Tesmer*, 219 Wis. 2d 708, 580 N.W.2d 307 (1998) (per curiam) (reprimanding judge for having law professor write 32 opinions).
 44. 43 N.Y.2d (J), (Y), 426 N.Y.S.2d 639, 648–49 (per curiam) (Opn. of Censure — Ct. on Jud. 1978).
 45. See *Sheppard v. Beerman*, 822 F. Supp. 931 (E.D.N.Y. 1993), *aff'd in part & vacated in part* by 18 F.3d 147 (2d Cir.) (Altimari, J.) (*Sheppard I*), *cert. denied*, 513 U.S. 816 (1994), *on remand to & dismissed* by 911 F. Supp. 606 (E.D.N.Y. 1995), *vacated & remanded*, 94 F.3d 823 (2d Cir. 1996) (McLaughlin, J.) (*Sheppard II*).
 46. 94 F.3d at 829.
 47. See *Sheppard v. Beerman*, 190 F. Supp. 2d 361, 362 (E.D.N.Y. 2002), *aff'd*, 317 F.3d 351 (2d Cir. 2003).
 48. *Sheppard v. Beerman*, 317 F.3d 351, 357 (2d Cir. 2003).
 49. *Sheppard v. Beerman*, 124 S. Ct. 135 (2003).
 50. *Hall*, 695 F.2d at 179.
 51. See generally John Paul Jones, *Some Ethical Considerations for Judicial Clerks*, 4 Geo. J. Legal Ethics 771 (1991).

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Advice to Law Clerks: How to Draft Your First Judicial Opinion



BY HON. GERALD LEOVITS AND LUCERO RAMIREZ HIDALGO, ESQ.*

INTRODUCTION

You just got a job clerking, interning, or externing for a judge. Among your other responsibilities will be to draft your first judicial opinion.¹ If legal writing is the hardest of the legal arts to master, judicial-opinion writing is the hardest of the legal-writing arts.² The court needs to get the decision right and for the right reasons. The task is difficult to handle without guidance.³ This article tries to demystify the task of drafting a credible, dignified, and impartial judicial opinion.

The entire adjudicative function and decision-making process is entrusted to the judge alone.⁴ Nonetheless, judges often assign their clerks to write the first drafts of their opinions.⁵ Clerks generally have good writing skills, but opinion writing requires a particular style, tone, and organization. No matter how flawless your legal analysis or how well you write, expect the judge to edit your draft until it looks and reads like the judge's own handiwork. Do not take the edits personally or let your ego interfere. Learning to emulate the judge's writing style will make you a better clerk, as you will facilitate the judge's editing task and make the editing more efficient.⁶

A judicial opinion is a "statement of reasons explaining why and how the decision was reached and providing the authorities upon which the decision relies."⁷ The primary purpose of an opinion is to give the parties the reasons that justify the court's outcome.⁸ Judicial opinions are persuasive writing.

Judges write opinions for many reasons: to help think through the issues;⁹ to explain to the parties, their counsel, and the appellate courts how and why the case was decided; to advance the law's development; to provide consistency by setting precedent;¹⁰ to show the public that judges are doing their job; to teach the law to students and the public; and to convince a possibly unfavorable audience that the judge wrote a correct decision. Opinions are the principal way judges communicate with society.¹¹ Opinions must not merely withstand criticism, they must also pro-

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mote respect for the courts and the administration of justice.

This article is divided into four sections. The first offers ideas on how to understand the case before putting pen to paper. The second discusses the drafting process. The third suggests how to review the draft to improve it. The fourth gives some pointers on what to do and what to avoid in opinion writing.

UNDERSTANDING THE CASE

The first thing to do when the judge assigns your first opinion to you is to make sure you understand the case. This implies becoming familiar with the facts, the procedural history, the issues, the standard of review, the applicable law, and how the case must be resolved. Only when you fully understand the case will you be able to start drafting.

To understand the case, review the parties' submissions and identify the issues in dispute. Sometimes the parties will have correctly identified the issues in their briefs. Other times you will find other issues that must be resolved or that the parties stated the issues incorrectly. Ascertain the issues yourself.

Once you have identified the issues, determine why the case is before the court and whether the court has jurisdiction, as "without jurisdiction to hear the case, an opinion stands on very shaky ground."¹² Next, identify the procedural posture and what relief the parties seek.

Then familiarize yourself with the relevant facts. A fact is relevant if it will affect the analysis and the decision. Do not get lost in every factual detail. Take notes or create timelines to recall the facts.

Next, determine what standard of review or burden of proof the court will need to apply to the case. At the trial level, the standard of review is the test the court uses to decide a motion. At the appellate level, the standard of review is the level of deference with which the appellate court will review the trial court's decision. At either level, the standard of review or the burden of proof is the lens through which the law applies to the facts.

Move on to the applicable law. Do not rely only on the law the parties cited. Do your own research to verify that the authorities on which you might rely are good law. It is sloppy when a lawyer cites bad law, but a judge who cites bad law will render a bad opinion.

Regardless of whether the judge has told you how to resolve the case or whether you are left on your own to suggest an outcome, review everything with an eye toward recommending and supporting a conclusion with which you are comfortable.

Once you review the facts, ascertain the standard of review, study the law and arrive at a conclusion, you should have a rough idea how the opinion should be laid out. Even so, if the opinion will be longer than two or three pages, you will not be able to draft it clearly and efficiently unless you create an outline first. Outlining is an investment in organization and readability.¹³ Outlining organizes thoughts, identifies

shortcomings and is efficient. It takes less time to outline than to repair an unclear draft later.

Once you have an outline, discuss the case with the judge or, if you are an intern or extern, with the judge's law clerk. Doing so will save time and effort. The conversation might begin like this: "This is a car-accident case. The defendant moves for summary judgment seeking dismissal. The defendant raises two points. As to the first point, the defendant argues xx, while the plaintiff argues yy. As to the second point, the defendant argues xx, while the plaintiff argues yy. I recommend that the plaintiff win because yy."

DRAFTING THE OPINION

Once you understand the case and the judge approves your outline, you are ready to start writing. It will be helpful to read some of the judge's earlier opinions to give you a template and help you mimic the judge's style and organization. Although different opinion writing styles abound¹⁴ and no two opinions are alike (unless the opinion is simple boilerplate), judges often have a traditional style that follows this order: caption, introduction, statement or findings of facts, statement of issues, legal analysis or conclusions of law, and conclusion.¹⁵

The caption identifies the case by including the court's name, the docket number, the parties' names, the judge's name, and the title of the document, such as "Order and Opinion."

The introduction or opening paragraph in a traditional opinion should tell the reader in a few seconds the essentials of the case: what the case is about; who the parties are; and, often, what the outcome is.¹⁶ If you can draft an opening paragraph that gives all this information succinctly and concisely, writing the rest of the opinion will be easier. The most common technique is to introduce the action and the litigants, write the most essential procedural history and facts, formulate the issue in general terms, and give a brief answer. The goal is to "combine the procedure, the facts, the issue and the answer to the issue in one fell swoop."¹⁷ Investing the time coming up with a good introduction will improve your opinion's readability and will be time well spent.

State the relevant facts. Get the facts directly from the record to be certain of their accuracy: "An opinion writer is entitled to the greatest leeway both in his law and in his reasoning, for they are his. But honesty allows no leeway in his statement of facts, for they are not his."¹⁸ Tell the facts impartially to show fairness in the court's consideration of the case.¹⁹ In using impartial, accurate facts, consider the losing side's facts and resolve issues of credibility. Tell your facts with specificity, not conclusions. Do not parrot the record witness by witness. Use emotional themes without writing emotionally. That involves understatement, a writing device linked not only to persuasion but also to integrity.

If possible, state the facts chronologically; the natural sequence of events will engage the reader. Only if a chronological narration is confusing — for example, if there are several claims or counterclaims — should you choose a thematic order.

Facts can also be ordered by importance, but that will make it difficult to create an easy-to-follow sequence. Do not copy a litigant's rendition of the facts. Doing so suggests a lack of independent thought and cuts against the perception of impartiality, fairness, and integrity.²⁰

Once you have stated the facts of the case, mention the issues the court will address. Judicial opinions should resolve only the claims and issues before the court. Avoid wandering off on hypotheticals or addressing issues that go beyond resolving the case. Doing so will lead readers to incorrect interpretations and unwelcome *dicta*.

When you phrase your issues, do so neutrally. The opinion will show bias if, in simply stating the issue, the court favors one side over the other. Then blend law and fact so that answering each issue resolves that part of the case. Address the issues by logical order, by a threshold issue that takes precedence over the merits, or by the order of greatest importance to the conclusion and not necessarily in the order the parties laid them out. Follow that order when you analyze the issues.

As soon as you list the issues, analyze them. Legal analysis requires applying the law to the facts. The standard of review or burden of proof will give you the framework for your analysis; state the standard or burden before you engage in a detailed analysis of each issue. A short opinion will not require headings, but longer or more intricate opinions might be more difficult to follow if topics are not divided up by headings. Consider headings, written neutrally, to keep you and the reader on track.

The complexity of the facts and the nature of the legal issues will determine the depth of the analysis of facts and law. Shape the opinion accordingly.²¹

The most important thing the opinion must do is “state plainly the rule upon which the decision proceeds. This is required in theory because the court’s function is to declare the law and in practice because the bar is entitled to know exactly what rule it can follow in advising clients and in trying cases.”²² Give the real reasons for the decision -- candor reveals integrity. Do not reveal personal thoughts in the guise of candor. An opinion resolves issues and should not be a vehicle for introspection or self-congratulation²³

Large block quotations go unread. Do not use them unless the court must interpret a statute or contract or is relying on key language from a seminal case. Instead, analyze the facts of the case, apply the law, and explain why the decision is justified. Like boilerplate opinions, which suggest that different cases were not analyzed differently, block quotations signal laziness and a lack of analysis. This is disrespectful to the case, the parties, and the judicial function.²⁴

Avoid metadiscourse. Metadiscourse, the antithesis of concision, consists of announcing what the writer plans to write. Examples of metadiscourse: “after careful consideration,” “having read all the papers, the court concludes that,” “it is well-settled that,” or “it is hornbook law that.” Opinions should get to the point and consider the facts and law carefully without saying how well they were researched or how seriously they were considered. Metadiscourse is condescending and pedantic.²⁵

Some judges like to include a closing paragraph after each issue has been analyzed. It is a final opportunity to restate and summarize the holding. If your judge follows this format, do not repeat all the information you have already given.

Conclude by stating the court's holding clearly. An opinion explains the reasons for the outcome of the case. Close the opinion with the decision.²⁶ The description that the court makes of its own holding will communicate the scope of the decision and set the opinion's precedential status.²⁷

Once you have a complete draft, be ready to start reviewing. The judge will expect your best product to start the collaborative effort of editing the opinion. Your goal is to craft a judicial opinion that is respectful, well-reasoned, factually honest and carefully written. Opinions must encourage public respect for the judiciary and acceptance of its opinions.²⁸

EDITING AND PROOFREADING

The revision process is designed to help your reader understand the opinion. Reviewing an opinion is time consuming and requires concentration, dedication, patience, and thoroughness.

To begin, make sure you are in the right state of mind, one that will allow you to evaluate your work and make edits to improve it. An effective way to get started is to put your work aside for a few hours, or even days, between drafts. Start the project early and leave time to reflect.

Editing and proofreading are the twin parts of revision. Editing corrects large-scale problems like content, organization, and reasoning. Proofreading corrects minutia like typographical errors, grammar, citations and format. Both aspects are crucial in producing a final product that is professional, easy to read and effective — an opinion worthy of having been produced by your judge.

You might want to start the editing stage by testing your draft to improve readability. You are looking to find ways to improve coherence, structure, and style. Reread the opinion a few times all the way through. This simple exercise will locate structural shortcomings or inconsistencies in style. If you find problems, create a new version of the document and come up with a better result. Having this new version allows you to return to the original version if you ever find that the new version does not improve the opinion.

If, after reading the opinion, you find no further room for improvement, ask yourself whether the introduction gives the reader a succinct understanding of the parties, why their dispute is before the court, what the relevant facts are and whether the conclusion is justified by what precedes it. Then go to the closing paragraph to make it consistent with the introduction. Make sure, also, that your statement of facts addresses all the facts that impact the conclusion and which are discussed in the legal analysis.²⁹ To justify the judge's decision and reinforce the appearance of a fair and impartial opinion, be sure that the opinion discusses the losing side's important facts and arguments.³⁰

Next, make sure that the opinion is written in a style that allows the reader to understand the opinion and which uses simple words written in plain English. Your “objective is not a literary gem but a useful precedent, and the opinion should be constructed with good words, not plastered with them.”³¹

Some divide proofreading into stages. You can read the text once to correct grammar and syntax, then to correct spelling and typographical errors, then to verify citations and quotations and finish by formatting the document correctly. As you become more experienced, you will notice your weaknesses and come up with your own ways to edit and proofread, perhaps by focusing on small things first, perhaps by focusing on large things first.

If a concept can characterize the reviewing stage, it would be thoroughness. Review your work with attention to detail. A judicial opinion must not look unprofessional.

The opinion must be clear, concise, and precise. Do not overwrite or draft treatise-like opinions — something done by inexperienced law clerks who lack the confidence to distinguish between the important and the trivial - between the settled and the novel. If you understand the case, you will know what the relevant facts and law are and you will not include irrelevant information or discuss basic concepts ad nauseam. A short opinion that cuts to the chase and provides only the necessary support for the conclusion is more easily understood.³²

Decisions, orders, decrees, and judgments must be understood if they are to be obeyed. You achieve this by using simple words that convey the meaning you desire; short sentences together with transitions; paragraphs that address one subject at a time; and only the words needed to convey each thought. Be sure to review each paragraph individually and in context. Reading the text aloud or reading it backwards can be helpful at this stage as well as spelling and grammar checkers.

Once you finish your review, do not ask someone outside the court system to critique your draft. Another pair of eyes will offer insights on how to improve it, but confidentiality concerns require that the opinion remain in chambers, never to be discussed elsewhere. No one but a judge, a member of the judge’s staff or law clerk from the court’s pool may draft or review an opinion.³³

Once you have come up with your best product, hand in your draft and be prepared to continue working on it through a sequence of edits and redrafts until the judge approves the opinion. Take the editing as a learning experience and as a way to improve the opinion, not as a personal affront. Internalize the view that decision-making remains exclusively with the judge. The judge alone is responsible for its content. Thus, the judge should not give you credit for your assistance. That could lead a reader to question whether the judge or someone else decided the case.³⁴

There are many lists of do’s and don’ts in opinion writing. For reference, we include some of the more important.

USEFUL DO'S AND DON'TS

Consider these suggestions when writing judicial opinions:

1. Avoid legalese like “thereinafter,” “hereinafter,” “said,” “such,” and “before mentioned.” Write in plain English.
2. Do not use Latin words or phrases if you have an English equivalent.
3. Use common Anglo Saxon words. Use short synonyms for long words.
4. Never use sexist language. Gender-neutral opinions project fairness.
5. Limit citations to the necessary sources. Cite only what you use and use only what you cite.
6. Add pinpoint or jump citations for every case or secondary authority you cite.
7. Avoid string citations if possible.
8. Avoid footnotes except for citations or collateral thoughts.
9. Never use sarcasm, humor or condescending language.³⁵ Avoid references to popular culture.³⁶
10. Avoid personal attacks or the appearance of bias or impropriety.
11. Do not be defensive.
12. Do not address everything. Discuss only the relevant facts and law.
13. Address arguments, not parties; and address parties, not their lawyers.
14. Refer to the parties consistently throughout the opinion.
15. Use Bluebook citations if you are a federal judge’s clerk, intern, or extern. Use *New York Official Reports Style Manual*, nicknamed the “Tanbook,”³⁷ if you work for a New York State judge.
16. Avoid unnecessary detail when discussing facts and law.
17. Be honest and accurate in the facts and law. Understate. Never exaggerate.
18. Write in the positive, not in the negative.
19. Eliminate the passive voice and nominalizations.
20. Be organized: Say it once, all in one place.
21. Avoid italics, underlining or quotation marks to emphasize.
22. Make your opinion easy to read.
23. Stress content, not style.
24. Be definitive, not cowardly or tentative.
25. Decide the case quickly.

CONCLUSION

We hope these notes are helpful for your opinion writing. As with everything else, you will improve over time and with experience. After working collaboratively and reediting your draft with your judge, your opinions will acquire a form and content of which you will be proud. Good luck, and enjoy your progress.

Endnotes

¹ Other writing tasks include bench memorandums. For a guide on how to write bench memorandums, see ALVIN B. RUBIN & LAURA B. BARTELL, *LAW CLERK HANDBOOK: A HANDBOOK FOR LAW CLERKS TO FEDERAL JUDGES* 143-44 (Fed. Jud. Ctr. rev. ed. 1989).

² RUGGERO J. ALDISERT, *OPINION WRITING* 22 (1990). Judge Aldisert's text is expected to be released soon in a second edition.

³ See Gerald J. Clark, *Supervising Judicial Interns: A Primer*, 36 *SUFFOLK U. L. REV.* 681 (2003) (describing educational value of judicial internships).

⁴ Judge Aldisert gives this advice to his clerks: "You were not selected by me to be a 'yes man.' . . . [Yet] when the decision is in, that is it." RUGGERO J. ALDISERT, *Duties of Law Clerks*, 26 *VAND. L. REV.* 1251, 1256-57 (1973).

⁵ Jeffrey O. Cooper & Douglas A. Bermann, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 *BROOKLYN L. REV.* 685, 697 (2001). For more on using law clerks to help draft opinions, see David Crump, *How Judges Use Their Law Clerks*, 58 *N.Y. ST. B.J.* 43 (1986); Sean Donahue, *Behind the Pillars of Justice: Remarks on Law Clerks*, 3 *LONG TERM VIEW* 77 (1995); Nicholas Johnson, *What DO Law Clerks Do?*, 22 *TEX B.J.* 229 (1959); Kermit Lipez, *Judges and Their Law Clerks: Some Reflections*, 22 *ME. B.J.* 112 (2007); J. Daniel Mahoney, *Law Clerks: For Better or Worse*, 54 *BROOKLYN L. REV.* 321 (1988); George Rose Smith, *A Primer of Opinion Writing for Law Clerks*, 26 *VAND. L. REV.* 1203 (1973). A survey conducted to determine the percentage of federal district law clerks who draft judicial opinions showed that 303 of the 311 respondent federal judges assign that responsibility to their law clerks. Todd C. Peppers, Giles, Micheal W. and Tainer-Parkins, Bridget, *The Hiring and Utilization of Federal District Court Law Clerks* 17 (Oct. 2007). Available at SSRN: <http://ssrn.com/abstract=1022623> (last visited Mar. 31, 2009).

⁶ Gerald Lebovits, *Judges' Clerks Play Varied Roles in the Opinion Drafting Process*, 76 *N.Y. ST. B.J.* 34, 34 (July/Aug. 2004).

⁷ Jennifer Sheppard, *The "Write" Way: A Judicial Clerk's Guide to Writing for the Court*, 38 *U. BALT. L. REV.* 73, 75 (2008).

⁸ Opinion Writing, *supra* note 2, at 22.

⁹ BRYAN A. GARNER et al., *THE REDBOOK: A MANUAL ON LEGAL STYLE* § 23.1(a), at 435 (2d ed. 2006).

¹⁰ John B. Nesbitt, *The Role of Trial Court Opinions in the Judicial Process*, 75 *N.Y. ST. B.J.* 39, 40 (Sept. 2003).

¹¹ Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 *COLUM. L. REV.* 810, 812 (1961).

¹² Aldisert, Ruggero J., Rasch, Mehan and Bartlett, Matthew P., *Opinion Writing and Opinion Readers* 36 (Mar. 16, 2009). Available at SSRN: <http://ssrn.com/abstract=1361161> (last visited Apr. 2, 2009).

¹³ Richard B. Klein, *Opinion Writing Assistance Involving Law Clerks: What I Tell Them*, 34 *JUDGES' J.* 33, 35 (1995).

¹⁴ For a discussion of different opinion writing styles, see Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 *U. CHI. L. REV.* 1421 (1995).

¹⁵ Different authors use different names to refer to an opinion's substantive parts. Judge Aldisert calls them the opening paragraph, the summary of issues discussed, the material or adjudicative facts, the litigants' analysis of the issues, and the conclusion. See *Opinion Writing and Opinion Readers*, *supra* note 12, at 32.

¹⁶ Gerald Lebovits, *Advanced Judicial Opinion Writing: A Handbook for New York State Trial and Appellate Courts* 54 (N.Y. St. Unif. Ct. Sys. 7.4 ed. Dec. 2004).

¹⁷ Sheppard, *supra* note 7, at 75.

¹⁸ Moses Lasky, *A Return to the Observatory Below the Bench*, 19 *SW. L.J.* 679, 689 (1965).

¹⁹ Am. Bar. Ass'n Appellate Judges Conference, *Judicial Opinion Writing Manual* 5 (1991).

²⁰ Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 *GEO. J.*

LEGAL ETHICS 237, 308 (2008).

²¹ *Judicial Writing Manual* 1 (1991).

²² John H. Wigmore, *Evidence in Trials at Common Law* § 8b, at 624 (Peter Tillers rev. ed., 1983).

²³ Gerald Lebovits, The Legal Writer, *Ethical Judicial Writing — Part I*, 79 N.Y. St. B.J. 64, 52 (Nov./Dec. 2007).

²⁴ Gerald Lebovits, *Ethical Judicial Writing — Part III*, 79 N.Y. St. B.J. 64, 56 (Feb. 2007).

²⁵ *Id.*

²⁶ Joyce J. George, *JUDICIAL OPINION WRITING HANDBOOK* 22 (4th ed. 2000).

²⁷ Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1398 (1995).

²⁸ Nancy A. Wanderer, *Writing Better Opinions: Communicating With Candor, Clarity, and Style*, 54 ME. L. REV. 47, 67 (2002).

²⁹ TOM GOLDSTEIN & JETHRO K. LIEBERMAN, *THE LAWYER'S GUIDE TO WRITING WELL* 155 (2d ed. 2002).

³⁰ Gerald Lebovits, *Ethical Judicial Writing — Part II*, 79 N.Y. St. B.J. 64, 50 (Jan. 2007).

³¹ BERNARD E. WITKIN, *MANUAL ON APPELLATE COURT OPINIONS* § 103, at 204-05 (1977).

³² Judith S. Kaye, *Judges As Wordsmiths*, 69 N.Y. St. B.J. 10, 11 (Nov. 1997).

³³ *Matter of Fuchsberg*, 426 N.Y.S.2d 639, 648 (N.Y. Ct. Jud. 1978) (*per curiam*); *Matter of Judicial Disciplinary Proceedings Against Tesmer*, 580 N.W.2d 307, 309 (Wis. 1998) (*per curiam*).

³⁴ *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524-25 (11th Cir. 1988).

³⁵ For more on the impropriety of using humor, see George Rose Smith, *A Primer of Opinion Writing for Four New Judges*, 21 ARK. L. REV. 197, 210 (1967); for sarcasm, see Robert A. Leflar, *Quality in Judicial Opinions*, 3 PACE L. REV. 579, 584 (1983).

³⁶ Witte, Ryan Benjamin, *The Judge as an Author/The Author as a Judge* (February 9, 2009). Available at SSRN: <http://ssrn.com/abstract=1339943> (last visited Mar. 31, 2009).

³⁷ The Tanbook is available online. See http://www.courts.state.ny.us/reporter/New_Styman.htm (last visited Apr. 1, 2008).

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What Can a Competitor Do?

*The Dividing Line Between Permissible
Competitive Behavior and Tortious
Interference With Contract*

by Glen Banks

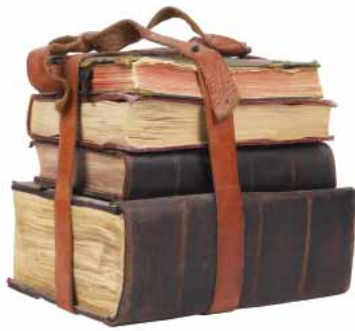
Also in this Issue

Non-compete Agreements
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Going Beyond the Will

Derivative Standing for
New York LLC Members

A Defense Lawyer's Guide
to No-Fault Litigation in
New York State



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Tanbook, Bluebook, and ALWD Citations: A 2007 Update

Citing is power. Lawyers cite not merely to help their readers find the law. They cite to attribute and support. Good citing is the mark of a good lawyer. Good citing makes legal writing concise and honest. Good citing informs and persuades. Good citing impresses. Citing well isn't just a matter of following rules. It's also a matter of knowing your audience and following the right rules.

New Yorkers are rich with uniform systems of citation. But this wealth makes New York citing systemically un-uniform.

New York lawyers have several citing options.¹ The leader is The Bluebook: A Uniform System of Citation.² Established in 1926, The Bluebook is in its eighteenth (2005) edition. Less used, but gaining in popularity in the law schools, is a Bluebook competitor, the ALWD Citation Manual: A Professional System of Citation.³ ALWD first appeared in 2000. It's already in its third (2006) edition.

This month — October 2007 — New Yorkers will have a new-and-improved option: The 2007 New York Law Reports Style Manual, Official Edition, commonly called the Tanbook,⁴ initially published in 1956 and currently published by Thomson West. The 2007 Tanbook will be available for free online this month in PDF and HTML. Go to “<http://www.nycourts.gov/reporter>” and click the “Style Manual” link on the left.

The 2007 Tanbook is the best option for New York practitioners. It's also the only option for New York practitioners.

The Official Style Manual

The Tanbook offers rules and suggestions on citing cases, statutes, rules, regulations, and secondary authority like law journals and treatises. It guides readers on style, usage, quoting, capitalizing, punctuating, and word choice. In the 2007 version, the rules and suggestions go on for 205 pages.

Tanbook citing is immediately recognizable because citations are surrounded by parentheses, supporting information is added in brackets, and periods — like those after the “v” in “versus” — are omitted in key places. Here are three examples from the 2007 Tanbook: Case law: (*Matter of Ganley v Giuliani*, 253 AD2d 579, 580 [1st Dept 1998], *revd* 94 NY2d 207 [1999].) Statute: (Penal Law § 125.20 [4].) Secondary authority: (The Bluebook: A Uniform System of Citation [Colum L Rev Assn et al. eds, 18th ed 2005].).

The Tanbook is prepared by the New York State Law Reporting Bureau (LRB),⁵ an arm of the New York Court of Appeals. The LRB's prime responsibility is to collate, select, and edit judicial opinions for publication online⁶ and in New York's Official Reports: the Miscellaneous (Misc.), Appellate Division (A.D.), and New York (N.Y.) (Court of Appeals) reports. Opinions printed in the Official Reports conform to Tanbook citing. Readers can always find examples of perfect Tanbook citing by looking at a recent volume of the Official Reports, or even by going online and skimming a few cases.

The citation schemes for New York opinions published unofficially are Bluebook-based but Bluebook inaccurate. Thomson West's N.Y.S.2d and

N.E.2d use The Bluebook, but spacing and other significant details differ from The Bluebook's. The New York Law Journal uses whatever system the author uses; it re-prints the opinion as submitted. The Law Journal will simply make some minor changes like adding periods after a “v” for “versus” in a case citation if the Tanbook-compliant author omits the period.

New York judges who want to publish their opinions in the Official Reports must cite Tanbook-style. New York lawyers, at their best when they make it easy for judges to rule for their clients, should cite Tanbook-style. As the 2007 Tanbook modestly explains, “Although not binding on them, many lawyers find the Manual useful in preparing papers for submission to New York courts.”⁷ Beyond using the Tanbook to help judges, lawyers should use the Tanbook because it's always accurate. The LRB knows New York legal research — New York cases, statutes, and secondary authority — better than anyone.

The Tanbook shines by itself and by comparison. The Bluebook is always wrong on New York sources. New York practitioners who rely on The Bluebook do so at their peril. And ALWD makes no pretense about whether it applies to New Yorkers. ALWD itself tells its New York readers to cite Tanbook-style.⁸

The Bluebook

The Bluebook is right for national and international sources. It's right for law-review and law-journal editors and readers. It's right for federal judges and practitioners. It's wrong for law-

CONTINUED ON PAGE 52

yers who write to or for New York State courts.

The Bluebook is wrong about official citations. The Bluebook tells users to cite the unofficial N.E.2d for Court of Appeals cases instead of the official N.Y.3d. It also tells users to cite the unofficial N.Y.S.2d instead of the official A.D.3d or Misc. 3d for decisions from other courts. An example from The Bluebook is *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928).⁹ Why The Bluebook favors the unofficial

Tanbook explains, “Parallel unofficial citations are not used for officially reported New York State cases.”¹⁵

The Bluebook is wrong, moreover, in directing writers to cite New York’s intermediate courts’ departments or districts only when that information “is of particular relevance.”¹⁶ The Bluebook cites as examples *Schiffman v. Corsi*, 50 N.Y.S.2d 897 (Sup. Ct. 1944), and *Schiffman v. Corsi*, 50 N.Y.S.2d 897 (Sup. Ct. N.Y. County 1944).¹⁷ Both the rule and the examples are wrong. Legal writers should always give the

later, The Bluebook contradicts itself — it gives a consecutively paginated way to cite the Law Journal (124 N.Y. L.J. 1221 (1950)) that will allow no one to find the reference.¹⁹

The New York Rules of Citation

The only way for New York lawyers to use The Bluebook is to fix it with the New York Rules of Citation, published by St. John’s University School of Law. Now in its fifth edition, revised in late 2005 to incorporate The Bluebook’s eighteenth-edition revisions, the Rules

New York judges who want to publish their opinions in the Official Reports must cite Tanbook-style.

reports is a mystery. Unofficial reports are often inaccurate, and New York requires official citations for decisions appearing in the Official Reports and in practitioners’ appellate papers.¹⁰

The Bluebook is also wrong about parallel citations and what New York’s “local” rules demand. The Bluebook properly directs that “[i]n documents submitted to state courts, all case citations should be to the reporters required by local rules.”¹¹ The Bluebook correctly refers its readers to Table BT.2, which commendably cites the Tanbook, the CPLR, and Court of Appeals and Appellate Division rules as the sources of New York’s local rules.¹² But The Bluebook gets it wrong from there. The Bluebook explains that “[l]ocal rules often require citation to both the official state reporter and the unofficial regional and/or state-specific reporter”¹³ and cites *Kenford Co. v. County of Erie*, 73 N.Y.2d 312, 537 N.E.2d 176, 540 N.Y.S.2d 1 (1989),¹⁴ as an example of the supposed New York local rule requiring parallel citations.

That rule doesn’t exist. According to the CPLR and New York court rules, parallel citations to New York cases aren’t required for New York lawyers. Nor are they helpful to New York judges, who rely, and properly so, on official citations only. As the 2007

department or district, for intermediate appellate courts and for trial courts, to tell readers whether the authority is binding or persuasive and, if persuasive, how persuasive. Additionally, The Bluebook’s citation to *Schiffman* isn’t from an intermediate appellate court, like New York’s Appellate Division or Appellate Term. It’s from a court of first instance: Supreme Court, Special Term. And *Schiffman* really does have intermediate appellate history. The Bluebook should have given this citation: *In re Schiffman v. Corsi*, 182 Misc. 498, 50 N.Y.S.2d 897 (Sup. Ct. N.Y. County), *aff’d mem. sub nom. In re Schiffman v. Murphy*, 268 App. Div. 765, 50 N.Y.S.2d 132 (1st Dep’t 1944), *rev’d sub nom. Schiffman v. Corsi*, 294 N.Y. 305, 62 N.E. 81, *cert. denied*, 326 U.S. 744 (1945).

The Bluebook continues to be wrong about the New York Law Journal. The Bluebook offers two ways to cite the Law Journal. Both are wrong. In one place, The Bluebook tells us that the Law Journal publishes opinions from the federal district court in Massachusetts and that dates of decision, in addition to publication dates, are available for citing. Neither is true. The Bluebook example is *Charlesworth v. Mack*, N.Y. L.J., Dec. 5, 1990, at 1 (D. Mass. Dec. 4, 1990).¹⁸ Sixty-one pages

of Citation explains The Bluebook’s deficiencies and tells lawyers, law students, and law-journal editors how to correct them. If you must use The Bluebook, combine it with the Rules of Citation. The Rules of Citation is prepared by St. John’s law librarian William H. Manz, who also wrote Gibson’s New York Legal Research Guide (3d ed. 2004), which dedicates many pages to comparing Bluebook, ALWD, and Tanbook citing.

ALWD

The ALWD citation manual is designed by legal-writing experts to substitute for the inordinately complex Bluebook. ALWD has succeeded in its mission: It’s much easier to use than The Bluebook. For example, it eliminates the unnecessary distinction between citing for law reviews and law journals and citing in practitioners’ legal documents.

Experts doubt whether ALWD will ever rival The Bluebook in popularity. The subtle distinctions in citing between ALWD and The Bluebook are noticeable to experienced practitioners and recent graduates from law review and moot court. They will assume that those who cite ALWD-style don’t know how to use The Bluebook.

In terms of New York citations, ALWD, in its third edition, is a vastly

improved product. In its first edition, every ALWD example for New York law was wrong. ALWD now refers its New York readers to the Tanbook.²⁰ For its national readers, ALWD still makes too many mistakes about New York. In one place, ALWD, like The Bluebook, uses unofficial citations instead of official citations and tells writers to add “App. Div.,” even though all New Yorkers know that “2d Dept.” means the Appellate Division: 634 N.Y.S.2d 740 (App. Div. 2d Dept. 1995), *aff’d*, 679 N.E.2d 1035 (N.Y. 1997).²¹ Later, ALWD, in its parallel-citing section, omits the “App. Div.” reference: *People v. Glanda*, 18 A.D.3d 956, 794 N.Y.S.2d 712 (3d Dept. 2005).²²

ALWD also errs the one time it gives an example of a rule. Calling New York’s ethics rules a “uniform law,” ALWD offers this citation: “N.Y. Code of Prof. Resp. DR 4-101(c)(2) (1999). [New York version of the Model Code of Professional Responsibility DR 4-101(c)(2)].”²³ This is all wrong. New York has not adopted the Model Code. And if one cites DR 4-101(c)(2), one must also add its 22 NYCRR parallel citation, because the Code of Professional Responsibility is binding only to the extent that the departments of the Appellate Division have adopted it. The correct way to cite the rule according to the Tanbook: (Code of Professional Responsibility DR 4-101 [c] [2] [22 NYCRR 1200.19 (c) (2)]).

2007 Tanbook Revisions

The 2007 Tanbook re-works the 2002 edition, which itself was updated by some amendments in 2004.²⁴ It’s the best Tanbook yet. In her foreword to the Tanbook’s 2002 edition, Chief Judge Judith S. Kaye wrote that the 2002 changes, encouraging “clearer, cleaner, more readable” legal writing, “ma[de] my heart jump with joy.”²⁵ The Chief Judge’s 2007 foreword explains that the current revision — she calls it “updating” — “is more akin to filling crevices than bridging chasms Always the movement, happily, is toward more readable text.”

Revisions for 2007 include rules requiring writers to add years of decision to case-law authority, eliminating “supra” usage, and new rules aiding writers’ use of electronic formats and making it easier to quote. The 2007 Tanbook offers new abbreviations, fewer capitalizations, and excellent guidance on gender-neutral writing and writing in plain English, such as avoiding Latinisms and legalisms. It also offers advice on reducing excessive hyphenation and italics. The 2007 revisions incorporate revisions from 2004, including eliminating asterisks “* * *” in favor of ellipses “. . .” and forbidding commas after signals like “see” and “contra.”

The 2007 Tanbook still includes two relics: Citations surrounded by disconcerting parentheses and brackets. The original view was that citations should be placed into but set off from the text. Parentheses and brackets satisfied that mandate. Today they are an anachronism, included, perhaps, only because the LRB must change citation usage incrementally, not wholesale. Another problem with the Tanbook is that it gives writers too much discretion in citing cases and secondary authority. Writers and readers want and need to be told what to do. As lawyers, we are confused when we have too many choices.²⁶ That discretion includes whether a citation will be part of the sentence or a separate sentence.

Despite the Tanbook’s relics and excessive permissiveness, New York lawyers, trained in The Bluebook and, increasingly, ALWD, would be smart to keep the 2007 Tanbook on their desks. The 2007 Tanbook is user-friendly in organization. It is accurate and comprehensive in legal research. It is progressive and informative on usage and style. It’s the best of the options by far. It’s for New Yorkers, by New Yorkers.

Some say you get what you pay for. Not so the 2007 Tanbook, available for free online. Other than the LRB’s free online case-law publication service, it’s the best free legal resource in New York.

New York lawyers,
at their best when
they make it easy for
judges to rule for their
clients, should cite
Tanbook-style.

In the next issue, the Legal Writer will continue with its series on Legal Writing Do’s, Don’ts and Maybes. ■

1. Compounding the problem is that many publications use their own citation systems. These publications include all State Bar publications, such as the *Journal*. State Bar publications use their own Bluebook variant. See http://www.nysba.org/Content/NavigationMenu/Publications19/Bar_Journal/Article_Submission22/Article_Submission.htm (last visited Aug. 14, 2007). Everyone, it seems, wants to set a different uniform citation method, including the American Association of Law Libraries, which has developed its Universal Citation Guide for courts designing medium-neutral citation schemes, or citation schemes that cite print and electronic sources the same way and which cite to paragraphs, not pages. See <http://www.aallnet.org/committee/citation/ucg/index.html> (last visited Aug. 14, 2007) (offering prior Universal Citation Guide version 2.1).

2. See <http://www.legalbluebook.com> (last visited Aug. 14, 2007).

3. ALWD is so-named because it’s written by the Association of Legal Writing Directors and Darby Dickerson, Stetson University College of Law’s dean. See http://www.alwd.org/publications/citation_manual.html (last visited Aug. 14, 2007). ALWD is published by Aspen Publishers, which has a helpful Web site that offers charts, appendixes, and updates. See http://www.alwdmanual.com/books/dickerson_alwd/default.asp (last visited Aug. 14, 2007).

4. Competing for the moniker “Tanbook” is LexisNexis’s New York Landlord-Tenant Law (Tanbook), currently in its 2007 edition.

5. For the Law Reporting Bureau’s Web site, go to <http://www.nycourts.gov/reporter> (last visited Aug. 14, 2007). The LRB’s editors who prepared the 2007 Tanbook are Gary Spivey, the State Reporter, and Charles A. Ashe, William J. Hooks, Michael Moran, Katherine D. LaBoda, Chilton B. Latham, Kathleen B. Hughes, and Cynthia A. McCormick.

6. See <http://www.nycourts.gov/reporter/Decisions.htm> (last visited Aug. 14, 2007).

7. Tanbook Preface at v.

8. ALWD Appendix 2, at 425 (citing 2002 Tanbook and quoting Gerald Lebovits, *New Edition of State’s “Tanbook” Implements Extensive Revisions in Quest for Greater Clarity*, 74 N.Y. St. B.J. 8 (Mar./Apr. 2002)).

9. Bluebook Rule B5.1.5, at 11. This cite also contradicts Bluebook rules. “Railroad” must be abbreviated as “R.R.” Bluebook Rule T.6, at 336.

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CONTINUED FROM PAGE 53

10. See, e.g., *Disenhouse Assocs. v. Mazzaferro*, 135 Misc. 2d 1135, 1137 n.*, 519 N.Y.S.2d 119, 120 n.* (Civ. Ct. N.Y. County 1987) (urging attorneys not to cite “the unofficial reports only”) (citing CPLR 5529(e), which provides that in their appellate briefs, attorneys who cite New York cases must cite the Official Reports, if available); *People v. Matera*, 52 Misc. 2d 674, 687, 276 N.Y.S.2d 776, 789 (Sup. Ct. Queens County 1967) (“[W]e are required, in the rendition of our opinions, to cite New York decisions from the official reports, if any, as the counsel themselves are bound to do in their briefs on appeal.”).

- 11. Bluebook Rule B5.1.3, at 9 (bold omitted).
- 12. *Id.* Rule BT.2, at 38.
- 13. *Id.* Rule B5.1.3, at 9 (emphasis in original).
- 14. *Id.*
- 15. Tanbook Rule 2.2 (b)(1), at 14.
- 16. Bluebook Rule 10.4(b), at 90.
- 17. *Id.*
- 18. *Id.* Rule 10.1, at 80.

- 19. *Id.* Rule 16.5(c), at 141.
- 20. See *supra* text and accompanying note 8.
- 21. ALWD Rule 11.3(g), at 56.
- 22. *Id.* Rule 12.4(d)(3)(g), at 82.
- 23. *Id.* Rule 27.4(f), at 243.
- 24. The 2002 Tanbook, accessible in HTML and PDF versions, is found at http://www.courts.state.ny.us/reporter/Styman_Menu.htm (last visited Aug. 14, 2007). It is reviewed and compared to The Bluebook (17th ed. 2000) and ALWD (1st ed. 2000) in Lebovits, *supra* note 8.
- 25. Tanbook Foreword at iii.
- 26. An earlier Bluebook competitor, The University of Chicago’s Maroonbook, failed because it offered too much discretion. Bryan A. Garner, *Practice Strategies: Legal Writing*, available at <http://www.abanet.org/genpractice/newlawyer/2003/nov/strategies2.html> (last visited Aug. 17, 2007) (discussing The Bluebook, ALWD, New York’s Tanbook, and other citation schemes). The Tanbook’s built-in audience and team of experts who keep it current will assure its success.



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AS OF 8/17/07	66,757
TOTAL LAW STUDENT MEMBERS	
AS OF 8/17/07	1,874
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8/17/07	68,631

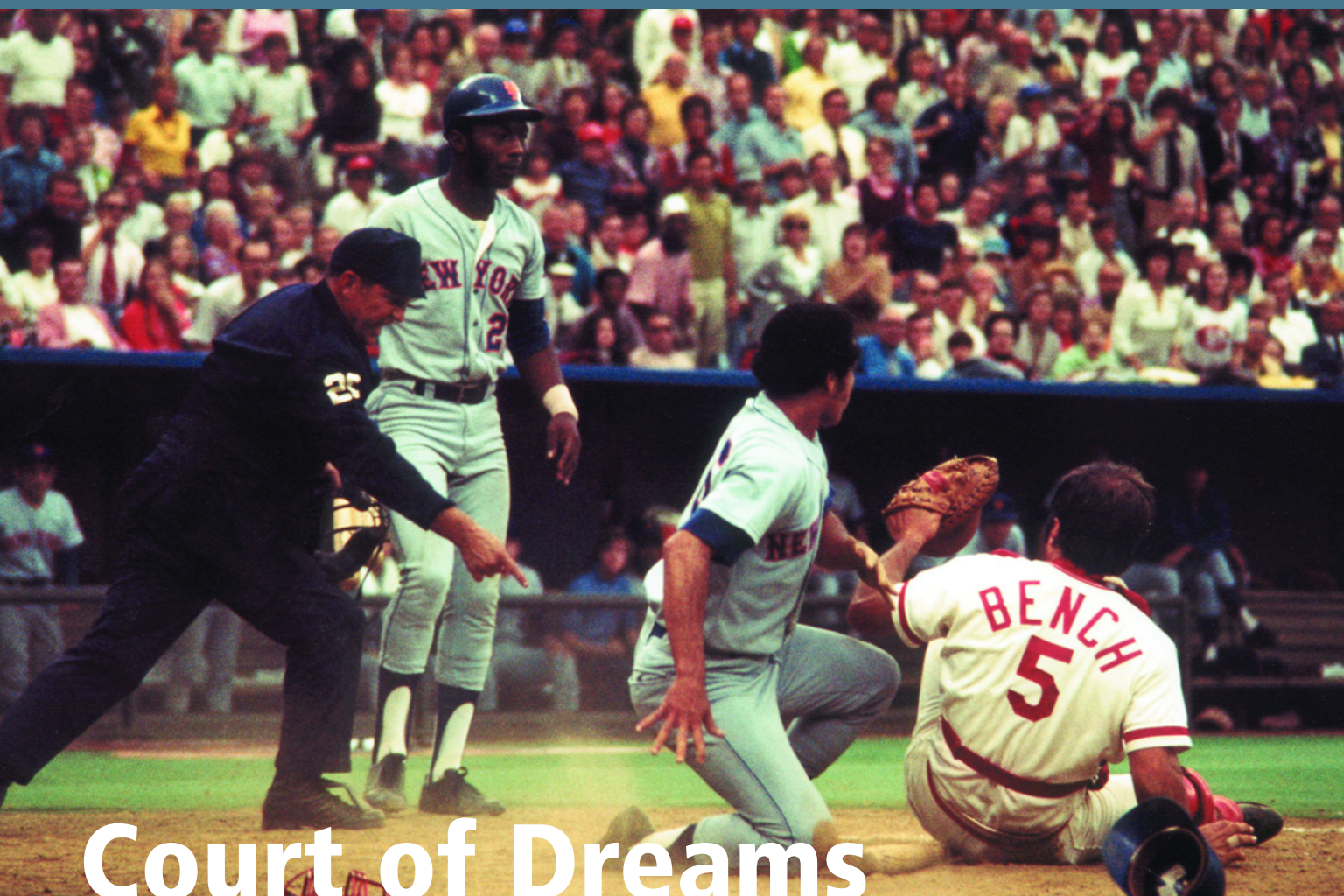
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MARCH/APRIL 2005

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NEW YORK STATE BAR ASSOCIATION

Journal



Court of Dreams

An improbable victory in the national pastime, high drama in the executive branch, and passing notes behind the high court bench.

Skip Card

Also in this Issue

More on *Daubert*

The Third Series: A Review

Determining Legislative Intent

Mortgage Satisfaction

Create a Case Chronology



GERALD LEBOVITS is a judge of the New York City Civil Court, Housing Part, in Manhattan, and an adjunct professor at New York Law School. He graduated from the Ottawa, Tulane, and New York University Law Schools. Judge Lebovits thanks court attorney Justin J. Campoli and New York Law School student Ryan O. Miller for their assistance.

The Third Series

A Review

By **Gerald Lebovits**

While the Boston Red Sox were preparing to crush the New York Yankees on the way to Boston's first World Series win in 86 years, a group of lawyers in Albany were preparing for what, to New York lawyers, will surely be a more fortunate and significant series: The Third Series.

The year 2004 marked the Bicentennial of official New York law reporting. The Official Reports have evolved over the past 200 years: from 1804, when the first Official Reports were published, to 1847, when the First Series of the current Official Reports was published, to 2004, when New York State's Law Reporting Bureau (LRB) began to compile the Third Series of Official Law Reports. The Third Series is the most comprehensive revision of New York's Official Reports since the First Series was published.

From Earliest Times

Reporting cases is older than the common law,¹ with a history of twists and turns.² While Moses may be considered the first reporter,³ Sir Edward Coke created the modern case reporter.⁴

Compiling and organizing New York's case law before 1804 consisted of practitioners and judges relying on their memory of case law.⁵ James Kent, best known as Chancellor of New York's Court of Chancery but who also served as Chief Justice of New York's Supreme Court of Judicature, began the push for judicial reporting. He encouraged judges to transcribe their decisions and to rely on written decisions. Before 1804, judges rarely wrote opinions. American and British judges delivered their judgments orally.⁶

Starting in 1804, the Legislature empowered the Court for the Trial of Impeachments and the Correction of Errors, the state's highest court, and the Supreme Court of Judicature to compile and publish nominative reports of decisions. Nominative reports were collections of decisions a reporter would collect, edit, and publish in volumes named after himself. George Caines published a nominative report entitled *Caines' Reports* from 1803 to 1805, while serving as New York's first reporter of decisions. William Johnson, who succeeded Caines, published a nominative report entitled *Johnson's Reports*, which were noted for their thoroughness and accuracy and set a high standard for official reporting in New York.⁷ Some reports still name the reporter on the bound volume's spine, and New York is an example. But nominative reports no longer exist.

In 1846, the Legislature abolished the Court for the Trial of Impeachments and the Correction of Errors and created the Court of Appeals.⁸ That same year, the Legislature also authorized the publication of officially reported judicial opinions in the *New York Reports* supervised by a reporter of decisions known as the State Reporter, appointed by the Executive Branch.⁹

Since 1804, the reporter of decisions has overseen the organization and publication of the state's judicial work product. Twenty-five men have served as State Reporter.¹⁰ Many went on to other achievements. Some became influential judges, including Hiram Denio (1845–48) (Chief Judge, Court of Appeals), George F. Comstock (1847–51) (Chief Judge, Court of Appeals), Samuel Hand (1869–71) (Judge, Court of Appeals, and

father of Judge Learned Hand), and Edward J. Dimock (1943–45) (U.S. District Court, S.D.N.Y.). Other State Reporters held important government positions, including Francis Kernan (1854–56) (U.S. Senator for New York) and Henry R. Seldon (1851–54) (Lieutenant Governor of New York). Still other State Reporters, like J. Newton Fiero (1909–31) (New York State Bar Association president), held leadership positions in the bar.

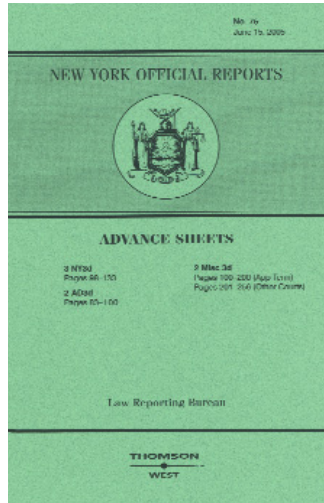
The Official Reports First Series served as New York’s Official Reports from 1847 to 1955 and consisted of 833 volumes. During those 108 years, the courts and law reporting experienced important innovations. In 1894, the Fourth State Constitution created the Appellate Division and the Appellate Term. In response to these new courts, the Legislature introduced the Appellate Division Reports and the Miscellaneous Reports to publish the new courts’ decisions. The Miscellaneous Reports were also intended to include selected opinions of non-appellate courts. In 1894, the Legislature authorized the State Reporter to begin compiling and distributing advance sheets to tell lawyers about decisions before a full, bound Official Reports volume was published.

In 1925, a New York constitutional amendment allowed the Legislature to create the LRB. Yet, for 13 more years, the responsibility to publish the Official Reports continued to be divided among the offices of the State Reporter, the State Supreme Court Reporter, and the Miscellaneous Reporter. In 1938 the Legislature finally established the LRB,¹¹ headed by a State Reporter appointed by the Court of Appeals.¹² The LRB was and continues to be charged with compiling, editing, and organizing for publication all decisions of the Court of Appeals and the Appellate Division and selected opinions from other courts of record.¹³

The New York Official Law Reports Third Series is the most comprehensive revision of New York’s Official Reports since the First Series was first published in 1847.

The Second Series survived for almost 50 years, from 1956 to 2003, and consists of 605 volumes. The Second Series was published when legal research transformed

from storing opinions on microfiche, to transferring them to CD-ROM technology, and finally to creating searchable Internet databases. But the Second Series could not fully integrate the new methods of legal research that practitioners now use every day. The Court of Appeals therefore approved in April 2003 the publication of a Third Series to address advances in technology and changes in the law. The LRB started publishing the Third Series in January 2004.



The Advance Sheets.

In the federal system, the only official reporter is the United States (U.S.) Reports.¹⁴ The Thomson West Publishing Company (West) publishes the Supreme Court (S. Ct.) Reports and collects lower-court opinions in unofficial reporters like the Federal Supplement 2d and the Federal Reporter 3d, respectively for District Court and Court of Appeals cases.¹⁵ In the state system, 28 states and the territory of Puerto Rico have official reporters of judicial opinions.¹⁶ Rather than favor a particular unofficial reporter over another unofficial

reporter, eight states have adopted a “vendor neutral” or “medium neutral” citation format for cases in the public domain.¹⁷ Mississippi’s public-domain format, adopted for cases decided after July 1, 1997, is cited like this, according to the Bluebook: *Pro-Choice Miss. v. Fordice*, 95-CA-00960-SCT (Miss. 1998).¹⁸

Operation of the Law Reporting Bureau

New York has long had an interest in officially reporting, publishing, and distributing its courts’ opinions, as the Court of Appeals has noted.¹⁹ The LRB’s function is to make this happen.

Since the Legislature authorized the LRB in 1925 and funded it in 1938, the LRB has served as the liaison between New York’s judiciary and the public for New York case law.²⁰ Currently, the LRB operates under the direction and control of a State Reporter and is supervised by the Court of Appeals, which has the power to appoint and remove the State Reporter.²¹ After the Court of Appeals or the Appellate Division issues an opinion, it is submitted to the LRB. Before the opinion is published in the Official Reports, the LRB’s editors perform a process that law review editors call cite-and-substance checking. They verify every citation to assure support for the cited proposition. They also assure that every quotation is accurate, that grammar and style are proper and clear, and that the citations conform to the Official Edition New York Law Reports Style Manual (Tanbook), which governs the format of opinions published in the Official Reports.²²

The LRB’s editors also check Court of Appeals and Appellate Division opinions for factual errors and for dis-

crepancies between the opinion and the record by comparing the appellate record and briefs with the court's opinion. They further verify the parties' names and designations as defendant, plaintiff, respondent, petitioner, appellant, or respondent (New York's appellee) and put the case titles in the proper form. The LRB corrects over 16,000 substantive mistakes and countless grammar and style mistakes every year.²³ If the LRB catches an error, it will notify the court or judge, which has the final say on whether to accept the suggestions.

Judiciary Law § 433 requires the LRB to prepare and publish headnotes, tables, and indexes of every cause determined in the Court of Appeals and the Appellate Division. The name of the judge or justice who presided at the hearing or trial in the court of original jurisdiction must also be included in the Court of Appeals and Appellate Division opinions.²⁴ In addition to the opinion, the reports must contain as much of the facts, arguments of counsel, decision, or any other matter the State Reporter deems necessary.²⁵

The LRB is also responsible for compiling, editing, and contracting the Official Reports for publication. The LRB assures publication of the Official Reports CD-ROM version, the official version of New York opinions published online, and the Official Reports microfiche version.²⁶

The LRB splits the printed Official Reports into three separate volumes that represent the three levels of New York State's judiciary. The volumes are designated New York Reports Third Series (N.Y.3d) for the Court of Appeals, Appellate Division Reports Third Series (A.D.3d) for the Appellate Division, and the Miscellaneous Reports Third Series (Misc. 3d) for the Appellate Term and the trial courts.²⁷

Currently, the LRB staff includes State Reporter Gary D. Spivey, Deputy State Reporter Charles A. Ashe, Assistant State Reporter William J. Hooks, Chief Legal Editor Michael S. Moran, and 31 others. They edit and publish a mountain of judicial opinions every year.²⁸



New York State Reporter
Gary D. Spivey.

Why a Third Series?

The LRB instituted the Third Series to modernize the Official Reports. The LRB's goal was to integrate the print version of the Third Series with the electronic databases, new research methods, and changes to the law.²⁹ For the Third Series, the LRB enhanced the Second Series' format and arrangement of the additional research tables that the

LRB provides to practitioners to make research easier and to improve the Official Reports' utility.

Print and electronic materials have been integrated by including research references to online materials in the print materials. This integration is important to maintaining the relevance of the Official Reports to this generation of lawyers, who use electronic-research mediums in addition to the traditional print-research mediums.

Significant Changes

The modernization of the Third Series began with changes in the look of the volumes and the content of the advance sheets. The general appearance of the Third Series' bound volumes has been updated by changing the binding from a grey-green to a glossy, speckled green; State Reporter Spivey's name remains on the spine. Advance sheets now have greater detail, including abstracts of other courts' opinions selected for online publication. Abstracts are created in Third Series Miscellaneous Reports for Appellate Term and trial-level opinions selected for online publication only.

In 1804, George Caines, the first official reporter, included a Digest Index in the Official Reports to enable researchers to find decisions by topic. That Digest Index system is still used today. The LRB modernized the Official Reports by updating the language of the Digest Index for the Third Series. Modernization was necessary because lawyers no longer use some of the archaic terms found in the Digest Index of the Second Series. For example, the LRB dropped the topic of "Master/Servant," the principle that employers are sometimes responsible for their employees' acts. The concept embodied by "Master/Servant" is now found within "Employment Relationships."

Another research tool in the Official Reports Third Series is the Total Client Service Library (TCSL) References. The LRB includes the TCSL References after the headnotes and before the appearances of counsel. The TCSL refers the researcher to encyclopedias, case reporters, statutes, finding aids, and practice guides. These resources are organized by topic to allow comprehensive research. The LRB has expanded the TCSL References for the Third Series to include more secondary sources like treatises, especially New York-centered sources like David D. Siegel's *New York Practice*.

The Third Series also ensures that practitioners will learn about mistakes found in the printed volumes. In the Second Series, the LRB issued corrections, sometimes by issuing an entirely new, corrected volume. The LRB's new method of issuing corrections after an opinion is published in the bound volume is more efficient. The Third Series has an "errata table," an innovation that allows users to discover mistakes found in an earlier volume of the Official Reports. The table contains corrections that

apply to bound versions of the previous volume's opinions. The opinions in the Official Reports Internet database (NY-ORCS in Westlaw or through the State Reporter's Web site³⁰) are also corrected and available to users immediately after correction. With the inclusion of the errata table, the LRB provides print users with a service comparable to that enjoyed by professionals who research on the Internet.

Another one of the LRB's significant changes to the format of the print-published opinions in the Third Series is the addition of sample queries that researchers can plug into a Westlaw search to bring up the topic in Westlaw's electronic database. The LRB's addition of sample queries, entitled "Find Similar Cases on Westlaw," allows researchers to find New York case law on related topics. Look up *Bansbach v. Zinn*, 1 N.Y.3d 1 (2003). The LRB has supplied lawyers with the query "shareholder /4 derivative & 626 & 'collateral estoppel'" and the Westlaw database in which to conduct a search: NY-ORCS. The sample queries are printed after the annotation reference section and before the points of counsel in the New York Reports and before the appearances of counsel in Appellate Division and Miscellaneous Reports.

Changes Specific to N.Y.3d

The New York (N.Y.) volume of the Third Series contains the officially reported opinions of the Court of Appeals, New York State's highest court. One notable change from the N.Y.2d is the LRB's inclusion in N.Y.3d of a table of cases overruled, disapproved of, or otherwise limited by the cases in that volume. The new criminal leave tables provide "opinion below" information citations to cases

notes for Appellate Division memorandum decisions, defined as brief, conclusory decisions that follow established principles.³¹ In both the First and Second Series, the headnotes for memorandum opinions appeared only in the Digest Index. In the Third Series, the headnotes appear at the beginning of each memorandum opinion.

The LRB continues to apply to the Third Series opinions a three-pronged approach to including headnotes for Appellate Division memorandum opinions. All other opinions are fully headnoted. If the Appellate Division's memorandum opinion contains enough material, it will be given a full headnote. If its memorandum opinion has some relevant material but not enough to support a full headnote, the opinion is summarized and classified according to its topic. And no headnote will be included and the memorandum opinion will not be classified if the opinion is based on a specialized set of facts.

Changes Specific to Misc. 3d

The Miscellaneous volume of the Third Series contains selected officially reported opinions of different lower courts of record. Misc. 3d includes selected opinions of the Appellate Terms — appellate courts that exist only in the first and second departments and hear appeals from the District Courts, City Courts, Town Courts, Village Courts, and the New York City Civil and Criminal Courts.

Misc. 3d also includes selected opinions from all of New York State's other lower courts: Supreme Court, Court of Claims, Family Court, Surrogate's Court, New York City Criminal Court, New York City Civil Court, County Court, District Court, and 61 City Courts, 932

The Third Series includes sample queries that researchers can plug into a Westlaw search.

reported below. The Second Series included only title, disposition, and judge. The Third Series also prints the official citation in the criminal tables.

The LRB has introduced an interim volume published roughly every six months to reduce the number of advance sheets that users must collect before publication of the bound volume. The interim volume is soft-bound and contains all the cases reported until that point. Subscribers can discard the interim volumes after the bound volume is distributed.

Changes Specific to A.D.3d

The Appellate Division (A.D.) volume of the Third Series contains the officially reported opinions of the four departments of the Appellate Division, New York's intermediate appellate court. The LRB now publishes head-

Town Justice Courts, and 552 Village Courts.³² Although the LRB publishes all the opinions of the Court of Appeals and the Appellate Division, the LRB is not required to publish all submitted Appellate Term and trial-court opinions.³³ The LRB publishes in the Miscellaneous Reports only about 26% of judicial opinions submitted each year.³⁴

Reported cases in Misc. 3d are now arranged differently from the way they were in the earlier two series. The LRB has included the Appellate Term opinions in the front half of the volume and trial-court cases in the back half of the volume instead of mixing them together. Also included in each half of Misc. 3d are the abstracts of opinions selected for online publication. The abstracts provide the case name, authoring judge or justice name, decision date, classifications to the Official Reports Digest-Index

headings, and slip-opinion citation. A slip opinion is an opinion that exists before it is published in a bound reporter.

Each opinion published in the electronic database is assigned a slip-opinion number and given page numbers to allow users to cite the specific pinpoint (jump cite) page.

Submission of Opinions

Under Judiciary Law § 432, every judge or justice of a court of record must promptly deliver to the State Reporter a copy of every written opinion rendered, although no one complies with that rule. Judges submit to the LRB only those opinions they hope to publish. Under Judiciary Law § 431, the LRB is required to publish all opinions and memoranda that the Court of Appeals and the Appellate Division transmit to the LRB. Unlike some jurisdictions, New York has no court rule or statute that prohibits citing unpublished opinions.³⁵

The LRB is authorized by Judiciary Law § 431 to publish select Appellate Term and trial-court opinions in the Miscellaneous Reports.³⁶ The LRB takes into account numerous factors to determine whether to publish a lower-court opinion. Factors include precedential significance, novelty, public importance, practical significance, subject matter diversity, geographical diversity, author diversity, and literary quality.³⁷ Opinions of interest only to the litigants or that contain primarily factual or discretionary matters or dicta are ineligible for publication.³⁸ Judiciary Law § 431 limits publication of an Appellate Term or trial-court opinion to one that is “worthy of being reported because of its usefulness as a precedent or its importance as a matter of public interest.”

The Committee on Opinions was created in 1963 to hear appeals from the State Reporter’s refusal to include opinions submitted for publication in the Miscellaneous volume of the Official Reports. The Committee is made up of a rotating panel of Appellate Division justices. Judges who believe that their opinions have been overlooked may appeal to the Committee. Since the Committee began, judges have appealed approximately 100 times the State Reporter’s decision not to publish an opinion. No judge has prevailed.³⁹

In 2003, the LRB published 148 Court of Appeals decisions in N.Y.2d and 301 Appellate Division decisions in A.D.2d. The LRB also accepted 584 trial court and Appellate Term decisions for publication in the Miscellaneous Reports. The LRB withheld 1687 opinions from Miscellaneous publication, for an acceptance rate of 26%. This rate has remained constant for several years. Of those opinions withheld from publication in the Miscellaneous Reports, 1261 were accepted for online publication,⁴⁰ including all Appellate Term opinions not published in the Miscellaneous Reports. Trial-court opinions not accepted for publication in the Misc. 3d or for

online-only publication may not be published, except in the *New York Law Journal*.⁴¹

People send about 2400 opinions to the LRB for publication in the Miscellaneous Reports every year. Attorneys may submit lower-court opinions for publication. The LRB sometimes solicits from the authoring judge an interesting opinion it finds in the *New York Law Journal* or elsewhere. Judges themselves submit most of the lower-court opinions the LRB selects for publication.⁴² Judges may themselves publish their decisions on the Web; some judges even maintain their own non-court-approved Web sites. But the decisions must contain the following two

Since the Committee on Opinions began in 1963, judges have appealed approximately 100 times the Reporter’s decision not to publish an opinion. No judge has prevailed.

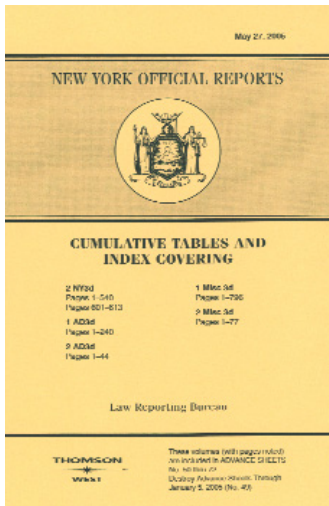
admonitions: (1) “This opinion is not available for publication in any official or unofficial reports, except the *New York Law Journal*, without the approval of the State Reporter or the Committee on Opinions (22 N.Y.C.R.R. 7300.1)” and (2) “This opinion is uncorrected and subject to revision in the Official Reports.”

Although judges are protected from liability for all acts done in the exercise of judicial functions, one state opinion has held that publishing opinions elsewhere than in the Official Reports is not required by law and is therefore not an act performed in a judicial capacity,⁴³ although some federal courts have taken a broader view of the immunity available to publishers of opinions.⁴⁴

To request that an opinion be published, a practitioner may send a letter with a copy of the opinion to the Honorable Gary D. Spivey, State Reporter, One Commerce Plaza, 17th Floor, Suite 1750, Albany, New York 12210. To submit an opinion, judges and their staffs should attach the opinion in WordPerfect or Microsoft Word (but not Microsoft Word 2002) to an e-mail to <reporter@courts.state.ny.us>. Include the phrase “Opinions Submitted Electronically” in the “Subject” line. If someone other than the authoring judge — such as a judge’s secretary or law clerk — is submitting the opinion, a carbon copy must be sent to the authoring judge.

Official vs. Unofficial

The LRB is responsible for content in the Official Reports, but the LRB does not publish the Official Reports. Judiciary Law § 434 requires that the Official Reports be printed and distributed under a competitively bid five-



The Cumulative Tables and Index pamphlet.

(A.2d), Pacific (P.2d), South Eastern (S.E.2d), South Western (S.W.2d), and Southern (So. 2d). Also part of the National Reporter System is a separate sub-regional reporter for New York, West's New York Supplement (N.Y.S.2d). The New York Supplement began publication in 1888. Decisions from New York are too numerous for the regional reporter, so New York's lower-court cases are excluded from the North Eastern Reporter, which publishes the decisions of the highest appellate courts of Illinois, Indiana, Massachusetts, New York, and Ohio. New York Court of Appeals opinions appear in the Official Reports, the North Eastern Reports, and the New York Supplement.

Content and Cost

Numerous differences separate the Official Reports Third Series from the N.E.2d and the N.Y.S.2d, the unofficial reports. In the New York Reports (N.Y.3d), a section named "Points of Counsel" contains the attorneys' arguments. The section is separated into issues brought up by the attorneys along with cases on which the attorneys relied for their arguments. The N.E.2d and N.Y.S.2d contain the attorneys' names for the parties involved, but their arguments and the cases they cite are absent.

Another major difference between the Official Reports Third Series and the N.E.2d and N.Y.S.2d is their cost. A subscription to N.Y.3d, A.D.3d, and Misc. 3d costs less than a subscription to the unofficial reporter. The N.E.2d consists of 815 volumes and costs \$11,307 for the entire set.⁴⁵ Individual volumes of the N.E.2d cost \$150.75.⁴⁶ The N.Y.S.2d consists of 780 volumes and costs \$5000.⁴⁷ Individual volumes of the N.Y.S.2d cost \$97.50.⁴⁸ Subscription to the Third Series bound volumes is \$19.67 a volume plus tax and \$10.00 plus tax for interim volumes, effective January 1, 2005. The LRB compiles approximately 19 volumes (17 bound and 2 interim volumes) each year for publication. A subscription to the Official Reports for one year costs about \$360 (17 bound volumes and 2 interim volumes at \$10 each). Advance

year publishing contract. West won the current five-year contract, covering 2001–2005. Interestingly, West competes against itself as the major unofficial publisher of decisions from the state and federal courts.

West's National Reporter System dates to the 1880s and covers state cases in seven regional reporters. These reporters are North Eastern (N.E.2d), North Western (N.W.2d), Atlantic

sheets are included at no additional charge. Practitioners may subscribe only to the advance sheets, for \$98.56 a year, effective January 1, 2005.

The space that these reporters take up on the subscribers' bookshelves is a factor to consider. A subscriber to the Official Reports must have enough shelf space for the three separate bound series (N.Y.3d, A.D.3d, and Misc. 3d), published each year. The N.Y.S.2d and the N.E.2d are each in separate bound series. The N.E.2d is a good investment for those who practice in several (arbitrarily grouped) states in the Northeast, but for those whose practice is in New York alone, buying the N.E.2d does not make economic sense. A lawyer practicing in New York will find it more economical to purchase only the N.Y.S.2d, which contains decisions from the Court of Appeals, the Appellate Division, and other selected Appellate Term and trial courts.

The publication's value correlates to the extra material that reporters add to their publications to make it easier to research a given legal topic. Judicial opinions enjoy no federal copyright protection,⁴⁹ although copyright protection, when available, extends to the reporter's own writings, including headnotes, statements of fact, statements of arguments, syllabuses, case tables, and other materials the reporter includes to create a more accessible and useful research tool.⁵⁰

Beware Corrections

The prime reason to use the Official Reporter is that the LRB has scrutinized and edited the decisions it publishes. If a lower-court opinion is edited for length in the Official Reports, the authoring judge decides what material is cut for publication. The unofficial reporters are not edited, or at least not as comprehensively as the Official Reports. When cited in an opinion or a lawyer's brief, therefore, the version of the opinion in the unofficial reporter might not have been corrected, depending upon whether the unofficial reporter has incorporated the corrections that the LRB makes available. The LRB gives unedited slip opinions selected for official publication to West, which then publishes the unofficial reports.⁵¹ The unofficial reports might not contain the LRB's corrections approved by the courts and included in the Official Reports, although the LRB makes corrections available to vendors, and West and Lexis make every effort to incorporate the corrections. Moreover, although the unofficial reporters publish unedited slip opinions, courts amend, clarify, vacate, and depublish slip opinions, occasionally without the unofficial reporter's knowledge.⁵²

Practitioners should, thus, always consult the Official Reports to verify a case citation. That advice applies to online research as well: lawyers should always read and cite the official version of New York case law. Although West is reliable, West sometimes makes mistakes of substance.⁵³ There is no reason not to rely on the Official

Reports. West makes citing the Official Reporter easy. Although the Official Reports do not “star” page the unofficial reports, West star pages the Official Reporter. Practitioners should at least use the star-pagination tool in the unofficial reporters to cite the Official Reporter correctly if they do not refer to the Official Reports directly.⁵⁴

In the past, an advantage to the unofficial reporters was that they were published more quickly than the Official Reporter. West was faster because the Official Reporter was delayed by the official editing process. But subscribers to both the unofficial reports and the Official Reports are offered advance sheets to keep them up to date. For some time now, the Official Reports have been as current as the unofficial reports; Court of Appeals opinions now come out faster in the Official Reports than in the unofficial reports.

Tanbook Citation

A further advantage to using the Official Reporter is that the edited opinions from the state courts contain the official Tanbook citation. The LRB developed the Tanbook in 1956, when it inaugurated the Second Series. Called the Tanbook because its cover is tan with black print, it provides the rules for citing New York statutes, cases, rules, regulations, and secondary authority. The Official Reports provide practitioners with the correct New York State citation format. The 2002 Tanbook, prepared by the LRB board of editors headed by Senior Legal Editor Katherine D. LaBoda, replaced the 1998 edition. In 2004, soon after the Third Series appeared, the LRB issued a supplement to the 2002 Tanbook.⁵⁵

A further advantage to using the Official Reporter is that the edited opinions from the state courts contain the official Tanbook citation.

Studying Tanbook citations in the edited Third Series opinions simplifies employing the correct citation format. The opinion will have the correct abbreviations, capitalization, quotations, word selection, and case-name style. West’s unofficial reports use a modified version of the Bluebook. But the Bluebook violates several New York rules.⁵⁶

Practitioners should cite according to the Tanbook when they write for a New York court. Attorneys must cite the Official Reports if the case was published in New York’s Official Reports.⁵⁷ This advice makes practical sense. The Official Reports are the only reports that New York’s judiciary receives under the LRB contract with

West, and they are likely the only reports a judge will have in chambers to refer to when reviewing an attorney’s papers.⁵⁸ Moreover, all judges are entitled to receive the Official Reports, but most are not given the unofficial reporters. The court must separately pay for subscriptions to unofficial reporters. Citing the unofficial reports means forcing judges and their law clerks to convert the citation to the Official Reports.

The Official Reports also make legal research easier than the unofficial reports. The LRB has integrated the print and the electronic Official Reports and developed a style of citation to tell readers where to find cases. All cases published in the Official Reports are assigned a slip-opinion number. The decisions can then be found on the LRB’s Web site, <<http://www.courts.state.ny.us/reporter/Decisions.htm>>.

The Tanbook has a new rule for citing those opinions that are assigned a slip-opinion number but are included only as an abstract in the hard copy of the Miscellaneous Third. To illustrate, *City Realty Assocs. Ltd. v. Westreich* is cited (in Tanbook format) as 3 Misc. 3d 127(A), 2004 NY Slip Op 50344(U) (App Term, 1st Dept 2004, per curiam).⁵⁹ Including the “(U)” after the slip-opinion number denotes that the full opinion is not published in the hard copy of the Official Reports. Including the “(A)” signals readers that they will need Internet access to read the full version of the opinion. The LRB’s Web site provides the public with easy access to a free source of New York case law.

Headnotes or Key Numbers

The LRB’s headnotes in New York Official Reports have advantages over West’s Key Number system. West’s Key Numbers published in N.E.2d and N.Y.S.2d are specific and include every point of law, whether the point is part of the opinion’s holding or dictum. The LRB’s headnotes sort cases by a general category and then sort them again into a specific category. For example, in *Matter of Town of Southampton v. New York State Public Employment Bd.*, 2 N.Y.3d 513 (2004), the headnote reads: “Civil Service — Public Employees’ Fair Employment Act — Jurisdiction of Public Employment Relations Board.” This headnote derives from the general issue of civil service and then specifically addresses the public employees’ Fair Employment Act and whether the Public Employment Relations Board has jurisdiction over the charge. The category of the headnote is then related to the specific part of the opinion to which it refers.

West’s Key Number system breaks the law down into major areas.⁶⁰ Each topic is divided into smaller and smaller concepts. The legal concepts are assigned unique numbers at each step in the process. Over 80,000 different, unique numbers correspond to a single point of law. West’s attorney editors pick out all the points of law in an opinion and write a brief headnote and assign a series of

Key Numbers to the point. The point of law gets a Key Number.

The Official Reports' headnotes refer researchers to specific points in an opinion that stand for the point of law the headnote addresses. The headnotes also contain a topic heading that allows a researcher to look up those topic headings in New York's Official Reports Digest Index to find other case law with those same points of law. West's Key Number system refers researchers to the legal points made in the case and to the West's Digest Index. The researcher can then look up the Key Number in the Digest Index and find the headnotes of cases that have the same points of law. When researching online, Key Numbers make it particularly easy for a researcher to find cases from different jurisdictions that deal with similar issues because the Key Number system is used for all the West's reporters that cover every state and federal court.

Important differences exist between the content of the headnotes and which topics are headnoted in the official and unofficial reports. In the Official Reports, *29 Holding Corp. v. Diaz*, 3 Misc. 3d 808 (Sup. Ct. Bronx County 2004), has two headnotes. The proposition that New York State Supreme Court parts are not bound by Appellate Term precedent is included in the first headnote. The central holding of *29 Holding* — that a residential landlord has a duty to mitigate — is in the second headnote along with the basic reasoning for the holding. In the unofficial report, *29 Holding* (775 N.Y.S.2d 807) has five headnotes, the last two of which cover the same propositions as the Official Reports headnotes. The *29 Holding* court noted in passing a point of law that is pure dictum, yet it is given a Key Number and included as a headnote in the unofficial reports. A researcher looking for controlling or persuasive precedent on a point of law would waste time looking at *29 Holding* for that point of law. The case is not precedent on that point and would never be expressly overruled on that point. The Official headnotes, as opposed to the West headnote, list the points of law at issue but leave the dictum out.

The difference between the two headnotes reflects a difference in the editorial staff of the LRB and West. The Official Reports' stated goal is to provide the New York bar with a concise, accurate summary of the published opinion. West refers to its Key Number system as "the most comprehensive and widely used indexing system for finding caselaw materials."⁶¹ Practitioners who want nationwide, comprehensive coverage might wish to invest in West's unofficial reporters. The benefits of investing in the Official Reports are greatest for those who are concerned with New York law alone.

Both the Third Series and the unofficial reporters include a summary of the facts and holding of the court, also known as a syllabus. The syllabus is not an official part of the decision, and may not be cited as legal author-

ity.⁶² The LRB editors write the Official Reports' summaries by adhering to the same goals of concision and precision they achieve when writing headnotes. West has its own version of summaries.

The Big Picture

The LRB's integration of the print and the electronic research mediums in the new Third Series is an important innovation. The Third Series is a not just a new binding or a way to start volumes from one onward. It is a new way of using the Official Reports as the source of New York law for a new era in the practice of law. After doing so well for so long, the Yankees did not advance to the World Series last season. But the LRB hit a home run with the Third Series. ■

1. See John Baker, *The Common Law Tradition: Lawyers, Books, and the Law* 133 (2000) (noting that during 600 years of law reporting, over one million sheep gave their skins so that opinions could be recorded).
2. For example, the colleagues of one Pennsylvania justice once refused to allow him to publish a dissent in the Pennsylvania official reports. The justice brought a mandamus action against his colleagues — and lost in his own court. See *Musmanno v. Eldredge*, 1 Pa. D. & C.2d 535 (Common Pleas), *aff'd per curiam*, 382 Pa. 167, 114 A.2d 511 (1955). For an account of a conflict between the Federal Justice Department and a publisher, see Stuart Taylor Jr., *U.S. Obtains Curb on Judge's Attack on Justice Dep't*, N.Y. Times, Jan. 22, 1984, at A1, which describes how the Justice Department obtained a temporary order restraining West Publishing from printing a controversial opinion in the Federal Supplement. The opinion was eventually published. See *United States v. Kilpatrick*, 575 F. Supp. 325 (D. Colo. 1983) (Winner, J.), *appeal dismissed & mandamus denied sub nom. Blondin v. Winner*, 822 F.2d 969 (10th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988).
3. See Frederick Pollock, *English Law Reporting*, 19 L.Q. Rev. 541 (1903).
4. See Steve Sheppard, *The Unpublished Opinion: How Richard Arnold's Anastasoff Opinion Is Saving America's Courts from Themselves*, [2002] Ark. L. Notes 85, 90.
5. "But how are their decisions to be known?": Celebrating 200 Years of New York State Official Law Reporting 13 (2004) (hereinafter "Celebrating"), available at <http://www.courts.state.ny.us/reporter/history/page_10.htm> (last visited on Feb. 4, 2005). For excellent histories of how judicial opinions have been reported and published, see Morris L. Cohen & Sharon Hamby O'Connor, *A Guide to the Early Reports of the Supreme Court of the United States* (1995); William Domnarski, *In the Opinion of the Court* 5-29 (1996); Gerald T. Dunne, *Early Court Reporters*, [1976] Sup. Ct. Hist. Soc'y Y.B. 61; John H. Moore, *One Hundred Fifty Years of Official Law Reporting and the Courts of New York*, 6 Syracuse L. Rev. 273 (1955); Erwin C. Surrency, *A History of American Law Publishing* 37 (1990).
6. John Caher, *The Exacting Work of Putting the Law Between Hard Covers*, N.Y. L.J., July 29, 2004, at 1, col. 4 (recounting Chancellor Kent's complaining that "[w]hen I came to the Bench there were no reports or State precedents").
7. See Celebrating, *supra* note 5, at 12.
8. See Andy Ashe, *200 Years of Law Reporting in New York*, 12 The Catchline: Bulletin of Ass'n of Reporters of Judicial Decisions (Feb. 2004) at <http://arjd.washlaw.edu/catchline_feb_2004.htm> (last visited Feb. 4, 2005). The Association of Reporters of Judicial Decisions (ARJD) is dedicated to improving the accuracy and efficiency of reported judicial opinions. See Association of Reporters of Judicial Decisions, *Articles of Ass'n and By-Laws*, Art. II, § 1. The ARJD consists of those responsible for preparing opinions for official publication by editing and writing headnotes, summaries, and syllabuses. Among the ARJD's stellar efforts: Proceedings of the Second International Symposium on Official Law Reporting: July 30, 2004 (Thomson West) distributed in early 2005. The Symposium materials include speeches by New York's Chief Judge Judith S. Kaye (keynote address on the importance of law reporting and Chancellor Kent's contributions), California Reporter of Decisions Edward W. Jessen (on official law reporting in America), U.S. Supreme Court Reporter of Decisions Frank D. Wagner (on the official U.S.

Reports), and New York State Reporter Gary D. Spivey (“200 Years of Official Law Reporting in New York”).

9. *In re Williams Press, Inc. v. Flavin*, 35 N.Y.2d 499, 503, 323 N.E.2d 693, 694–95, 364 N.Y.S.2d 154, 157 (1974). For other decisions that discuss the history and operations of New York law reporting, see *Murray v. Brancato*, 290 N.Y. 52, 48 N.E.2d 257 (1943); *Little v. Banks*, 85 N.Y. 258 (1881); *In re Lenz & Riecker, Inc. v. Fitzpatrick*, 129 Misc. 2d 1068, 500 N.Y.S.2d 929 (Sup. Ct. Albany County 1986); *In re Lawyers Co-op. Publ’g Co. v. Flavin*, 69 Misc. 2d 493, 331 N.Y.S.2d 159 (Sup. Ct. Albany County 1971), *aff’d*, 39 A.D.2d 616, 322 N.Y.S.2d 616 (3d Dep’t), *lv. denied*, 30 N.Y.2d 488, 287 N.E.2d 398, 335 N.Y.S.2d 1027 (1972); *People v. Carr*, 5 Silvernail 302, 23 N.Y.S. 112 (Sup. Ct. Gen. Term 3d Dep’t 1884); *Little v. Banks*, 67 Hun. 505, 51 N.Y. Sup. Ct. 462, 22 N.Y.S. 512 (Sup. Ct. Gen. Term 3d Dep’t 1893).

10. Celebrating, *supra* note 5, at 23.

11. Law of 1938, Ch. 494, § 1.

12. Judiciary Law § 430.

13. *About the Official Reports* at <<http://www.courts.state.ny.us/reporter/About.htm>> (last visited Feb. 4, 2005).

14. William A. Hilyerd, *Using the Law Library: A Guide for Educators — Part II: Deciphering Citations & Other Ways of Locating Court Opinions*, 33 J.L. & Educ. 365, 369 (2004).

15. *See id.*

16. *See id.* at 369 n.16. The 28 are Arizona, Arkansas, California, Connecticut, Georgia, Idaho, Illinois, Kansas, Maryland, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Vermont, Virginia, Washington, West Virginia, Wisconsin.

17. *See* The Bluebook: A Uniform System of Citation, tbl. T.1 (17th ed. 2000); K.K. DuVivier, The Scrivener: Modern Legal Writing, *Parallel Citations—Past and Present*, 30 Colo. Law. 25 (Jan. 2001). The eight are Louisiana, Maine, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wisconsin.

18. *See* Bluebook *supra* note 17, at 211 tbl. T.1.

19. *See Williams Press*, 35 N.Y.2d at 503, 323 N.E.2d at 695, 364 N.Y.S.2d at 156.

20. *See generally* Caher, *supra* note 6, at 1, col. 4.

21. Judiciary Law § 430. Judge Victoria A. Graffeo is the current liaison to the LRB.

22. *See* Gerald Lebovits, *New Edition of “Tanbook” Implements Extensive Revisions in Quest for Greater Clarity*, 74 N.Y. St. B.J. 8, 9 (Mar./Apr. 2002).

23. *Editing of the Official Reports* at <<http://www.courts.state.ny.us/reporter/Edit.htm>> (last visited Feb. 4, 2005).

24. *See* Judiciary Law § 433.

25. *See id.*

26. *See About the Official Reports* at <<http://www.courts.state.ny.us/reporter/About.htm>> (last visited Feb. 4, 2005).

27. Judiciary Law § 433-a.

28. *See* Celebrating, *supra* note 5, at 2.

29. *See id.* at 52.

30. *Research the Official Reports* at <<http://www.courts.state.ny.us/reporter/Decisions.htm>> (last visited Feb. 4, 2005).

31. Gerald Lebovits, The Legal Writer, *Technique: A Legal Method to the Madness — Part I*, 75 N.Y. St. B.J. 64, 64 (June 2004).

32. Frederick A. Muller, *Dissenting Opinion in The American Association of Law Libraries Task Force on Citation Formats Final Report*, 87 Law Libr. J. 624, 627 (1996).

33. Judiciary Law § 431.

34. *See Selection of Opinions for Publication* at <<http://www.courts.state.ny.us/reporter/Selection.htm#Criteria>> (last visited Feb. 4, 2005). New York is selective of opinions for publication. *See generally* Caher, *supra* note 6, at 1, col. 4 (reporting that LRB publishes in print about 25% of opinions submitted for publication and publishes online about 50% of opinions submitted for publication); Comment, *Discretionary Reporting of Trial Court Decisions: A Dialogue*, 114 U. Pa. L. Rev. 249 (1965).

35. *See* Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. App. Prac. & Process 251, 258 (2001).

36. *See* William S. Holdsworth, *The Case-Law System: Historical Factors Which Controlled Its Development*, in *The Life of the Law* 44–45 (Honold ed. 1964)

(reciting belief that selectively publishing decisions provides a clearly defined view of the law).

37. *See Selection of Opinions for Publication* at <<http://www.courts.state.ny.us/reporter/Selection.htm#Criteria>> (last visited Feb. 4, 2005).

38. *See generally* Antonio I. Brandveen, *Opinion Writing for Publication: Hearing and Trial Judges 1–4* (O.C.A. monograph for 1999 Judicial Seminar); James M. Flavin, *Decisions and Opinions for Publication*, 12 Syracuse L. Rev. 137 (1960); Gary Spencer, *Behind the Books: Reporter Selects, Cuts Official Opinions*, N.Y. L.J., Feb. 28, 1991, at 1, col. 3.

39. *See* Caher, *supra* note 6, at 1, col. 4.

40. *See 2003 Annual Report of the State Reporter* at <<http://www.courts.state.ny.us/reporter/annual2003.htm>> (last visited Feb. 4, 2005).

41. *See* 22 N.Y.C.R.R. 7300.1.

42. *See 2003 Annual Report of the State Reporter* at <<http://www.courts.state.ny.us/reporter/annual2003.htm>> (last visited Feb. 4, 2005).

43. *See Murray*, 290 N.Y. at 57, 48 N.E.2d at 259.

44. *E.g., Beary v. West Publ’g Co.*, 763 F.2d 66, 68–69 (2d Cir. 1985) (disavowing *Murray*, 290 N.Y. at 59, 48 N.E.2d at 260, while holding unofficial reporters immune).

45. *Thomson West Publishing — Product information for the North Eastern Reports* at <<http://west.thomson.com/product/22011703/product.asp>> (last visited Feb. 4, 2005).

46. *Thomson West Publishing — Individual North Eastern Volumes* at <http://west.thomson.com/store/volume.asp?product_id=22011703> (last visited Feb. 4, 2005).

47. *Thomson West Publishing — Thomson West Product information for the New York Supplement Reports* at <<http://west.thomson.com/product/22011509/product.asp>> (last visited Feb. 4, 2005).

48. *Thomson West Publishing — Individual New York Supplement Volumes* at <http://west.thomson.com/store/volume.asp?product_id=22011509> (last visited Feb. 4, 2005).

49. *Wheaton v. Peters*, 33 U.S. 591, 668 (1834) (holding that individual reporter’s publisher may not claim copyright in judicial opinions).

50. *See Callaghan v. Myers*, 128 U.S. 617, 647 (1888) (holding that copyright could be obtained covering portions of compilation resulting from intellectual labor).

51. *See* Muller, *supra* note 32, at 625 (noting that Axel-Lute honesty principle requires citation to source writer actually uses) (citing Paul Axel-Lute, *Legal Citation Form: Theory and Practice*, 75 Law Lib. J. 148, 149 (1982)).

52. *See id.* at 625–26 (noting that final edited text of Official Reports might include headnotes, summaries, syllabuses, and other editorial enhancements that authoring court approved).

53. *See* James W. Paulsen, *An Uninformed System of Citation*, Harv. L. Rev. 1780, 1786 (1992) (noting West errors).

54. Star paging, often using asterisks, refers readers to specific pages in other reporters in which the opinion is published. Michelle D. Orton, *House Bill 1822: New Anti-Westopoly Rule Proposed in Congress*, 7 DePaul-LCA J. Art. & Ent. L. & Pol’y, 308, 313 (1997). Star paging is not copyrightable. *Matthew Bender & Co. Inc. v. West Publ’g Co.*, 158 F.3d 693, 699 (2d Cir. 1998).

55. *See* <http://www.courts.state.ny.us/reporter/New_Styman.htm>. To download on pdf. the 2002 Tanbook and its 2004 supplement, go to <http://www.courts.state.ny.us/reporter/styman_menu.htm>.

56. *See* Lebovits, *supra* note 22, at 11–12 (noting that Bluebook advice contradicts New York law and practice).

57. *See* CPLR 5529(e) (requiring that “New York decisions . . . be cited from the official reports, if any”); Rules of Ct. of App., 22 N.Y.C.R.R. 500.1(a), 500.5(d)(3), 510.1(a); Rules of App. Div., 1st Dep’t, 22 N.Y.C.R.R. 600.10(a)(11); Rules of App. Div., 4th Dep’t, 22 N.Y.C.R.R. 1000.4(f)(7).

58. *See* Judiciary Law § 434(6); DuVivier, *supra* note 17, at 25 (noting that one value of Official Reports is that judges have them in chambers).

59. *See 2004 Supplement to 2002 New York Reports Style Manual* § 2.2(a)(2)(b).

60. *See West’s Key Number System: The Key to Finding Good Law* at <<http://lawschool.westlaw.com/KNnumbers/default.asp?mainpage=16&subpage=4>> (last visited Feb. 4, 2005).

61. *Id.*

62. *See generally* Gerald Lebovits, The Legal Writer, *Write the Cites Right — Part I*, 76 N.Y. St. B.J. 64, 64 (Oct. 2004).

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Judith S. Kaye

We take the opportunity to recognize Chief Judge Judith Kaye with a tribute to her many accomplishments and the imprint she leaves upon the Court.

by Skip Card

Also in this Issue

**Medical Malpractice and
the Modern-Day Athlete**

**2008 Article and
Author Index**



GERALD LEBOVITS is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor at St. John's University School of Law. For their research, he thanks law students Boris N. Gorshkov (Brooklyn Law School), Katharine Keefe (Washington University), and Cynthia Ganiere (New York Law). Judge Lebovits's e-mail address is GLEbovits@aol.com.

Plain English: Eschew Legalese

Don't escheat your reader. Good legal documents are free of legalese. Legalese is pettifog: the foreign and formulaic way many lawyers write. Legalese drowns the reader and hides gaps in analysis. Legalese is lawyers' dull and turgid jargon.¹ It makes lawyers the butt of jokes.² It's a pseudo symbol of prestige lawyers use to indulge their egos, dominate others, and distance themselves from their lay readership. Legalese leads to interpretations that stray from the author's intended meaning: Legalese masks meaning.³ Legalese favors form over content: It forces readers to dig for content. Legalese alienates.⁴ Legalese is lazy. Although the best writing is planned, formal speech, legalese deviates from how people speak: Legalese is obscure and wordy.

Lawyers need to filter legalese to create readable documents.⁵ Good lawyering means writing in accessible, clear, and efficient language.

The opposite of legalese is plain English. The plain-English movement calls on lawyers to write comprehensibly and succinctly. The movement aims to keep legal documents precise and simple. The word "plain" is deceiving. Plain English isn't "plain" in the aesthetic sense. Nor does plain English dumb down writing.⁶ "Plain" denotes logically organized, concise documents that are to the point and visually inviting to the audience. Documents in plain English are understandable on their first read.

To write in plain English, writers must visualize their audience's interests and needs. This visualization

moves writers to give readers only the information they require. Ignoring the audience leads to documents no one wants to read and which don't inform or persuade. To break bad habits, writers must become reader-oriented. Writers should write for their readers, not themselves. Writers must treat readers like busy professionals. Writers shouldn't waste their readers' time or insult them.

Most judges, law professors, lawyers, and clients prefer legalese-free documents.⁷ This preference is motivated by the need to read documents without verbiage. Verbiage leads to ambiguity, not only slow reading. With the growing volume of legal work, plain English is critical in today's environment for both writer and reader.⁸

The Plain-English Movement

The movement to use plain English is traced to the profession's earliest days. While practitioners have always used legalese, the public has always urged lawyers to write plainly.⁹ The movement's recent wave gathered pace in the 1940s, when Rudolf Flesch published *The Art of Plain Talk*.¹⁰ The plain-English movement grew in 1960s. In 1963, David Mellinkoff wrote *The Language of the Law*, a magisterial work in which he tracked language development and its weaknesses. By the 1970s, federal agencies began redrafting regulations into plain English.¹¹ This resulted in documents that are easier to understand.¹² New York also mandates plain English in commercial transactions.¹³

Plain English became popular in the legal community in the 1980s. In

May 1984, the *Michigan Bar Journal* began publishing a regular column on plain English. The movement has expanded, but the popularity of plain English has come slowly and painfully. As George Hathaway noted in 1994, "plain English in the law is like safe sex: you never used to hear about it; now you hear about it all the time, but not enough people actually practice it."¹⁴ Quitting legalese is harder than quitting smoking.

Numerous articles, books, and organizations extol plain English's virtues.¹⁵ One group of scholars presents annual awards for excellent plain English as well as the Golden Bull Award, "given for the year's worst examples of gobbledegook."¹⁶ The legal community tolerates gobbledegook less and less.

Putting Plain English Into Practice

Many lawyers don't know how to write in plain English. They never unlearned the bad habits they gleaned from the poor role models they read in law school. Although knowledgeable in the law, lawyers — society's best-paid writers — need to learn more about communication.¹⁷ Plain English requires the writer to take each sentence and ask: "Will this be misunderstood?" "Is this the clearest, most efficient way to write it?" "Is this word necessary?" These questions demand focus on message, respect for audience, and intent to be coherent. Good legal writers "write the document in a way that best serves the reader. They convey ideas with the greatest possible clarity."

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Many techniques exist to write in plain English. They range from organization, to word choice, to sentence structure. What follows are some tools — suggestions to help writing be effective, readable, and succinct.

Keep organization tight.¹⁸ Use headings to break documents into manageable bits. Put related issues together, in logical order. Say it once, all in one place. Put the most important information first. State the general before the specific. Introduce things before you discuss them. Introduce people before you write about them. Minimize cross-referencing. Use thesis paragraphs and topic sentences. State what relief you seek before you say why you want it. Give a full citation before you give a short-form citation. Organize by issues and arguments, not by cases and statutes.

Admire the active voice. The active is less vague than the passive. The active is also shorter and easier to read. In the passive, the sentence's subject is used as the verb's receiver. *Incorrect:* "The respondent was interrupted by the petitioner." *Becomes:* "The petitioner interrupted the respondent." Double passives don't identify the subject or the actor. *Example:* "The passive voice is avoided."¹⁹ Use single passives to connect sentences or end sentences with emphasis.²⁰ Use double passives if the actor is known or identification is unnecessary.

Cut compound constructions. A compound construction uses several words when only one or two are needed. *Incorrect:* "At that point in time the petitioner moved for summary judgment for the reason that no factual issues remained." Eliminating compound phrases will shorten the sentence. *Becomes:* "The petitioner moved for summary judgment because no factual issues remained."

Reject redundant phrases.²¹ Redundancies include "null and void." Use "void" instead. If you can say it in one word, don't use two or three. Other redundancies: "made and

entered into" ("made"), "rest, residue, and remainder" ("rest"), "force and effect" ("force"), "last will and testament" ("will"), and "give, devise, and bequeath" ("give").

Don't nominalize verbs. Nominalized verbs turn into nouns because of an added suffix. Nominalizations make phrases and sentences long and complicated. They also make action abstract; they don't describe action forcefully.²² Nominalized verbs end in "al," "ance," "ancy," "ant," "ence," "ency," "ent," "ion," "ity," and "ment." Examples with auxiliary verbs: "is waiting," "was reading," and "were." They result in phrases like "made the argument that" instead of "argued" and "engaged in a discussion about" instead of "discussed."

Use "of" sparingly. *Incorrect:* "At issue is the duty of a lawyer to preserve the confidences of a client." The sentence is more effective without the excess. *Becomes:* "At issue is a lawyer's duty to preserve client confidences."

Delete lead-ins, called metadiscourse, like "it is well settled that," "it is hornbook law that," "it is important to add that," and "it is interesting to note that." Noteworthy points speak for themselves.²³

Vitiate vague antecedents. Let the following refer to one person or thing only: "he," "she," "his," "her," "their," and "its." To avoid confusion, repeat the word.

Eliminate elegant variation. Use the same word to refer to the same thing. Different words have different meanings. Variations will be understood as an intent to distinguish.²⁴ *Incorrect:* "The first case was adjourned, and the second piece of litigation was put over to a new date." *Becomes:* "The first case and the second case were adjourned."²⁵

Match modifiers. Dangling, misplaced, and squinting modifiers confuse.²⁶ Dangling modifiers modify no word or the wrong word. *Example modifying no word:* "As someone who teaches at St. John's Law School, it's easy to assume that all law students are uber smart." *Becomes:* "As someone who teaches at St. John's Law School,

I easily assume that all law students are uber smart." *Example modifying the wrong word:* "Although nearly finished, we left the trial because of our client." *Becomes:* "Although the trial was nearly finished, we left because of our client." To place modifiers correctly, keep them next to the word they modify. *Misplaced word example:* "We almost ate the entire Inn of Court dinner." *Becomes:* "We ate almost the entire Inn of Court dinner." *Misplaced clause or phrase example:* "I threw the baby down the stairs some candy." *Becomes:* "I threw some candy down the stairs to the baby." Squints can modify

**Quitting legalese
is harder than
quitting smoking.**

the word before or after. *Example:* "To practice New York landlord-tenant law, I *only* had to re-learn the doctrines of subinfeudation and petty serjeanty." *Becomes:* "To practice New York landlord-tenant law, I had to re-learn *only* the doctrines of subinfeudation and petty serjeanty." Be careful with the word "with." *Incorrect:* "I robbed a bank with money." *Becomes:* "I used a gun to rob a bank." *Or:* "I robbed a bank because it had money."

Nix negatives. People speak and think in the positive. *Incorrect:* "We have *not yet received* permission . . ." *Becomes:* "Our application *is under review.*" Also, avoid negative words like "except," "disallowed" ("dis-" words), "fail to," "notwithstanding," "other than," and "unless" and "unlawful" ("un-" words). And don't place these words after "not."²⁷

Seek shorter paragraphs. Save one-sentence paragraphs for emphasis, but long paragraphs bore readers. A good average for paragraph length is three to five sentences. Paragraphs shouldn't exceed 250 words, two-thirds of a double-spaced page, or one large thought.

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Limit long sentences. Shorter sentences increase understanding. The best sentences have one thought only and 25 words or fewer, ideally between 15 and 18. But vary sentences length to make writing interesting.

Simplify sentence structure. Prefer simple declarative sentences to complex constructions. Put the subject near the beginning in most sentences. But vary sentence structure, like long sentences, to make writing interesting.²⁸ Avoid connecting sentences with weighty conjunctive adverbs like “however,” “moreover,” and “therefore.”

Don't separate subject from predicate. Every complete sentence contains two parts: a subject and a predicate. The subject is what (or whom) the sentence is about. The predicate tells something about the subject. Inserting lengthy qualifiers between subject and predicate frustrates readers. *Incorrect:*

readers, lack substance, and are wordy. *Incorrect:* “Enclosed *herewith* please find” This common formula serves no purpose. *Becomes:* “I enclose”²⁹ *Or:* “Enclosed please find”

Forgo formalisms. Unwanted formalisms include “and/or,” “the instant” case,” and “such” and “said” as adjectives.

Advocate for Anglo-Saxon words. Latinisms and romance-language words are proper when they're terms of art. Otherwise, use foreign words only if an English equivalent is unavailable. *Examples to avoid:* “ad infinitum” (“forever”), “arguendo” (“for the sake of argument”), “inter alia” (“among others”), “pro rata” (“proportional”), and “to wit” (“namely”).

Toss technical terms. Use them only when writing about a field-specific topic. *Example:* “holdover” when referring to landlord-tenant proceedings. If you must use technical terms, include a short definition so that your reader

simpler “before.” *Becomes:* “Sixty days before the license expires”³⁰ Instead of “subsequent,” use “following” or “after.” *Incorrect:* “Subsequent to the defendant's appearance, the plaintiff moved for leave to amend.” *Becomes:* “After the defendant appeared, the plaintiff moved for leave to amend.”

Cherish concision. *Examples:* “In order to” *becomes* “to,” “at that point in time” *becomes* “then,” “for the reason that” *becomes* “because.”³¹

Write as you say it — and don't write it if you wouldn't say it. *Example:* “Pursuant to the terms of the covenant, a payment of \$100 must be remitted by you.” “Pursuant to” is less precise than “under,” and “the terms of” adds nothing. *Becomes:* “Under the covenant, you must pay \$100.”³² Use the same unaffected tone you'd use while speaking.

Verify vocabulary. *Example:* “His bad faith in the failure to investigate is *exacerbated* by the ease with which violations can be avoided.” “Exacerbate” means “to increase in severity of or to aggravate, to make worse.”³³ One can't exacerbate bad faith or do so easily.³⁴

Stress content, not style. Legal writing succeeds when the reader doesn't notice word choice or sentence structure.³⁵

Present properly. Appearances count, in legal writing as in everything else. Add plenty of white space around text. No excessive capitals, italics, bold, underlining, or strange font styles.

Revise regularly. Editing produces plain English. There's no “good writing, only good rewriting.”³⁶

Get Involved With Plain English

Several organizations further plain English. Scribes, an organization of legal writers, was founded in 1953 to honor legal writers and encourage a “clear, succinct, and forceful style in legal writing.”³⁷ Scribes has developed into a nonprofit, ABA-affiliated organization that publishes a newsletter, *The Scrivener*, and a law journal, *Scribes Journal of Legal Writing*. Clarity promotes clear language in the legal profession. It publishes *Clarity*, which explores the use of plain English internationally.³⁸

The legal community tolerates gobbledygook less and less.

“The judge made the decision after consulting with colleagues to recuse himself.” *Becomes:* “After consulting with colleagues, the judge recused himself.” *Or:* “The judge recused himself after consulting with colleagues.”

Omit unnecessary detail. People, places, and dates are clutter unless they're relate to the theme of your document.

Avoid over-long or too many quotations. They substitute for analysis.

Avoid acronyms. Acronyms appear to simplify or shorten your documents. But “alphabet soup” forces readers to retrace their steps to find definitions.

Axe archaic legalisms. Archaic legalisms include “aforementioned,” “hereinafter,” and “wherefore.” The veil of legalese is made of words like “hereto,” “in witness whereof,” “now comes,” and “whereas.” They mystify

knows what you're discussing. The amount of explanation will vary with your audience and the purpose of your document. If helpful, give examples to illustrate your point.

Disparage dictionary words. Simple words appeal to readers. Plain verbs communicate directly and effectively. *Examples:* “ascend” (“rise”), “comprehend” (“understand”), “delegate” (“assign”), “elaborate” (“explain”), and “morph” (“change”).

Mutilate multi-syllabic words. Prefer shorter words with fewer syllables. Shorter words are familiar to readers. They're read quickly and grasped easily. *Examples:* “consequently” (“as a result”), “notwithstanding” (“despite”).

Simplify. *Incorrect:* “Sixty days prior to the expiration of the license” “Prior to” is clunky. Use the shorter and

The Plain English Campaign, the organization that awards the Golden Bull, is an editing service that publishes *Plain English* magazine and books. It has more than 10,000 supporters in 80 countries.³⁹

Here's some food for thought to chew on: To eschew legalese, write in plain English. If you write in plain English, you won't escheat your reader. ■

1. Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 *Geo. J. Legal Ethics* 237, 259–61 (2008); Judith D. Fischer, *Why George Orwell's Ideas About Language Still Matter for Lawyers*, 68 *Mont. L. Rev.* 129, 140 (2007) ("Jargon is the specialized language of a particular field. Unnecessary legal jargon is often called legalese — that is, the inflated language some lawyers use instead of simpler, more familiar phrasing.")
2. George Hathaway, *Plain English, An Overview of the Plain English Movement for Lawyers . . . Ten Years Later*, 73 *Mich. B.J.* 26, 29 (Jan. 1994).
3. Robert D. Eagleson, *Plain Language: Changing the Lawyer's Image and Goals*, 7 *Scribes J. Legal Writing* 119, 134 (2000).
4. Robert W. Benson, *The End of Legalese: The Game Is Over*, 13 *N.Y.U. Rev. L. & Soc. Change* 519, 531 (1984–85).
5. Carol M. Bast, *Lawyers Should Use Plain Language*, 69 *Fla. B.J.* 30, 30 (Oct. 1995).
6. Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 *Scribes J. Legal Writing* 1, 1 (1997).
7. See, e.g., Joseph Kimble, *Plain Language, You Be the Judge (Again)*, 84 *Mich. B.J.* 56 (Jan. 2005); Robert W. Benson & Joan B. Kessler, *Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing*, 20 *Loyola L.A. L. Rev.* 301 (1987); but see, e.g., Howard Darmstadter, *Hereof, Thereof, and Everywhereof: A Contrarian Guide to Legal Drafting* (2002).
8. Mark Duckworth & Christopher Balmford, *Convincing Business That Clarity Pays*, 82 *Ill. B.J.* 573, 573 (Oct. 1994) ("The ultimate success of the plain language movement depends on business recognizing that clear communications improve efficiency, effectiveness, and competitiveness.")
9. George H. Hathaway, *The Plain English Movement in the Law — A 1994 Update*, 50 *J. Mo. B.* 19, 19 (Jan./Feb. 1994).
10. Michael G. Byers, *Eschew Obfuscation — The Merits of the SEC's Plain English Doctrine*, 31 *U. Mem. L. Rev.* 135, 138 (2000) (citing Rudolph Flesch, *The Art of Plain Talk* (1946)). See also Rudolph Flesch, *How to Write Plain English: A Book for Lawyers and Consumers* (1979); Rudolph Flesch, *The Art of Readable Writing* (rev. ed. 1974).
11. See Office of Investor Educ. & Assist., U.S. Sec. & Exch. Comm'n, *A Plain English Handbook: How to Create Clear SEC Disclosure Documents* 25 (1998), available at <http://www.sec.gov/pdf/handbook.pdf>. (last visited Aug. 13, 2008).
12. Barbara J. Comly, "Plain English" — *Beyond Prospectus Disclosure*, *N.J. Law. Mag.* 24 (Aug. 2001); Carla E. Laszewski, *Plain English as a Second*

Language: Will It Become Second Nature at the SEC?, 87 *Ill. B.J.* 536, 536 (Oct. 1999).

13. See N.Y. General Obligations Law § 5-702.
14. Hathaway, *supra* note 9, at 19.
15. See, e.g., Mark Adler, *Clarity for Lawyers: Effective Legal Writing* (2d ed. 2007); Michele M. Asprey, *Plain Language for Lawyers* (3d ed. 2003); Robert D. Eagleson, *Plain English — A Boon for Lawyers*, *The Second Draft* (Legal Writing Institute), Oct. 1991, at 12; Robert D. Eagleson, *Writing in Plain English* (1990); Bryan A. Garner, *Legal Writing in Plain English: A Text With Exercises* (2001); Bryan A. Garner, *Securities Disclosure in Plain English* (1999); Stanley M. Johanson, *In Defense of Plain Language*, 3 *Scribes J. Legal Writing* 37 (1992); Joseph Kimble, *Lifting the Fog of Legalese: Essays on Plain Language* (2006); Joseph Kimble, *The Great Myth That Plain Language Is Not Precise*, 7 *Scribes J. Legal Writing* 109 (1998–2000); Joseph Kimble, *Answering the Critics of Plain Language*, 5 *Scribes J. Legal Writing* 51 (1994–95); Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 *Thomas M. Cooley L. Rev.* 1 (1992); Joseph Kimble, *A Plain English Primer*, 33 *Prac. Law.* 83 (1987); Christine Mowat, *A Plain Language Handbook for Legal Writers* (1998); Thomas A. Murawski, *Writing Readable Regulations* (1999); Plain English Campaign, *Language on Trial: The Plain English Guide to Legal Writing* (1996); Plain English Campaign, *The Plain English Story* (rev. ed. 1993); Wayne Schiess, *What Plain English Really Is*, 9 *Scribes J. Legal Writing* 43 (2003–04).
16. <http://www.plainenglish.co.uk/goldenbulls.htm> (last visited Aug. 13, 2008).
17. Robert D. Eagleson, *Plain English, What Lawyers Need to Know About Plain Language*, 73 *Mich. B.J.* 44, 46 (Jan. 1994).
18. For good suggestions on plain-English organization, see Joseph Kimble, *Plain English, The Elements of Plain Language*, 81 *Mich. B.J.* 44, 44 (Oct. 2002).
19. This example comes from Gerald Lebovits, *The Legal Writer, He Said — She Said: Gender-Neutral Writing*, 74 *N.Y. St. B.J.* 64, 55 (Feb. 2002).
20. Gerald Lebovits, *The Legal Writer, Do's, Don'ts, and Maybes: Legal Writing Do's — Part II*, 79 *N.Y. St. B.J.* 64, 64 (June 2007).

21. Richard C. Wydick, *Plain English for Lawyers* 17-20 (5th ed. 2005).
22. Hathaway, *supra* note 2, at 26.
23. For additional pointers, see Mark P. Painter, *30 Tips to Improve Readability in Briefs and Legal Documents or, How to Write for Judges, Not Like Judges*, 31 *Mont. Law.* 6, 10 (Apr. 2006).
24. K.K. DuVivier, *The Scrivener: Modern Legal Writing, Play It Again, Sam: Repetition — Part 1*, 30 *Colo. Law.* 65, 65 (Sept. 2001).
25. Wydick, *supra* note 21, at 70 (giving example).
26. For a good explanation of modifier problems, see University of Ottawa Writing Centre, *HyperGrammar*, <http://www.uottawa.ca/academic/arts/writcent/hypergrammar/msplmod.html>.
27. See <http://www.plainlanguage.gov/howto/guidelines/bigdoc/writeNo2Negs.cfm> (last visited Aug. 13, 2008).
28. Philip Frost, *Plain English, Plain Language in Transition*, 84 *Mich. B.J.* 46, 46 (Aug. 2005).
29. Tom Goldstein & Jethro Lieberman, *The Lawyer's Guide to Writing Well* 112 (2d ed. 2002).
30. *Id.* (giving example).
31. Wydick, *supra* note 21, at 11 (giving examples).
32. This example comes from Goldstein & Lieberman, *supra* note 29, at 112.
33. Webster's Universal College Dictionary 277 (1997).
34. This example comes from Goldstein & Lieberman, *supra* note 29, at 110.
35. *Id.* (giving example).
36. James D. Yellen, *Securities Arbitration 2005: Telling Your Story — Plain English in Securities Arbitration Pleadings*, *Prac. L. Inst., Corp. L. & Prac. Course Handbook Series* 41, 48 (Aug. 2005).
37. <http://scribes.org> (last visited Aug 13, 2008).
38. See <http://www.clarity-international.net> (last visited Aug. 13, 2008).
39. See <http://www.plainenglish.co.uk> (last visited Aug. 13, 2008).

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Harness Racing and New York's Ethics Laws

How politicians' interest in the harness tracks gave New York its ethics laws.

by Bennett Liebman

Also in this Issue

**A Brief Introduction to
Florida Tort Law for
New York Attorneys**

**Economic Globalization
and Its Impact Upon the
Legal Profession**

**The Wave of the Future
or Blatant Copyright
Infringement?**



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Do's, Don'ts, and Maybes: Legal Writing Do's — Part I

To create a legal document, you must know your audience, the purpose of your document, how to organize, and when to stop researching and start writing. You must follow deadlines. You must comply with court and ethics rules. You must edit your work and have pride in it. That's the writing process.

Once you've perfected the process you can focus on the final product. The way to create a good final product is to know legal writing's do's, don'ts, and maybes. This column and the next offer the Legal Writer's top 26 do's — a double baker's dozen. Following these two columns will be two columns on legal writing's don'ts. The Legal Writer will then continue with columns on grammar errors, punctuation issues, and legal-writing controversies. Together this series of columns covers legal writing's do's, don'ts, and maybes.

There's no one way to write it right. Good writers do things differently. But writers and readers always agree about whether a document is written well. Despite the controversies about some legal-writing details, there's a consensus about what's important: accuracy, brevity, clarity, and honesty. Here's the consensus — the things writers should love.

1. Love the Right Tone. Tone helps determine whether readers will accept what you write. To get your tone right, ascertain whom you're writing for. Anticipate the reader's concerns. Always be measured, rational, and respectful. Never be bitter, condescending, defensive, defiant, sarcastic, self-righteous, or strident. Don't

bold, italicize, underline, capitalize, or use exclamation points or quotation marks to emphasize or show sarcasm. Avoid excessive capitalization. Once you've found the right tone, keep it consistent. If the audience is a court and you're writing a brief, your tone should be confident, formal, persuasive, and understated, not angry, colloquial, harsh, or pushy. If your audience is your boss and you're writing an office memorandum, your tone in discussing fact and explaining law should be objective, not argumentative. Write about emotional issues, but don't write emotionally.

2. Love Perspective. To persuade, make your reader identify with your client. Write about real people and real events. Your client isn't a wooden figure, although your adversary's client might be. Bring your client to life. The way you refer to people affects how readers perceive them. Use your client's real name. If you represent the defendant in a criminal case, describe the crime blandly or generally. If you represent the prosecution, invoke the victim's perspective and describe the crime in detail. A key place for perspective is when you write the facts. Telling a revealing and vivid story will engage the reader and help the reader remember what you wrote.

3. Love Theme. Every persuasive legal document must have a theme. Without a theme, a document won't be persuasive. A theme works if it appeals to a smart high-school student. Themes involve right and wrong, good and bad. Theme is about what's just and moral. To create a theme, imagine you're in a jurisdiction with no

laws, a jurisdiction in which all that counts is justice and morality. Tell the reader you're right, not because some law says this or that, but because if you lose the bad will prosper and the good will suffer. Think about your adversary's theme. Once you find a theme, weave it from the beginning to the end of your writing. Include every important and helpful authority, fact, and issue that supports your theme or contradicts your adversary's theme. Exclude all else.

4. Love Good Facts. Organization, perspective, and theme are essential to writing facts. How you present facts determines whether the story is effective. Organize facts chronologically. Reciting facts witness by witness won't engage the reader.

A brief's Statement of the Case or Counterstatement section or an office memorandum's Facts section, should contain only facts, not argument. Don't explain the significance of the facts. Save the argument for the brief's Argument section or office memorandum's Discussion section.

In a brief, present facts favorable to your position first. Readers will prejudge the case and rationalize later inconsistent facts because of what they already believe is true. *Example:* A man you've already described as a pillar of the community walks into a bar and spills beer on someone. The reader will infer that the spilling was accidental. When you later argue it was accidental, the reader will agree. *Example:* A man you've already described as dishonest and vile walks into a bar and spills beer on someone. The reader will

CONTINUED ON PAGE 56

infer that the spilling was intentional. When you later argue it was intentional, the reader will agree. Surround unfavorable facts with favorable facts for a halo effect. Emphasize favorable facts and de-emphasize unfavorable ones. In a brief, never let two sentences pass without letting the reader know which side you represent.

In an office memorandum, present the facts neutrally and objectively, with no intention to persuade the reader. The reader shouldn't know from the facts what you'll ultimately recommend or predict.

In a brief's Argument section or an office memorandum's Discussion section, apply only those facts mentioned in your facts. In your facts, use only those facts you'll apply in the Argument or Discussion section. Review your facts after preparing the Argument or Discussion sections to confirm that you've included all necessary facts. Eliminate irrelevant dates, facts, people, and places. The record must support every assertion of fact, which comes from pleadings, affidavits, and deposition, hearing, and trial transcripts. Always cite the record for facts mentioned anywhere in a brief or office memorandum.

The brief's Statement of the Case or Counterstatement should begin with something about the person you want the reader to identify with or hate. Start from that person's perspective. End the Statement of the Case or Counterstatement with procedural history. The office memorandum's Facts section should begin with procedural history.

5. Love Clarity. Jewelers say that the better the clarity, the better the quality. The same applies to legal writing. Omit unnecessary fact, law, and procedure. In sentences, paragraphs, and sections, put essential things first. Assume that the reader knows nothing about your case. Write directly, not indirectly. *Example:* "Justice is an important concept." *Becomes:* "This

court should reverse the conviction." State clearly and repeatedly why you're writing. What do you want? What relief are you seeking? Go from general to specific, but don't generalize. Raise the issue before you explain it. Give the rule before you give the exception. Give rules and exceptions in separate sentences. Lay a foundation before you discuss something: Don't discuss the terms of a contract before you establish that the parties have a contract. Familiarize readers with a case before you analogize or distinguish it. Introduce characters before you talk about them.

6. Love Getting to the Point Fast. State your point in the first paragraph on page one of your document or, in a brief, in the Argument section. Putting your main point up front gives your readers the conclusion in case they don't read further. It tempts readers to continue and puts everything in context. Consider the shape of a funnel or inverted pyramid: give the conclusion (the big picture), then detail. Stating your point immediately in a brief means including a thesis paragraph after each point heading. The thesis paragraph is the roadmap, the organization to your argument. In the topic sentence — first sentence — of the thesis paragraph, state your conclusion on the issue. Then explain how you've reached that conclusion: why you should win. Conclude the thesis paragraph with a thesis sentence: what you want the court to do. In an office memorandum, begin the thesis paragraph with a topic sentence: a statement of your issue. Then state the law objectively on the issue from your topic sentence. Conclude the thesis paragraph with a recommendation or prediction.

7. Love Succinctness. Readers have short attention spans. Don't repeat yourself: Say it once, all in one place. Don't dwell on givens. Don't give the entire procedural history unless doing so advances your argument or proves necessary in context. Include only legally significant facts, apply only relevant law to those facts, and tell your readers only what they need to know. Include

only facts that advance your theme and help good arguments get noticed. Cite only to legal authority that's helpful to your argument. Unless you want to analogize or distinguish your case from the authority you're citing, don't analyze the authority in depth or give its facts. Don't add unnecessary text by defining and qualifying.

8. Love Concision. Use only necessary words: the fewest words without losing precision in language, because precision is more important than concision. Make every word count. If the last line of a paragraph has only a few words, cut words out of the paragraph to save a line. Deleting unnecessary words will make your writing tighter and your document shorter. This technique lets you come within the page limit. Obliterate the obvious. *Incorrect:* "If respondent is evicted, he will have to leave his apartment." Replace coordinating conjunctions ("and," "but," "for," "nor," "or," "so," "yet") with a period. Then start a new sentence. Transfer to a second sentence most parenthetical expressions, also called embedded clauses — an internal word group that has its own subject and verb. Doing so shortens your sentence and thus is concise, even though it might add text. *Example:* "The judge's chambers, which has a view of the Empire State Building, is on the ninth floor." *Becomes:* "The judge's chambers is on the ninth floor. It has a view of the Empire State Building." Delete "as" and "to be," if possible. *Examples:* "Some consider cigarette smoking as a crime." *Or:* "Some consider cigarette smoking to be a crime." *Become:* "Some consider cigarette smoking a crime." Don't begin sentences with "in that" or use "in that" in an internal clause: "In that the judge's cousin was a litigant, the judge recused herself." *Becomes:* "The judge recused herself because her cousin was a litigant." Delete "being." *Example:* "The attorney was regarded as being a good writer." *Becomes:* "The attorney was regarded as a good writer." Wipe out "of" and "as of." Delete the following: "in fact," "in point of fact," "as a matter of fact,"

“the fact is that,” “given the fact that,” “the fact that,” “of the fact that,” and “in spite of the fact that.” Save “in fact” to state facts, not opinions. *Incorrect:* “The opinion relies on the fact that testimonial statements are inadmissible at trial.” *Correct:* “The opinion relies on the rule that testimonial statements are inadmissible at trial.” Strike the nonstructural “who,” “who are,” “who is,” “whoever,” “whom,” “whomever,” “which,” “which is,” “which are,”

similes, parallelism, and antithesis. Metaphors, which compare unlike things that have something in common, make abstract concepts concrete. *Examples:* “You don’t get a second bite from the apple.” “Property rights are a bundle of sticks.” “The court must suppress the fruit of the poisonous tree.” A simile is a comparison using “as,” “as if,” “as though,” or “like.” *Examples:* “A judge is like an umpire at a baseball game.” “Judges are like funnels:

an important case in which you must preserve the record for appeal. State your main point within 90 seconds. Recite facts chronologically. Add detail to tell a memorable story. Cut out facts that don’t advance your argument. Use 50 to 75 words to frame your issue.

In a brief, use separate sentences to create a statement-statement-question format for each Question Presented. Starting your question with “whether” and writing one long, convoluted

There’s a consensus about what’s important: accuracy, brevity, clarity, and honesty.

“which were,” “that,” “that is,” “that are,” and “that were.” *Example:* “The point that I’m making is that . . .” *Becomes:* “The point I’m making is that . . .” Trim “to” stilt: “Help to prepare” becomes “help prepare.” “In an attempt to,” “in an effort to,” “in order to,” “so as to,” “unto,” “with a view to,” and “with the object being to” become “to.” “In order for” becomes “for.” “Is authorized to” becomes “may.” “With reference to,” “with regard to,” and “with respect to” become “about.” Eliminate pleonasm. They’re unnecessarily full expressions. *Example:* “The judge, who e-mailed me, he likes me.” *Becomes:* “The judge, who e-mailed me, likes me.”

9. Love Concreteness. Don’t just tell your readers something: Show them what you mean. Show by describing people, places, and things. Abstract conclusions don’t help readers understand the problem. Turn the general and vague into the particular and vivid. Write so that readers will hear, see, smell, taste, and touch your ideas. Prefer concrete nouns and vigorous verbs to adverbs and adjectives. Use adjectives and adverbs sparingly. *Poor examples:* “The man is tall.” *Or:* “The man is very tall.” *Good example:* “The man is seven feet, three inches tall.”

10. Love Memorable Rhetoric. Rhetoric is the art of marshaling and expressing argument. Embrace rhetorical strategies by using metaphors,

There’s a big opening at the top and all the law clerks and the staff attorneys pour stuff in there.”¹ Another effective device is parallelism: a similarity of structure in a pair or series of words, phrases, and thoughts. *Examples:* “A government of the people, by the people, and for the people.”² “We will not tire, we will not falter, and we will not fail.”³ “I came, I saw, I conquered.”⁴ Antithesis is powerful when it concisely contrasts ideas of the same order. *Examples:* “Injustice anywhere threatens justice everywhere.”⁵ “Never in the field of human conflict was so much owed by so many to so few.”⁶ “We must all hang together or we will all hang separately.”⁷

11. Love Issues. A common mistake law students make is to focus on citations instead of issues and arguments. Stress issues and arguments, not citations. Give rules first. Then support them with citations.

Here are some suggestions on writing issues, called Questions Presented in a brief or Issues Presented in an office memorandum. Choose one to four issues. An issue is an independent ground on which the relief you seek can be granted if the reader agrees with you on that issue and disagrees with you on everything else. Avoid trivial issues. The only time you should raise as many points as possible — the kitchen-sink approach — is if you have

sentence is superficial and ineffective. The first two sentences in this statement-statement-question format present the legal controversy and introduce relevant facts. The last sentence is a question that goes to the heart of the issue. Write the question so that the answer is yes. The answers to the Questions Presented are found in your point headings. In an office memorandum, write the Issues Presented as a question, one sentence long, that addresses the issues. To prevent a long, intricate question, write the Issues Presented in a statement-statement-question format. After the Issues Presented, include an Answer section — answer the Issues Presented with a “yes,” “no,” or “maybe” and the concise reasons for your answer, without repeating the question and without using “because.”

First argue the issue that has the greatest likelihood of success. If all claims have the same likelihood of success, discuss the claim that’ll affect the litigation most. In a criminal appeal in which you represent the defendant, for example, discuss whether the court should grant your client a new trial before you discuss whether the court should reduce your client’s sentence.

Exceptions: Your first issue should be a dispositive threshold issue — jurisdiction or statute of limitations — if you have one. Move logically

Putting your main point up front gives your readers the conclusion in case they don't read further.

through statutory or common-law tests. Discuss your issues in the order in which the statute or case laid out a multi-factor test. When the answer to one issue depends on the answer to an earlier question, resolve the first issue first. Discussing claims and issues in the order they arose facilitates understanding if the claims and issues arose chronologically. Resolve issues by a hierarchy of authority: constitutional issues first, then statutory issues, then common-law issues.

In opposition papers, don't copy the way your adversary ordered the issues. Tell your reader which issue you're opposing, but order your opposing issues the way it works for your client, not your adversary.

12. Love Large-Scale Organization: Headings. Structure your writing so that the reader follows your thoughts from the beginning to the end of the document. Identify each section in your brief or office memorandum: "Question Presented" or "Issue Presented"; "Statement of the Case" (opening brief) or "Counterstatement" (replying brief) or "Facts"; "Argument" or "Discussion"; and "Conclusion."

After you've figured out the issues and how to order them, divide your brief's Argument section or office memorandum's Discussion section into headings to tell readers where you're going. Headings are signposts. Use roman numerals for your point headings (I., II., III.). Some writers believe that you should use all capitals for your point headings. The Legal Writer recommends capitalizing only the first letter of each word. All capitals is unreadable. For your subheadings (A., B., C.), capitalize the first letter of each word: Don't use all capitals. For your sub-subheadings, use figures (1., 2., 3.). You can't have a subheading (A.) or a sub-subheading (1.) on its own.

With subheadings or sub-subheadings, you need two or more subheadings (A., B.) or sub-subheadings (1., 2.). The exception is that you can have a single point heading (I.) on its own. Use a period after each heading, subheading, or sub-subheading. Single-space your headings.

All headings, subheadings, and sub-subheadings should be one sentence long, although they may contain a semicolon. They must be concise, descriptive, and short.

Point headings in a brief answer the Questions Presented. Match the number and order of your Questions Presented with your point headings. If you have one Question Presented, you should have one point heading; if you have two Questions Presented, have two point headings. If you have two or more Questions Presented, mention them in the same order in the table of contents and in the Argument section. In the office memorandum's Discussion section, address the issues in the same order as you did in the Issues Presented.

In a brief, write headings in an affirmative, argumentative, and conclusory way — the conclusion you want after applying law to fact. The more subheadings or sub-subheadings, the more conclusory the point headings. The argument in the subheadings should add up to the argument in the point headings. The sub-subheadings should add up to the subheadings. Too many headings will break up the text too much. Your document will be disjointed and have no flow. Too few headings will make your document disorganized. To determine whether you've enough headings, read all the headings in the table of contents as they appear in the brief. The argument should reveal itself.

In an office memorandum, write the headings in an objective, neutral, and informative way.

Keep your subject near its predicate. Don't interject information between your subject and predicate. Never write ambiguous headings in which "not" precedes "because." Will the sen-

tence mean "Not because of this, but rather because of that"? Or "Not so, and for this reason"? Or "Because of this, but for a different reason"? Use "because" before "not," but never use "not" before "because" unless you add a second clause or sentence.

What goes in the text after the heading, subheading, and sub-subheading shouldn't repeat the heading, subheading, and sub-subheading. Be creative. Don't regurgitate. Don't even paraphrase.

In the body of your document, bold your headings, subheadings, and sub-subheadings, including the roman numerals, letters, and figures that come before them. Don't bold anything in the brief's table of contents or use a period after each heading. Use dot leaders in your table of contents to separate your headings from their corresponding page numbers.

13. Love Large-Scale Organization: IRARC and CRARC. For a brief's Argument section, organize each issue using the CRARC method — the Legal Writer's patent-pending way to organize. CRARC is an IRAC variant (Issue, Rule, Analysis, and Conclusion). CRARC stands for Conclusion, Rule, Analysis, Rebuttal and Refutation, and Conclusion. In the first Conclusion section of CRARC, state the issue and why you should prevail on it. In the Rule section, state your points from the strongest (those you'll most likely win) to the weakest (those you'll least likely win). After each rule, cite your authority from the strongest to the weakest and from the most binding on down. In the Analysis section, apply your rules — the law — to the facts of your case. The facts should come from the Statement of the Case or Counterstatement. In the Rebuttal and Refutation section, state the other side's position honestly and refute it persuasively. Address adverse fact and law, even if your adversary didn't or might not. Doing so will diffuse its impact before your reader figures out your adversary's argument. The Rebuttal and Refutation section is placed here on purpose. The Rebuttal

and Refutation section is in the middle, not the beginning or end — places with the greatest emphasis — of the argument. You’ve begun with why you should win. You’re right because you’re right, more than because the other side is wrong. In the Rebuttal and Refutation section, don’t repeat anything you’ve written in the Rule section. In the second Conclusion section, state the relief you’re seeking on the issue.

For an objective office memorandum’s Discussion section, organize each issue using the IRARC method — the Legal Writer’s other organizational tool. IRARC, an IRAC variant, stands for the Issue, Rule, Analysis, Rebuttal and Refutation, and Conclusion. In the Issue section, state the issue objectively. In the Rule section, state the rule applicable to the issue. Then support each point with the law. In the Analysis section, apply your rules — the law — to the facts of your case. Facts come from the Facts section, which is compiled from affidavits, affirmations, and deposition, hearing, and trial transcripts. In the Rebuttal and Refutation section, create a strawman argument — the contrary argument — and then refute it. In the second Conclusion section, give your recommendation or prediction.

In the next issue, the Legal Writer will continue with a second set of 13 do’s. Following that column will be two columns on legal writing’s don’ts. ■

1. Richard S. Arnold, *The Future of the Federal Courts*, 60 Mo. L. Rev. 533, 543 (1995).
2. Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), in 7 *The Collected Works of Abraham Lincoln* 17, 23 (Roy P. Basler ed., 1953).
3. George W. Bush, address before Joint Meeting of Congress, September 20, 2001.
4. “I came, I saw, I conquered” is the English translation of Julius Caesar’s oft-quoted statement from the Latin, “Veni, vidi, vici.”
5. Rev. Dr. Martin Luther King Jr., Letter from the Birmingham Jail, Apr. 16, 1963, available at <http://www.almaz.com/nobel/peace/MLK-jail.html> (last visited Feb. 22, 2007).
6. Sir Winston S. Churchill, 1940, on the debt due to the Royal Air Force pilots during World War II.
7. John Bartlett, *Familiar Quotations* 348 (15th ed. 1980) (attributing these words to Benjamin Franklin).

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Journal



Smoke and Mirrors

The Fabrication and Alteration of Electronic Evidence

*Manipulated Evidence Can Be More
Powerful Than the Sum of Its Parts*

by Sharon D. Nelson and John W. Simek

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Report to Membership*



GERALD LEBOVITS is a judge of the New York City Civil Court, Housing Part, in Manhattan. He thanks court attorney Alexandra Standish for assisting in researching this column. His e-mail address is GLebovits@aol.com.

Do's, Don'ts, and Maybes: Legal Writing Do's — Part II

In the last column, the Legal Writer discussed 13 things you should do in legal writing. We continue with our list of the next 13 do's. Together the columns are a double baker's dozen of legal writing's do's — the things writers should love.

14. Love Small-Scale Organization: Paragraphs. Paragraphs are the building blocks of writing. Start each paragraph with a topic or transition sentence. A topic sentence introduces what you're going to discuss in your paragraph. Every sentence in each paragraph must relate to and amplify your topic sentence. One way to have a topic sentence is to take the last sentence of a paragraph and put it onto the next. A transition sentence links the end of one paragraph to the start of the next paragraph by linking or repeating a word or concept. Use transitional devices to divide paragraphs and to connect one paragraph to the next when a paragraph becomes lengthy. The best transitional devices join paragraphs seamlessly. End your paragraph with a thesis sentence that summarizes and answers your topic sentence. Don't restate your topic sentence. Every sentence in the paragraph should lead to the conclusion set out in the thesis sentence. Each sentence must relate to the next, to the one before it, to the topic sentence, and to the thesis sentence. *Topic sentence:* "Defendant lied about his relationship with ABC." *Thesis sentence:* "The court should reject defendant's testimony as incredible." *Transition sentence:* "Defendant also lied about his relationship with XYZ."

15. Love Appropriate Paragraph and Sentence Length. A sentence

with more than 25 words is hard to digest. Each sentence should contain one thought and about 15–18 words. A paragraph should rarely be longer than six sentences. It shouldn't exceed one thought and two-thirds of a double-spaced page or 250 words, whichever is less. Varying sentence and paragraph length makes your writing spicy and more readable. When in doubt, shorter is better. Reserve one-sentence paragraphs for those sentences that must have great emphasis. If you use too many one-sentence paragraphs, the emphatic effect will be lost. Also, too many short sentences or paragraphs in rapid order is angry-sounding, choppy, and distracting.

To see your "average words per sentence" on WordPerfect, go to "File," then "Properties," and then "Word Count." On Microsoft Word, you have two ways to see your "words" and "paragraphs." Go to "Tools," then "Word Count," or go to "File," then "Properties," and then "Statistics."

16. Love Small-Scale Organization: Sentences. Start sentences with familiar, less important information. End sentences with new, more important information. The best writing repeats in the beginning of the second sentence concepts, names, phrases, and words taken from the end of the first sentence. Transition from sentence to sentence by going from old to new, from simple to complex, from short to long, or from general to specific. The strongest emphasis is at the end of a sentence. The second strongest is at the beginning of a sentence. The least emphasis is in the middle of a sentence. *Example:* "Bill drinks, but he's a good worker."

Versus: "Bill's a good worker, but he drinks." Start and end with power. Bury less important information in the middle. The best writing doesn't rely excessively on conjunctive adverbs like "additionally," "along the same lines," "furthermore," "however," "in addition," "in conclusion," "moreover," "lastly," and "therefore." If the logic and movement of your ideas are clear, your reader connects thoughts without needing artificial transitional devices that impose superficial logic.

17. Love Simple Declarative Sentences. Don't write convoluted sentences. Each sentence should contain a subject, a verb, and an object. Put the subject at the beginning of most sentences. *Examples:* "The court . . ." "Defendant . . ." "The witness . . ." Use a short subject. Put the verb immediately after the subject. Don't put words between the subject and the verb: keep your subjects next to their verbs. *Examples:* "The court held . . ." "Defendant fled . . ." "The witness explained . . ." Misplacing your subject, not keeping your subject next to your verb or object, or placing qualifying or descriptive information before the main subject and its verb ("front-loading") are common errors that lead to lack of clarity.

Don't begin every sentence with a subject. From time to time substitute subjects with subordinate clauses, also called dependent clauses, to assure flow and to rank ideas by importance. Then place the main idea in the main clause, after the dependent clause. A subordinate clause begins with a subordinate conjunction ("after," "although," "as,"

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“because,” “before,” “if,” “though,” “until,” “when,” “where,” or “while”) or a relative pronoun (“that,” “which,” “who,” “whoever,” or “whom”) and will contain a subject and a verb. For variety, begin sentences occasionally with “after,” “although,” “as,” “as if,” “as long as,” “because,” “before,” “if,” “though,” “until,” “when,” “where,” or “while.”

Not every sentence should be simple. A few should be compound, complex, or compound-complex. Compound sentences contain two independent clauses: the clauses are linked with a semicolon, or they are linked with a coordinating conjunction. *Example:* “New York City is fun and exciting, but it doesn’t compare to Montréal.” Complex sentences contain a main, independent clause and at least one dependent clause linked by a subordinating conjunction. *Examples:* “Although Montréal is a fun town, I don’t visit often enough.” Compound-complex sentences contain at least two independent clauses, and at least one dependent clause, all somehow linked. *Example:* “New York City is fun and exciting, and so is Montréal, but New York City doesn’t compare to Montréal, although I don’t visit Montréal often enough.”

18. Love the Active Voice. Prefer the active voice to the passive. The passive voice comes in two forms: single passives and blank passives. Blank passives are sometimes called double or nonagentive passives. A single passive occurs when a sentence is converted to object, verb, subject from subject, verb, object. The blank passive hides the subject. The active voice lets readers know who did what to whom, in that order. The active voice is concise; the passive, wordy. The active voice is always honest; the passive is sometimes dishonest. People think in the active voice, not the passive. Active voice: “The lawyer wrote the brief.” This sentence goes from subject, to verb, to object. Single passive: “The brief was written by the

The active voice is concise; the passive, wordy. The active voice is always honest; the passive is sometimes dishonest.

lawyer.” If you see a “by,” you’ll see a single passive.

Use single passives only to dovetail or to end a sentence with climax. To dovetail is to connect sentences. To climax is to end a sentence with emphasis. One dovetailing technique is to move from old to new. *Active example:* “Mr. Smith wrote the brief. Mr. Smith is a strong writer.” *Dovetail examples:* The brief was written by Mr. Smith, who is a strong writer.” *Or:* “The brief was written by Mr. Smith. Mr. Smith is a strong writer.” *Climax example:* “The ground was shaken by an earthquake.” The word “earthquake” brings about the climax; the words “the ground” aren’t that important. The active version is less interesting than the passive version: “An earthquake shook the ground.”

Sometimes blank passives hide what’s important but harmful. Using blank passives to conceal information is unethical. *Example:* “Mistakes were made.” In this sentence, you don’t know who made the mistakes. *Becomes:* “Attorney Abe made mistakes.” *Example:* “The suspect was read her *Miranda* rights.” The problem with this sentence is that you don’t know who read the suspect her rights. Write it in the active voice instead: “Officer Jones read the suspect her *Miranda* rights.” *Exceptions:* Use blank passives if you don’t know who the subject (actor) is or to de-emphasize an irrelevant or obvious subject (actor).

19. Love Gender-Neutral Language. Gender neutrality isn’t about political correctness. It’s about thinking and writing in a nondiscriminatory way. Sexist language is bad because it’s offensive and degrading. It’s discrimination in print. Sexist language is also bad because it focuses readers on style.

Gender-neutral language focuses readers on content. A writer’s goal is to emphasize content, not style.

The first way to make language gender neutral is to make the antecedent plural: “A law clerk can’t be careless. She must be meticulous and precise.” Change “a law clerk” to “law clerks” and “she” to “they” to eliminate the sexist language. *Becomes:* “Law clerks can’t be careless. They must be meticulous and precise.” The second way is to rephrase the sentence to eliminate the pronoun: “She who can’t handle the work should find another job.” *Becomes:* “Anyone who can’t handle the work should find another job.” “A waiter likes his customers to be generous.” *Becomes:* “A waiter likes generous customers.” The third way is to repeat the noun. “A police officer will be here soon. He’ll help you.” *Becomes:* “A police officer will be here soon. The officer will help you.” The fourth way is to use the second-person pronoun: “you,” “your,” or “yours.” “He who can write should apply for the job.” *Becomes:* “If you can write, apply for the job.”

Eliminate all sexist language. Use gender-neutral parallel language: Write “husband and wife,” not “man and wife” or “man and woman.” Delete the suffix “-man.” Use “Assembly Member” not “Assemblyman”; “Chair” not “Chairman” or “Chairperson”; and “Police officer” not “Policeman.” Avoid the suffixes “-ess” and “-trix.” Use “executor,” not “executrix”; “prosecutor,” not “prosecutrix.” Eliminate masculine terms: “humanity,” not “mankind”; “made by hand,” not “man-made”; “average person,” not “common man.” Don’t use clumsy variants like “s/he/it,” “s/he,” “(s)he,” “he or she,” or “him or her,” or alternate

between “he” and “she.” Never write ungrammatically to solve a gender issue. *Incorrect:* “A gourmet likes their coffee black.” *Correct:* “Gourmets like black coffee.”

20. Love Good Quoting. To quote or not to quote — that’s the question. Quoting shows readers you’re reliable: The reader needn’t consult the source to confirm your argument.

only in a newspaper headline. Use double quotation marks to set off or define a word or phrase and to repeat speech.

All quoting must be accurate. Always proofread your quotation from the original source to assure perfect quoting, letter for letter, comma for comma. Show if you’ve altered, added, or deleted language. Use brackets “[]”

The appellate court held that the lower court “should have denied the summary-judgment motion.”

People don’t like to read quotations. Tempt them. Introduce the quotation with a lead-in, weave the quotation into the sentence, or use an upshot to paraphrase the meaning of the quotation. *Lead-in:* “As the prosecutor explained, ‘The defendant bought a gun.’” *Weave:* “The prosecutor explained that defendant ‘bought a gun’ before he committed the crime.” *Upshot:* “The prosecutor explained that the defendant purchased the murder weapon before he committed the crime: ‘The defendant bought a gun.’”

21. Love and Follow Rules. Readers think that if you’ll cheat on rules, you’ll lie about the record or not cite controlling authority. Your credibility — essential to legal writing — will vanish. If you’re submitting a document to a court, follow the court’s rules about page length, table of contents, font, paper color, and number of copies you must submit. It’s easy to comply with these rules; many courts publish their rules on their Web sites. Make sure in particular to follow the rules of the judge who’s presiding over your case. Your office might have its own rules on style and format. Follow them, too.

22. Love Good Format. Write for the ear, not the eye. But create easy-to-read documents. Presentation always counts. Readers need plenty of white space on a page. Your margins should measure at least one inch, up to 1.25 inches, on the bottom, sides, and top. Indent your paragraphs one tab from the margin. The Legal Writer prefers single spacing, although many court rules require double spacing between paragraphs. The Legal Writer prefers two spaces between sentences, not just one space. If you’re writing an article for publication, for example, editors will convert to one space between sentences. The Legal Writer also prefers right-ragged margins to fully justified ones. Don’t create a kaleidoscope of colored or highlighted text. Choose one font and stick to it. The Legal Writer recommends Times New Roman or any

Readers think that if you’ll cheat on rules, you’ll lie about the record or not cite controlling authority.

Quoting is good if done reasonably. Quote essential things you can’t say better than the original. Quote authoritative sources. If a case, contract, or statute is in dispute, quote it. Quote to eliminate any suggestion of plagiarism. Then quote only what’s helpful or necessary. Quoting excessively makes your document look choppy and you look lazy. Excessive quoting doesn’t substitute for analysis. Paraphrase and explain instead, and cite the source.

Don’t use block quotations (also called blocked or set-off quotations) unless you’re quoting important parts of a statute, contract, or critical text from a case. The Legal Writer recommends that quotations of 50 words or more be double-indented. Others suggest blocking quotations of three lines or more. Single-space block quotations, but double space between block paragraphs. Never end a paragraph with a block quotation. The Tanbook — New York’s Official Style Manual — recommends that you use double quotation marks (“ ”) around the entire block quotation. The Bluebook advises not to surround the block quotation with quotation marks. The Legal Writer recommends using double quotation marks around the block quotation. They make it easier to see quotations, especially in documents published online.

Use single quotation marks (‘ ’) around a quotation within a quotation. Otherwise use single quotation marks

to show alterations or additions to a letter or letters in a word. *Alterations:* “Substantially” becomes “Substantial[.]” “Substantial” becomes “Substantial[ly].” “Substantially” becomes [s]ubstantially.” “Substantly” becomes “substant[ia]lly.” *Additions:* “The judge did [not] like to make jokes [sic] in court.” When quoted material contains a spelling, usage, or factual error, use “[sic],” meaning “thus,” after the error to show that the error is in the original. If the context makes it clear that the error was in the original, don’t add “[sic].” If you overuse “[sic],” the reader will believe you’ve used the quoted material only to highlight the error. To prevent overusing “[sic],” alter the quotation or paraphrase it.

Use ellipses to show omission. Use three-dot ellipses (“ . . .”), all separated by spaces, to show omissions of punctuation or one word or more in the middle of the sentence. Use four-dot ellipses (“”), all separated by spaces, to show omissions at the end of a sentence if (1) the end of the quotation is omitted; (2) the part omitted isn’t a citation, a footnote, or an endnote; and (3) the remaining portion is an independent clause. Unless all three criteria are satisfied, use a period, not an ellipse. Don’t use ellipses before the portion you quote. *Example:* The appellate court held that the lower court “. . . should have denied the summary-judgment motion.” *Becomes:*

font with the word “book” in it, with 12- or 13-point font size. Italicize case names. Don’t underline and italicize at the same time. Number each page (suppress the first page) unless you’re writing an affidavit or an affirmation, then number your paragraphs. Get rid of orphans and widows. An orphan is a single word or phrase at the end of a paragraph or page. A widow is a single word or phrase appearing alone at the top of a page.

23. Love Official Citations. Always cite the official version when you cite a New York case to a New York court. The court system gives most judges only the official reports; official citations are more accurate than unofficial ones; and CPLR 5529(e) requires lawyers to use official citations in appellate briefs. Prefer the New York Reports and its Second or Third Series (N.Y., N.Y.2d, N.Y.3d) to West’s North Eastern Report and its Second Series (N.E. or N.E.2d) or West’s New York Supplement and its Second Series (N.Y.S. or N.Y.S.2d); the New York Appellate Division Reports and its Second or Third Series (A.D., A.D.2d, A.D.3d) to West’s New York Supplement and its Second Series (N.Y.S. or N.Y.S.2d); and the New York Miscellaneous Reports and its Second or Third Series (Misc., Misc. 2d, Misc. 3d) to West’s New York Supplement and its Second Series (N.Y.S. or N.Y.S.2d). Use West’s unofficial reports, but not instead of the official citations. In New York, it’s unnecessary to give parallel citations. If you do, always cite and use the official citation (N.Y.3d, A.D.3d, Misc. 3d), if available, in addition to the unofficial citation. Use commas to separate parallel citations.

24. Love Good Citing. Readers love proper citation. It doesn’t take long to look up the rule in the Bluebook, now in its eighteenth edition, or in ALWD, the Association of Legal Writing Directors Citation Manual, now in its third edition. The Bluebook has been around since 1926. Most lawyers, law journals, and Moot Court competitions use the Bluebook. Some law school legal-writing programs use ALWD as an antidote for the Bluebook blues. New York

judges use the New York Law Reports Style Manual (Tanbook),¹ prepared by the New York Law Reporting Bureau.² Make it easy for the court to rule for you. Use the Tanbook when you write for New York courts. The Bluebook and ALWD are brilliant documents. But their recommendations on how to cite New York authorities are always wrong; and the Tanbook is always right.

Citing well makes you credible. It tells readers to trust you and your writing. Use the correct volume, reporter, page number, and case name. Accurate citations help readers find propositions fast. Give a full citation in each new section of your document before you give a short-form citation; then always use the short-form citation in that section of your document. Use signals to introduce citations. No signal is necessary after a quotation or if the citation supports your proposition directly. Use “contra” if your citation contradicts your proposition directly. Use “see” if your citation supports your proposition indirectly or by inference. When you use “see,” explain in the text or in a parenthetical following the citation why the citation supports your proposition. Use “but see” if your citation contradicts your proposition indirectly.

Use pinpoint (jump) citations. This forces you to read the authority so that you’re certain your authority supports your proposition fully; it also helps you find other citations and arguments. Pinpointing tells readers that you’ve read the case and know the material. It also prevents readers from rummaging through an entire document to find your point. When citing cases or secondary authorities, use pinpoint citations down to the footnotes. Use the correct court and year to tell the reader whether your authority is binding or persuasive. Mention in a parenthetical after your citation whether the opinion is a memorandum, per curiam, en banc, dissent, concurrence, or plurality opinion. Mention whether leave or certiorari was granted or denied. Use parenthetical explanations to clarify authority. Use lower-cased gerunds — a verb used as a noun that ends in “-ing”

— at the beginning of the parenthetical explanation: “citing,” “comparing,” “distinguishing,” “finding,” “holding,” or “noting.” *Example: A v. B*, 3 N.Y. 123, 125 n.4, 55 N.Y.S.2d 231, 234 n.4, 1 N.E. 456, 457 n.4 (1981) (holding that landlord may take for personal use one or more apartments in building if landlord shows good faith at trial). Pinpoint even if your proposition is on the first page: *E v. F*, 16 Misc. 61, 61, 18 N.Y.S. 75, 75 (App. Term 2d & 11th Jud. Dists. 2d Dep’t 1961) (per curiam). The same applies if your authority has only one page.

One good citation is enough. Don’t string cite obvious or threshold matters. Limit string citing to three cases except when you must document the sources necessary to understand authority or a split in authority. Separate different authorities by semicolons. Never cite headnotes and syllabuses.

25. Love Deadlines. Submit court documents on time. If you need more time, ask the court in advance, not after the document is due. If your boss gave you a deadline, follow it. Adhering to deadlines shows that you’re professional and responsible. It shows that you respect and value someone else’s time. If you gave yourself a deadline, follow it, too.

26. Love Visuals. Paint visuals for the reader. Attach to your legal document the authority you’ve cited if the authority is unpublished. If you’re submitting a document to a trial court, attach the leading cases even if the cases are published or available on Westlaw or LEXIS. Highlight the relevant text in the attachment. Download photographs and include them in the document. Create graphs and charts if you can. Attach them in an appendix and explain them in the text.

In the next two columns, the Legal Writer will discuss legal writing’s 26 don’ts. ■

1. See http://www.courts.state.ny.us/reporter/New_Styman.htm (last visited Apr. 20, 2007). A new edition of the Tanbook will be released sometime in the latter part of 2007.

2. See <http://www.courts.state.ny.us/reporter> (last visited Apr. 20, 2007).

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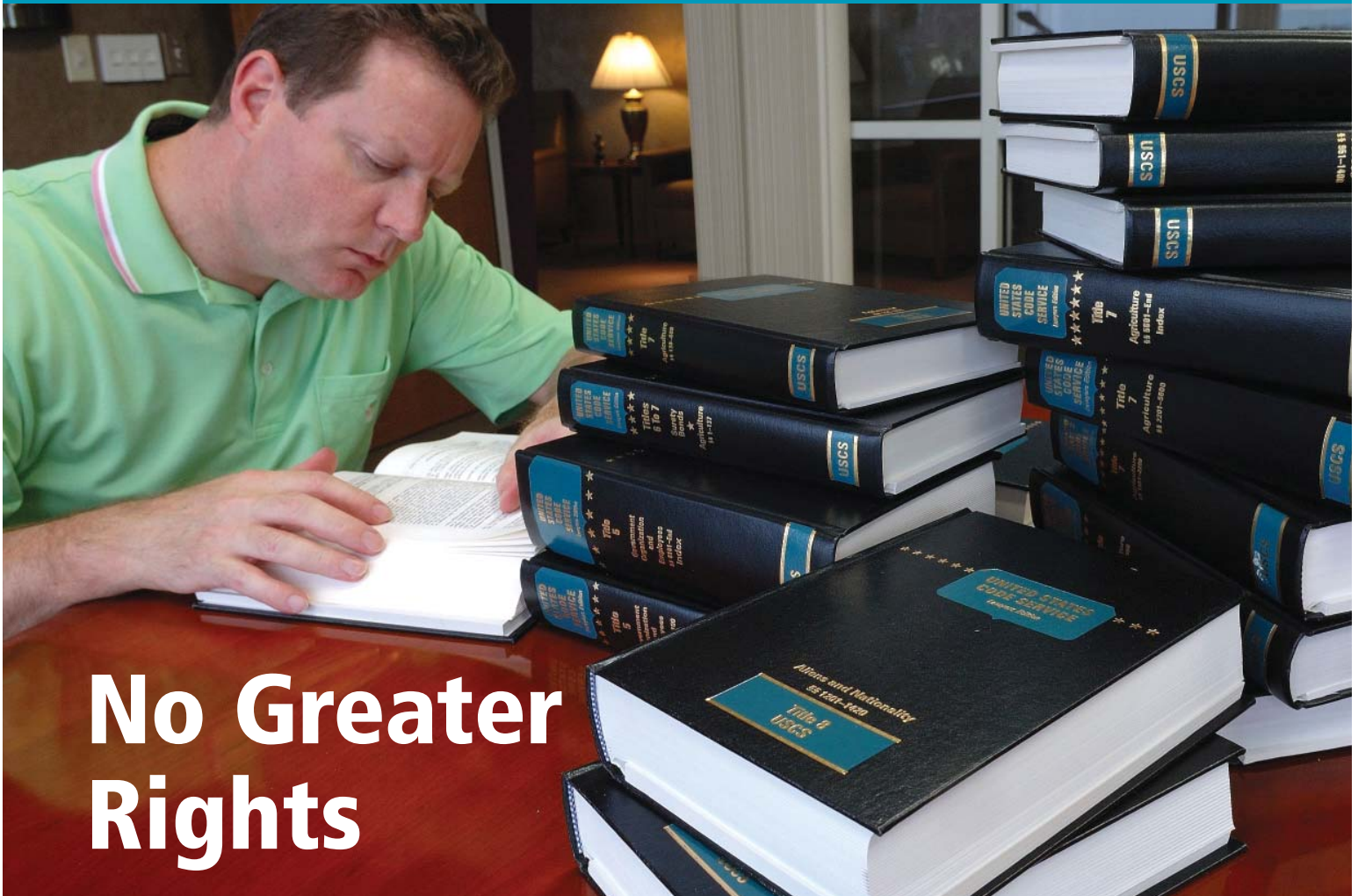
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Journal



No Greater Rights

The Limits of Pro Se Litigation in New York Courts

by Richard L. Weber

Also in this Issue

The Animal Welfare Act – What's That?

Religious Motif in Law and Nation Building

Motorist Insurance Law Update – Part II

Preparing for Your First Oral Argument



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Do's, Don'ts, and Maybes: Legal Writing Don'ts — Part I

In the last two columns, the Legal Writer discussed 26 things you should do in legal writing. We continue with a baker's dozen of things you shouldn't do: 13 things writers should hate.

1. Hate Boilerplate. Boilerplate is laziness. It's boring and intimidating at the same time. Readers know when you do a cut-and-paste job. They won't read boilerplate. Don't recycle your legal arguments. If you or the person from whom you've copied your boilerplate made errors in the original document, you'll repeat them in your boilerplate. Each client and case is unique. Boilerplate won't be specific to your case. Boilerplate is fine for contracts or forms. It's unacceptable in a legal argument.

2. Hate Clichés. Avoid clichés like the plague. Clichés make writers look as if they lack independent thought. They're banal. Eliminate the following: "all things considered," "at first blush," "clean slate," "exercise in futility," "fall on deaf ears," "foregone conclusion," "it goes without saying," "last-ditch effort," "leave no stone unturned," "lock, stock, and barrel," "making a mountain out of a molehill," "nip in the bud," "none the wiser," "pros and cons," "search far and wide," "step up to the plate," "tip of the iceberg," "wait and see," "wheels of justice," "when the going gets tough," and "writing on a clean slate."

3. Hate Misrepresentations and Exaggerations. Be honest. Mistakes are excused. Purposeful misstatements and negligent misquoting aren't. Honesty is the best policy. It's also the only policy. To prevent misrepresentations,

cite fact and law accurately, using the record for facts and original sources for law. But don't obsess. Obsessing over accuracy leads to including irrelevant details. Obsessing will make you overly cautious, force you to over-explain, cause you to submit a document late, and lead you to hate being a lawyer. Exaggerating is a form of misrepresenting. Understate not only to show integrity but also because understating persuades. Understating calls attention to content, not the writing or the writer. Also, concede what you must to make you honest and reasonable.

4. Hate Expletives. "Expletive" means "filled out" in Latin. Avoid expletives: "there are," "there is," "there were," "there was," "there to be," "it is," and "it was." *Examples:* "There are three issues in this case." *Becomes:* "This case has three issues."

"There is no fact that is more damaging." *Becomes:* "No fact is more damaging." "The court found there to be prosecutorial misconduct." *Becomes:* "The court found prosecutorial misconduct." Also eliminate double expletives: "It is obvious that it will be my downfall." *Becomes:* "My mistake will be my downfall." *Exceptions:* Use expletives for emphasis; for rhythm; to climax (end with emphasis); or to go from short to long or from old to new. *Emphasis examples:* "It was a full metal jacket bullet that killed John." Here, the author emphasizes the object that killed John, not that John was killed.

"It was Judge Beta who wrote the opinion." Here, the author emphasizes Judge Beta's authorship even though it would have been more concise to write "Judge Beta wrote the opinion." *Rhythm example:* "To everything there is a season."¹ This example would have been different had the author written "To everything is a season." *Climax example:* "There is a prejudice against sentences that begin with expletives" is better than "A prejudice against sentences that begin with expletives exists." The climax should not be on "exists."

5. Hate Mixed Metaphors, Puns, Rhetorical Questions, and False Ethical Appeals. Metaphors compare two or more seemingly unrelated subjects. Metaphors make the first subject equal to the second: "All the world's a stage/ And all the men

Readers know when you do a cut-and-paste job. Don't recycle your legal arguments.

and women merely players."² In this example, Shakespeare compared the world to a stage, and men and women to actors. Mixed metaphors combine two commonly used metaphors to create a nonsensical image: "He tried to nip it in the bud but made a mountain out of a molehill." Puns fail because they transform formal legal writing to informal writing. Puns are for children, not groan readers. A pun is a figure of speech that uses homonyms as synonyms for rhetorical effect. *Examples:* "Whom did the mortician invite to his

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party? Anyone he could dig up!"³ "Families are like fudge. Mostly sweet with a few nuts."⁴ "Madness takes its toll; please have exact change."⁵ "Some people are wise, and some, otherwise."⁶ Are rhetorical questions effective? What do you think? Readers want answers, not questions. Some writers use rhetorical questions to make readers think or to involve them. Do you agree? Rhetorical questions fail because you don't know how the reader will answer the question or how involved the reader wants to be. False ethical appeals are attempts to convince a reader that you're credible, ethical, honest, or meticulous because you

sequent to." Legalese makes for bad lawyering: I am, inter alia, an attorney, hereinafter a per se bad attorney, for utilizing said aforementioned legalese.

7. Hate Pomposity. Be formal but not over the top. Stay away from IQ or SAT words. No one will be impressed. You'll look bovine, fatuous, and stolid, not erudite, perspicacious, and sagacious. The fewer syllables in a word, the better. Prefer simple and short words to complex and long words: "Adjudicate" becomes "decide." "Aggregate" becomes "total." "Ameliorate" becomes "improve" or "get better." "As to" becomes "about" or "according to." "At no time" becomes "never." "Attain" becomes "reach." "Commence" becomes "begin" or "start." "Complete" becomes

nouns like "myself," "yourself," "yourselves," "ourselves," "herself," "himself," "themselves," and "itself." Consider this dialogue between A and B. *Incorrect:* A: "How are you? B: "Fine. And yourself?" *Correct:* A: "How are you?" B: "Fine. And you?" Why would anyone say "How are yourself?"

8. Hate Abbreviations, Contractions, and Excessive or Undefined Acronyms. Don't use these abbreviations: "i.e.," "e.g.," "re.," "etc.," and "N.B." Be formal: use "facsimile," not "fax." Leave contractions, which are friendly and sincere, for informal writing, e-mails, and Legal Writer columns. Eliminate "aren't," "couldn't," "don't," "haven't," "it's," "isn't," "shouldn't," "wouldn't," and "you're." An acronym is an

Legalese makes for bad lawyering.

say so. Instead of telling the reader that you exhaustively researched the law, discuss your research exhaustively. Let your writing speak for itself. Some false, unnecessary appeals: "It is well settled that"; "it is hornbook law that"; "this author has carefully considered the facts and concludes that . . ."

6. Hate Legalese. Use simple and common words that readers understand. Legalese is the antithesis of plain English. All legalisms can be eliminated. The only loss will be the legalese, and the gain will be fewer words and greater understanding. *Incorrect:* "Enclosed herewith is my brief." *Correct:* "Enclosed is my brief." *Incorrect:* "The defendant has a prior conviction." *Correct:* "The defendant has a conviction." Eliminate these words: "aforementioned," "aforesaid," "foregoing," "forthwith," "hereinafter," "henceforth," "herein," "hereinabove," "hereinbefore," "per" (and "as per"), "said," "same," "such," "therein," "thereby," "thenceforth," "thereafter," "to wit," "whatsoever," "whereas," "wherein," and "whereby." Legal writing is planned, formal speech. If you wouldn't say it, don't write it. Write "earlier" or "before," not "prior to." Write "after" or "later," not "sub-

"end" or "finish." "Component" becomes "part." "Conceal" becomes "hide." "Demonstrate" becomes "show." "Donate" becomes "give." "Effectuate" becomes "bring about." "Elucidate" becomes "explain." "Implement" becomes "carry out" or "do." "In case" or "in the event that" becomes "if." "Incumbent upon" becomes "must" or "should." "Is able to" becomes "can." "Necessitate" becomes "require." "Per annum" becomes "a year." "Possess" becomes "own" or "have." "Proceed" becomes "go." "Procure" becomes "get." "Relate" becomes "tell." "Retain" becomes "keep." "Sufficient" becomes "enough." "Terminate" becomes "end," "fire," or "finish." "Utilize" becomes "use."

Pomposity arises when writers go out of their way to sound intelligent but then err. For example, you'll sound foolish if you try to use "whom" and then use it incorrectly. *Incorrect:* "Jane is the person who defendant shot." *Better:* "Jane is the person whom defendant shot." *Best:* "Jane is the person defendant shot." *Incorrect:* "Whom shall I say is calling?" The answer is, "He [or she] is calling." *Better:* "Who shall I say is calling?" *Best:* "Who's calling?"

You'll also sound pompous if you misuse reflexive and intensive pro-

abbreviation formed from the first letter of each word of a title. Define terms and nouns you'll frequently use in your legal document: Department of Housing Preservation and Development (DHPD); New York Stock Exchange (NYSE). Don't use quotation marks or "hereinafter referred to as" to set out the acronym: Judge Me Not Corporation ("JMNC") becomes Judge Me Not Corporation (JMNC). Common legal acronyms need not be defined: CPLR, not Civil Practice Law & Rules (CPLR). If you use acronyms, use articles that modify the acronym, not the word. *Example:* "An NYPD officer," not "A NYPD officer." A person's name or title need not be defined. *Incorrect:* "John Smith (Smith)" or "John Smith, the architect (the Architect)."

9. Hate Mystery and History. Legal documents aren't mystery novels. Don't wait to surprise your readers until the end. Don't bury essential issues in the middle, either, or give your readers clues along the way, hoping they'll catch them on time. Few will try to decipher what you have to say. Also, don't inundate your readers with the history of the case law or statute. Readers don't want a history lesson.

Stay away from IQ or SAT words.

They want current law and how it applies.

10. Hate Inconsistency. Be consistent in tone: Don't be formal in one place and informal in another. Be consistent in point of view: Don't use your point of view in one place and the reader's in another. *Example:* "Writers must not shift your point of view." Be consistent in reference: Don't write "my client" in one place, "this writer" in another, and "plaintiff" in a third. Be consistent in voice: Don't write "you" in one place and "I" in another. Be consistent in style. *Examples:* If you use serial commas in one place, use them everywhere. If you write "3d Dep't" in one citation, don't write "3rd Dept." in another.

11. Hate Nominalizations. A nominalization is a verb turned into a noun. Nominalizations are wordy. They hide. They're abstract. *Example:* "The defendant committed a violation of the law." *Becomes:* "The defendant violated the law." Don't bury your verbs. Most buried verbs end with these suffixes: "-tion," "-sion," "-ment," "-ence," "-ance," and "-ity." Use strong verbs: "Allegation" becomes "allege." "Approval" becomes "approve." "Assistance" becomes "assist." "Complaint" becomes "complain." "Conclusion" becomes "conclude." "Conformity" becomes "conform." "Consideration" becomes "consider." "Decision" becomes "decide." "Description" becomes "describe." "Dissatisfaction" becomes "dissatisfied." "Documentation" becomes "documents." "Enforcement" becomes "enforce." "Evaluation" becomes "evaluate." "Examination" becomes "examine." "Finding" becomes "found." "Holding" becomes "held" or "holds." "Identification" becomes "identify." "Indemnification" becomes "indemnify." "Knowledge" becomes "know." "Litigation" becomes "litigate." "Motion" becomes "moved." "Notation" becomes "noted." "Obligation" becomes "obligate" or "oblige." "Opposition" becomes "oppose." "Performance"

becomes "perform." "Preference" becomes "prefer." "Reference" becomes "refer." "Registration" becomes "register." "Reliance" becomes "rely." "Review" becomes "reviewed." "Ruling" becomes "rule." "Settlement" becomes "settle." "Similarity" becomes "similar." "Statement" becomes "state." "Technicality" becomes "technical."

12. Hate Negatives. Watch out for negative words: "barely," "except," "hardly," "neither," "not," "never," "nor," "provided that," and "unless." *Example:* "Good lawyers don't write in the negative." *Becomes:* "Good lawyers write in the positive." Eliminate negative combinations: "never unless," "none unless," "not ever," and "rarely ever." Don't use "but," "hardly," or "scarcely" with "not." Use "but" instead of "but however," "but nevertheless," "but that," "but yet," and "not but." Eliminate negative prefixes and suffixes: "dis-," "ex-," "il-," "im-," "ir-," "-less," "mis-," "non-," "-out," and "un-." Use negatives only for negative emphasis: A: "How are you?" B: "Not bad."

13. Hate Attacks or Rudeness. Condescending language, personal attacks, and sarcasm have no place in legal writing. Attacking others won't advance your reasoning. This behav-

ior, possibly sanctionable, distracts readers and leaves them wondering whether your substantive arguments are weak. Wounding your adversary, your adversary's client, or the judge is ineffective. Instead, be courteous and professional. Never be petty. But if you must attack, aim to kill, metaphorically speaking.

In the next column, the Legal Writer will continue with the next baker's dozen of don'ts. Following that column will be three columns on grammar errors, punctuation issues, and legal-writing controversies. Together with the two preceding columns on legal writing's do's, this series represents legal writing's do's, don'ts, and maybes. ■

1. Ecclesiastes 3:1.
2. William Shakespeare, *As You Like It*, act 2, scene 7, available at http://www.shakespeare-literature.com/As_You_Like_It/10.html (last visited Feb. 22, 2007).
3. My Favourite Pusters: Stan Kegel, available at http://workinghumor.com/puns/stan_kegel.shtml (last visited Feb. 22, 2007).
4. *Pun ny Oneliners*, available at <http://workinghumor.com/puns/oneliners.shtml> (last visited Feb. 22, 2007) (attributed to Theresa Corrigan).
5. *Id.* (attributed to Geoff Tibballs).
6. *Id.* (attributed to Phylbert).

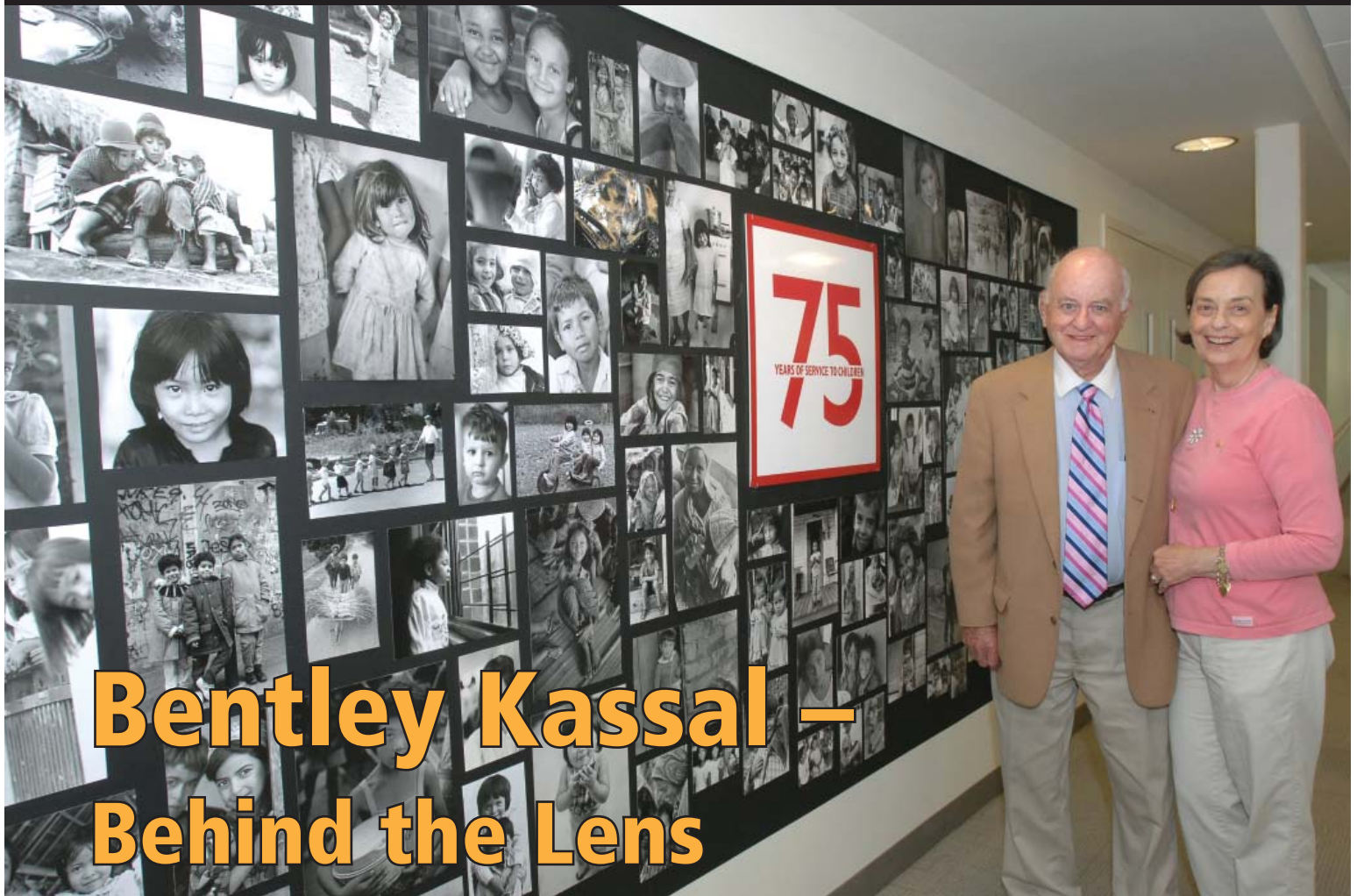
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Journal



Bentley Kassal – Behind the Lens

Judge, Attorney, Children's Advocate

by Skip Card

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Do's, Don'ts, and Maybes: Legal Writing Don'ts — Part II

In the last column, the Legal Writer discussed the 13 things you shouldn't do in legal writing. We continue with 13 more don'ts — the things writers should hate.

14. Hate Incorrect Tenses. Mismatched tenses confuse readers. State current rules in the present tense, past rules in the past tense, and past facts in the past tense. Past fact but current rule: "The court held in *Alpha v. Zeta* that statutory rape is illegal even if the victim consents." Past fact and past rule: "Until the court reversed *Zeta v. Alpha*, the rule was that . . ." Past fact: "The defendant ran the red light." (Not "runs.") Past but still-valid rule: "This court has held that . . ." Past fact, permanent truth in dependent clause: "Albert Einstein proved that E equals mc^2 ."

15. Hate Metadiscourse. Metadiscourse is discourse about discourse. It's throat clearing. Get to the point without a running start that occupies space but adds nothing. Delete the following: "After due consideration," "as a matter of fact," "bear in mind that," "for all intents and purposes," "it appears to be the case that," "it can be said with certainty that," "it goes without saying that," "it is clear that," "it is important (or *helpful* or *interesting*) to remember (or note) that," "it is significant that," "it is submitted that," "it should be emphasized that," "it should not be forgotten that," "the fact of the matter is," and "the point I am trying to make is that." Example: "Please be advised that your hair is on fire." *Becomes*: "Your hair is on fire."

16. Hate "Of." Readers who see "of" know you're wordy. Eliminate "of" by

creating possessives or by inverting or rearranging the sentence. *Possessive example*: "The foregoing constitutes the decision and order of the court." *Becomes*: "This opinion is the court's decision and order." *Rearranging and inverting examples*: "I am a fan of the Doors." *Becomes*: "I am a Doors fan." "Because of Judge Doe's status as a judge . . ." *Becomes*: "Because Judge Doe is a judge . . ." "He's a justice of the Supreme Court of the State of New York." *Becomes*: "He's a New York State Supreme Court justice." "You're not the boss of me." *Becomes*: "You're not my boss."

the grounds of" *becomes* "because." "Regardless of whether or not" *becomes* "regardless whether." "With the exception of" *becomes* "except." Also, eliminate "type of," "kind of," "matter of," "state of," "factor of," "system of," "sort of," and "nature of."

17. Hate Redundancies. Redundancy is the unnecessary repetition of words or ideas. "Advance planning" *becomes* "planning." "Adequate enough" *becomes* "adequate." "Any and all" *becomes* "any." "As of this date" *becomes* "today." "At about" *becomes* "about." "At the present time" *becomes* "now." "At the time when"

Get to the point without a running start that occupies space but adds nothing.

If the possessive looks awkward, keep the "of." "Subdivision B's remedies." *Becomes* "The remedies of Subdivision B." "The Fire Department of the City of New York's (FDNY) policies." *Becomes*: "The policies of the Fire Department of the City of New York (FDNY)."

Delete "as of." "The attorney has not filed the motions as of yet." *Becomes*: "The attorney has not filed the motions yet." Don't use "of" prepositional phrases: "Along the line of" *becomes* "like." "As a result of" *becomes* "because." "Concerning the matter of" *becomes* "about." "During the course of" *becomes* "during." "In advance of" *becomes* "before." "In case of" *becomes* "if." "In lieu of" *becomes* "instead of." "In the event of" *becomes* "if." "On

becomes "when." "By the time" *becomes* "when." "Complete stop" *becomes* "stop." "During the time that" *becomes* "during." "Each and every" *becomes* "each" or "every," but not both. "Few in number" *becomes* "few." "For the reason that" *becomes* "because." "If that is the case" *becomes* "if so." "In the event that" *becomes* "if." "Necessary essentials" *becomes* "essentials." "Necessary requirements" *becomes* "requirements." "On the condition that" *becomes* "if." "Several in number" *becomes* "several." "Sworn affidavit" *becomes* "affidavit." "True facts" *becomes* "facts." "Until such time as" *becomes* "until." "Whether or not" *becomes* "whether."

18. Hate Jargon, Slang, Colloquialisms, Trendy Locutions,

CONTINUED ON PAGE 58

and Euphemisms. Jargon is terminology that relates to a specific profession or group. Don't use words or phrases only you or another lawyer might know. *Examples:* "In the instant case" or "in the case at bar" becomes "here" or "in this case." Or, better, discuss your case without resorting to "here" or "in this case."

Eliminate slang from formal legal writing. Slang is made up of informal words or expressions not standard in the speaker's dialect or language and which are used for humorous effect. Use "absent minded" instead of "out to lunch," "drag" or "take" instead of "schlep," "jewelry" or "money" instead of "bling," "marijuana" instead of "weed," "police" instead of "Five-O," "stolen goods" instead of "loot" or "stash," and "respect" instead of "props."

Don't use colloquialisms. Colloquialisms are expressions that aren't used in formal speech or writing. *Examples:* "gonna" and "ain't nothin."

"call girl," "escort," "working girl," and "sex workers" are all euphemisms for "prostitute." Replacing one euphemism for another won't eliminate negativity or discomfort. Replacing one euphemism for another perpetuates negativity and discomfort.

If you're quoting from a witness's testimony and the slang, colloquialism, or euphemism is material to your case, then quote it.

19. Hate Typos. Typos tell readers you don't care. No one will take your writing seriously if you make obvious errors in grammar, punctuation, spelling, or syntax. Typos distract readers from the substance of your writing and make you appear unprofessional. No typo is subtle. Readers give typos greater weight than they deserve. Readers who see small typos assume that the writer didn't get the big things right. The solution is to proofread. Use someone you trust to proofread. Use your word-processing program's spell and grammar checkers. Edit on a hard copy. Read your hard copy backward. Read it out loud if the document is

"truly," "undeniably," "undoubtedly," "utterly," "various," and "virtually." The exception is if you're confessing an error: "I'm clearly wrong" is clearly O.K.

21. Hate Cowardly Qualifiers. Leave no room to equivocate. Be brave and decisive. It's better to be wrong than cowardly. Eliminate doubtful, hedged, timid, and weaselly equivocations, phrases, and words: "apparently," "at least as far as I'm concerned," "basically," "conceivably," "evidently," "if practicable," "practically," "perhaps," "probably," "purportedly," "in effect," "it may well be," "it might be said," "it is respectfully suggested," "it seems," "more or less," "nearly," "rather," "seemingly," "somewhat," "sort of," "virtually," and "would contend." Don't cowardly combine letters and numbers. *Incorrect:* "two (2)." Legal writing isn't a check that can be forged. Also, eliminate cowardly expressions. Not only are "at or near," "on or about," and "on or before" equivocal, these expressions, which signal approximations, may not precede exact places or times. Use "at or near," "on or about," or "on or before" only when you're writing a complaint and you don't know exact places or times. Use "generally," "typically," and "usually" if you need to discuss an exception to a rule, rather than the rule. *Example:* "Generally, a municipality is not liable for its failure to provide police protection. An exception arises when a municipality and an injured party have a special relationship. A special relationship arose here."

22. Hate Foreign, Latin, and Archaic (Old English) Words. Lawyers love romance languages: French, Italian, and Spanish. Don't use foreign words. They won't help you sound more educated or sophisticated. And don't mix foreign languages with English unless you're quoting or repeating dialect. Use Latin, a dead language, only when the word or expression is deeply ingrained in legal usage ("mens rea," "supra") and when no concise English word or phrase can substitute. Use "agendas" not "agendums"; "appendixes"

Readers who see small typos assume that the writer didn't get the big things right.

Do away with trendy phrases. They're here today, gone tomorrow. *Examples:* "bottom line," "cutting edge," "interface," "maxxed out," "need-to-know basis," and "user-friendly." Eliminate the trendy "-ize" suffixes: "concretize," "finalize," "maximize," "optimize," "prioritize," and "strategize."

A euphemism is a word or phrase that replaces a negative, offensive, or uncomfortable word or phrase. Some euphemisms for dying: "passed away," "passed on," "checked out," "kicked the bucket," "bit the dust," "bought the farm," "cashed in their chips," and "croaked." "Sanitation engineer" and "sanitation worker" are euphemisms for "garbage man." "Hooker,"

important. Go from big edits to small ones: Verify that your arguments make sense, that each sentence segues into the next, that your style is consistent, and that each sentence is grammatically correct and free of spelling errors.

20. Hate Adverbial Excesses. Adverbial excesses weaken and obscure. They suggest that those who disagree with you are stupid. They also make a good, skeptical reader question whether you're right. Is it really obvious? Eliminate "absolutely," "actually," "almost," "apparently," "basically," "certainly," "clearly," "completely," "extremely," "incontestably," "nearly," "obviously," "plainly," "quite," "really," "seemingly," "surely,"

not “appendices”; “curriculum” not “curricula”; “dogmas” not “dogmata”; “formulas” not “formulae”; “forums” not “fora”; “indexes” not “indices”; “memorandums” not “memoranda” or “memorandas”; and “syllabuses” not “syllabi.” Replace Latin terms with their well-known English equivalents. “Ab initio” becomes “from the start.” “Arguendo” becomes “assuming” or “for the sake of argument.” “Ergo” becomes “therefore.” “Ex contractu” becomes “in contract” or “contractual.” “Inter alia” becomes “among others.” “In toto” becomes “on the whole.” “Ipso facto” becomes “by itself” or “necessarily.” “Pro se” becomes “self-represented” or “unrepresented.” “Sui generis” becomes “one of a kind” or “unique.” “Via” becomes “by” or “because of.” Eliminate archaic words like “behooves,” “betwixt,” “eschew,” and “hither.” Example: “It behooves you to eschew archaic words.”

23. Hate Vague Referents. Readers hate writing that’s unclear about what or to whom writers are referring. Be careful with “it,” “that,” “this,” “such,” “which,” “he,” “his,” “him,” “she,” “her,” “they,” and “them.” Writers use these referents for concision. But it’s better to be clear than concise. Use these referents if they refer to one thing only. Otherwise, use as many words as you need to make your writing clear. Example: “They won’t understand you as such.” Here, the writer doesn’t clarify who won’t understand you. Also unclear is what “as such” refers to. Example: “He told Judge John Doe that he should do some research.” In this example, it’s unclear to whom the second “he” refers: Judge John Doe or the person who spoke to Judge Doe. Example: “Plaintiff failed to deliver the widgets after defendant failed to pay for them. That started the lawsuit.” It’s unclear what started the lawsuit — plaintiff’s failure to deliver or defendant’s failure to pay. Or both. Clarify vague referents by using different nouns; by repeating the same nouns; by making one antecedent singular and another plural; or by rewriting the sentence to sharpen the antecedent.

24. Hate Elegant Variation. Elegant variation is the technique by which a writer uses different terms to identify one idea, person, place, or thing. Use different words to mean different things. Don’t use synonyms to say the same thing. It’s wrong to reach for a thesaurus in this way. *Incorrect:* “The prosecutor wanted to indict the defendant. That’s why the Assistant District Attorney [the prosecutor] secured a grand jury true bill [indictment] against the suspect who was arraigned [the defendant].” To be understood, be repetitious.

Repeating articles, nouns, prepositions, and verbs adds power and helps comprehension. Repetition makes writing powerful and clear. Repetition cures inelegant variation. *Examples:* “In Selma, as elsewhere, we seek and pray for peace. We seek order. We seek unity.”¹ (Repetition of “seek.”) “But this time, the world was not silent. This time, we do respond. This time, we intervene.”² (Repetition of the words “this time.”) In lengthy lists or for poetic value, repeat “because,” “that,” and similar words. Then make your lists parallel. *Examples:* “The court found *that* the attorney lied and *that* his behavior is sanctionable.” “Lawyers advocate *because* they have something to say and *because* they’re paid to advocate.”

25. Hate Personal Opinion or Emotion. Don’t interject personal opinion or emotion. Eliminate “I (or *we*) think,” “I (or *we*) feel,” and “I (or *we*) believe.” Don’t vouch for your client.

26. Hate Logical Fallacies. A fallacy is an invalid way of reasoning. Excessive reliance on logic is problematic. Accepting a fallacy is worse: Fallacies lead to incorrect conclusions. Here are some logical pitfalls.³ Post hoc fallacy: Assuming that because one thing happens after something else, the first caused the second. *Examples:* “Every time I brag about how well I write, I submit something with lots of typos.” The fallacy is that if you don’t brag about your writing, you’ll submit a typo-free document. “I never had any problems with the pipes. Only after

It’s better to be wrong than cowardly.

you moved in did the pipes burst.” The fallacy is that if the tenant had never moved in, the pipes would be intact. Dicto simpliciter: Applying the general rule to the exception. *Example:* “Judge X never learned grammar, but she writes well.” The fallacy is that because Judge X never studied grammar, no one need study grammar. Hasty generalizations: Jumping to conclusions without adequate sampling. *Example:* “Lawyer Z never edits his briefs. All lawyers from Lawyer Z’s firm are lazy.” The fallacy is that Lawyer Z, who doesn’t edit, is lazy or that because Lawyer Z is lazy, all attorneys from the firm must be lazy. Circular reasoning: An argument that begs the question of the truth of its conclusion by assuming its truth. *Example:* “A good brief begins with a strong opening because a strong opening makes a brief good.” The fallacy is that a good brief is a good brief because a strong opening is a strong opening.

Resuming in the November/December *Journal*, the Legal Writer will address the do’s, don’ts, and maybes relating to grammar errors, punctuation issues, and legal-writing controversies. ■

1. Excerpt from President Lyndon B. Johnson’s “We Shall Overcome” speech on Mar. 15, 1965, available at <http://www.americanrhetoric.com/speeches/lbjweshallovercome.htm> (last visited Feb. 22, 2007).

2. Excerpt from Elie Wiesel’s “The Perils of Indifference” speech on Apr. 12, 1999, available at <http://www.americanrhetoric.com/speeches/ewieselperilsofindifference.html> (last visited Feb. 22, 2007).

3. For an excellent discussion of logical fallacies, see Gertrude Block, *Effective Legal Writing* 254–56 (5th ed. 1999).

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Journal



"A Just Cause for War"

How slave transit in an abolitionist state sparked New York's Dred Scott decision.

by William H. Manz

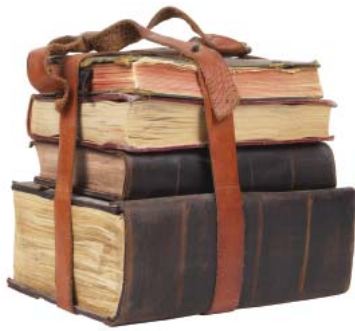
Also in this Issue

Tax Deduction of Settlements

Lessons from the Smithsonian

As a Client Faces Loan Default

Did the Appellate Odds Change in 2006?



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Do's, Don'ts, and Maybes: Legal Writing Grammar — Part I

In four of the last five columns, the Legal Writer discussed the things you should and shouldn't do in legal writing. We continue with 10 grammar issues and, in the next column, with 10 more. Studying these 20 grammar issues offers a framework to write comprehensible, intelligent documents. Good grammar is a good start, although good legal writing demands much more. Knowing grammar won't make you a good legal writer. But you're a poor legal writer if you don't know grammar.

Grammar is a system or set of rules that govern a language. English categorizes words into eight different parts of speech according to how the words function in a sentence: nouns, pronouns, verbs, adverbs, adjectives, conjunctions, interjections, and prepositions. Nouns refer to an event, idea, person, place, quality, substance, or thing. Pronouns are used in place of a noun. Verbs name an action, occurrence, or state of being. Adverbs modify verbs, adjectives, clauses, sentences, and other adverbs. Adverbs don't modify nouns. Adjectives modify nouns or pronouns. A conjunction connects two words, phrases, or clauses. An interjection shows strong emotion. A preposition links to another word in the sentence a noun or a pronoun following the preposition.

Here are the most common grammar errors — not the controversies; only the recognized, accepted errors — and how to fix them.

1. Singular and plural nouns. For most nouns, add "s" to form the plural. "Bat" becomes "bats." "Window" becomes "windows." "Book" becomes

"books." Add "es" if the noun ends in "s," "sh," "ch," or "x." "Dress" becomes "dresses." "Wish" becomes "wishes." "Church" becomes "churches." "Fox" becomes "foxes."

If the noun ends in a "y" and a consonant precedes the "y," change the "y" to "i" and add "es." "Baby" becomes "babies." "Beauty" becomes "beauties." If the noun ends in a "y" and a vowel precedes the "y," add an "s." "Alley" becomes "alleys." "Attorney" becomes "attorneys."

Pluralize most nouns ending in "f" by adding "s." "Brief" becomes "briefs." "Proof" becomes "proofs." "Roof" becomes "roofs." "Dwarf" becomes "dwarfs." *Exception:* Change some nouns ending in "f" or "fe" to "v" and add "es." "Elf" becomes "elves." "Knife" becomes "knives." "Leaf" becomes "leaves." "Life" becomes "lives." "Wolf" becomes "wolves."

If a name ends in "f," add an "s" to form the plural. "Mr. and Mrs. Wolf" becomes "the Wolfs."

To pluralize compound words, make the main word plural. "Attorney general" becomes "Attorneys general." "Court-martial" becomes "courts-martial." "Passerby" becomes "passersby." "Sister-in-law" becomes "sisters-in-law." Two exceptions: (1) if the compound word has no noun, add an "s" to the end of the word; (2) if the compound word ends in "ful," add an "s" at the end. *Examples:* "Dress-up" becomes "dress-ups." "Takeoff" becomes "takeoffs." "Teaspoonful" becomes "teaspoonfuls." "Cupful" becomes "cupfuls."

Some nouns change when they become plural. "Child" becomes "child-

dren." "Foot" becomes "feet." "Goose" becomes "geese." "Man" becomes "men." "Mouse" becomes "mice." "Ox" becomes "oxen." "Person" becomes "people." "Tooth" becomes "teeth." "Woman" becomes "women."

Some nouns stay the same whether they're singular or plural. *Example:* "deer," "fish," "moose," "Portuguese," "series," "sheep," and "species."

Some words maintain their Latin or Greek form in the plural. "Nucleus" becomes "nuclei"; "syllabus" becomes "syllabi" ("syllabuses" is acceptable); "focus" becomes "foci"; "fungus" becomes "fungi"; "cactus" becomes "cacti" ("cactuses" is acceptable); "thesis" becomes "theses"; "crisis" becomes "crises"; "phenomenon" becomes "phenomena"; "index" becomes "indices" ("indexes" is acceptable); "appendix" becomes "appendices" ("appendixes" is acceptable); "criterion" becomes "criteria."

A verbs must agree with its subject.

If a noun ends in "ics" and refers to a body of knowledge, a science, or course of study, it's usually singular. *Examples:* "mathematics," "phonetics," and "semantics." If a noun ends in "ics" and refers to concrete activities, practices, or phenomena, it's usually plural. *Examples:* "athletics," "mechanics," and "acoustics." Sometimes whether nouns are singular or plural depends on their meaning. *Example:* "Acoustics is the study of sound." (Singular.) Or:

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"The courtroom's acoustics (acoustical qualities) are poor." (Plural.) *Example:* "Athletics (athletic training) isn't part of law school." (Singular.) *Or:* "Athletics (sports) are popular with sports attorneys." (Plural.) *Example:* "Politics affects every aspect of our lives." (Singular.) *Or:* "His politics (opinions) aren't going to affect our decision." (Plural.)

2. Pronouns. Pronouns substitute for nouns. Some common singular pronouns: "he," "her," "hers," "him," "his," "I," "it," "me," "mine," "my," and "she." Some common plural pronouns: "its," "our," "ours," "their," "theirs," "them," "they," "us," and "we." Some pronouns stay the same whether they're singular or plural: "you," "your," and "yours."

Legal writers will object to you fusing participles.

Use reflexive and intensive pronouns only to refer back to a pronoun. Some common reflexive and intensive pronouns: "myself," "yourself," "yourselves," "ourselves," "herself," "himself," "themselves," and "itself." *Examples:* "I said that to myself." (Reflexive pronoun.) "I myself said that." (Intensive pronoun.) *Incorrect:* "The judge and me [or myself] went to the courtroom." It's not "me [or myself] went to the courtroom." It's "I went to the courtroom." *Therefore:* "The judge and I went to the courtroom."

Here's a tip when you write a sentence with two or more pronouns: Delete the first pronoun. Then ask whether the sentence reads with an "I," "me," "he," "him," "she," "her," "they," or "them." *Incorrect:* "She and him went to court." Delete "she." The sentence makes sense if you say "He went to court." *Therefore:* "She and he went to court." *Incorrect:* "He and them argued the motion." Delete "he." The

sentence makes sense if you say "They argued the motion." *Therefore:* "He and they argued the motion." *Incorrect:* "Mary and me went to court." In this example in which "Mary" replaces a pronoun, follow the same rule: Delete "Mary." The sentence makes sense if you say "I went to court." *Therefore:* "Mary and I went to court." *Incorrect:* "The judge played softball with Henry and I." The sentence doesn't make sense if you delete "Henry and." The sentence would be, incorrectly: "The judge played softball with I." *Therefore:* "The judge played softball with Henry and me."

Never use these nonstandard reflexive and intensive pronouns: "theirself," "theirselves," "themself," and "themselves."

Pronouns must agree with their antecedents in gender, person, and number. An antecedent is the noun to

which the pronoun refers. Example of a singular antecedent with a singular pronoun: "Jane [singular antecedent] alleges that XYZ Corp. violated *her* [singular, feminine pronoun] constitutional rights." Example of a plural antecedent with a plural pronoun: "Mary and Jane [plural antecedent] allege that XYZ Corp. violated *their* [plural pronoun] rights."

Indefinite pronouns don't refer to any specific person or thing. Here are some common indefinite pronouns: "all," "any," "anyone," "anybody," "anything," "each," "either," "everyone," "everybody," "everything," "little," "much," "neither," "nobody," "no one," "none," "nothing," "other," "one," "somebody," "someone," and "something." These indefinite pronouns are always singular. *Incorrect:* "Everyone has their price." *Becomes:* "Everyone has his price." To eliminate the sexist language, rewrite the sentence. *Correct:* "Everyone has a price."

Incorrect: "Someone used their pen to deface the judge's bench." *Becomes:* "Someone used his pen to deface the judge's bench." To eliminate the sexist language, change to "Someone used a pen to deface the judge's bench."

The "one" exception: "Attorney Able is one of those jurists who knows what he is doing." *Becomes:* "Attorney Able is one of those jurists who know what they are doing."

The "not one" exception: If "none" means "no one" or "not one," the verb is singular. If "none" refers to more than one person or thing, the verb is plural. *Examples:* "None of us [meaning *not one of us*] knows grammar." "None of the attorneys know how to write the brief."

A "pair" of exceptions: "A pair of socks" but "three pairs of socks."

"Both," "few," "many," "others," and "several" are always plural.

"All," "any," "more," "most," "none," and "some" are singular or plural depending on the noun or pronoun to which they refer. *Incorrect:* "All the attorneys eats lunch at Forlini." *Becomes:* "All the attorneys eat lunch at Forlini." *Incorrect:* "All the pizza in the judge's chambers are gone." *Becomes:* "All the pizza in the judge's chambers is gone."

Collective nouns in American usage take a singular verb. Some common collective nouns: "appellate court," "army," "assembly," "audience," "board," "committee," "couple," "crowd," "family," "jury," "majority," "number," and "team." *Incorrect:* "The jury was right. They decided correctly." *Becomes:* "The jury was right. It decided correctly." *Or:* "The jurors were right. They decided correctly." *Incorrect:* "The family won the case. They celebrated." *Becomes:* "The family won the case. It celebrated."

"We" versus "us." To determine when to use the pronouns "we" or "us," drop the noun or noun phrase before the pronoun. *Incorrect:* "Us attorneys can no longer tolerate the firm's policies." If you drop the noun "attorneys," the sentence wouldn't make sense: "Us can no longer toler-

ate the firm's policies." *Correct*: "We attorneys can no longer tolerate the firm's policies." If you drop the noun "attorneys," the sentence makes sense: "We can no longer tolerate the firm's policies." *Incorrect*: "The firm has given we paralegals no alternative." If you drop the noun "paralegals," the sentence wouldn't make sense: "The firm has given we no alternative." *Correct*: "The firm has given us paralegals no alternative." If you drop the noun, the sentence now makes sense: "The firm has given us no alternative."

3. Fused Participles. Fused participles occur when a writer fails to use a possessive form of a noun or pronoun to introduce a gerund. Use logic to solve fused-participle problems by eliminating miscues. Ask yourself where the reference and stress should be. *Incorrect*: "The People objected to the defendant leaving the courtroom a free man." The gerund "leaving" is fused into the noun "defendant." "Leaving" is the object of the preposition "to"; "leaving" doesn't modify the noun "defendant." In this sentence, the reader might incorrectly believe that the People objected to the defendant. *Therefore*: "The People objected to the notion that the defendant would leave the courtroom a free man." Or insert an apostrophe: "The People objected to the defendant's leaving the courtroom a free man."

Fused participles affect pronouns. *Incorrect*: "Do you mind us getting all these cases?" In this example, the writer didn't mean to write "Do you mind us?" But that's what the reader understands. *Becomes*: "Do you mind *our* getting all these cases?" *Incorrect*: "The police objected to them possessing contraband." In this example, the writer did not mean, "The police objected to *them*." *Becomes*: "The police objected to *their* possessing contraband." *Incorrect*: "My parole officer objected to me living alone." The writer did not mean to write, "My parole officer objected to *me* living." *Becomes*: "My parole officer objected to *my* living alone." *Incorrect*: "The judge feared the Constitution becoming a shield for lawlessness."

The writer did not mean to write, "The judge feared the Constitution." *Becomes*: "The judge feared that the Constitution would become a shield for lawlessness." Or: "The judge feared the Constitution's becoming a shield for lawlessness."

4. Verb Tenses and Moods. Verbs have six tenses: present, past, future, present perfect, past perfect, and future perfect. The last three tenses (present perfect, past perfect, and future perfect) are also known as the past participle form. The present refers to actions occurring when the writer is writing. The past refers to actions that occurred before the writer wrote. The future refers to actions that will occur after the writer writes. The present perfect refers to actions that began in the past and were completed before the present. Use the past perfect when one past action was completed before another past action began. Use the future perfect when an action that started in the past will end at a certain time in the future.

An example of the verb "talk" using the different tenses: "talk" (present); "talked" (past); "will talk" (future); "have talked" (present perfect); "had talked" (past perfect); and "will have talked" (future perfect).

Form the present perfect by using "have" or "has" before the past participle. Form the past perfect by adding "had" before the past participle. Form the future perfect by adding "will have" before the past participle.

Three moods exist in English: indicative, imperative, and subjunctive. Use the indicative for statements of facts or questions. Use the imperative for orders or commands. Use the subjunctive to express a wish, an idea contrary to fact, a requirement, or a suggestion or recommendation. *Examples of indicative mood*: "Julia researches in the library." "Sarah writes all day." *Examples of imperative mood*: "Be quiet." "Argue the motion." *Examples of subjunctive mood*: "She wishes her partner were here." "If John were more aggressive, he'd be a better attorney." "Ashley would have passed the bar

exam if she had studied harder." "The suspect acted as if he were guilty." "The judge requested Mrs. Doe's presence at the hearing."

5. Irregular verbs. For most verbs, form the past tense by adding a "d" or "ed" at the end of the verb. "Talk" becomes "talked." "Play" becomes "played." Other verbs are irregular. Irregular verbs change a vowel and add "n" or "en"; change a vowel and add "d" or "t"; or don't change at all.

To form the past participle, use a helping verb: "is," "are," "was," or "has been." Then add the principal part of the verb.

Examples: "Arise" (present tense) becomes "arose" (past tense) becomes "arisen" (past participle). "Bear" becomes "bore" becomes "born" or "borne." "Beat" becomes "beat" becomes "beaten." "Become" becomes "became" becomes "become." "Begin" becomes "began" becomes "begun." "Bite" becomes "bit" becomes "bitten." "Blow" becomes "blew" becomes "blown." "Break" becomes "broke" becomes "broken." "Choose" becomes "chose" becomes "chosen." "Come" becomes "came" becomes "come." "Do" becomes "did" becomes "done." "Draw" becomes "drew" becomes "drawn." "Drink" becomes "drank" becomes "drunk." "Drive" becomes "drove" becomes "driven." "Eat" becomes "ate" becomes "eaten." "Fall" becomes "fell" becomes "fallen." "Fly" becomes "flew" becomes "flown." "Forget" becomes "forgot" becomes "forgotten." "Forgive" becomes "forgave" becomes "forgiven." "Freeze" becomes "froze" becomes "frozen." "Get" becomes "got" becomes "gotten" or "got." "Give" becomes "gave" becomes "given." "Go" becomes "went" becomes "gone." "Grow" becomes "grew" becomes "grown." "Hide" becomes "hid" becomes "hidden." "Know" becomes "knew" becomes "known." "Lie" (horizontal position) becomes "lay" becomes "lain." "Ride" becomes "rode" becomes "ridden." "Ring" becomes "rang" becomes "rung." "Rise" becomes "rose" becomes "risen." "Run" becomes "ran" becomes "run." "See" becomes "saw" becomes "seen."

"Shake" becomes "shook" becomes "shaken." "Shrink" becomes "shrank" becomes "shrunken." "Sing" becomes "sang" becomes "sung." "Sink" becomes "sank" becomes "sunk." "Speak" becomes "spoke" becomes "spoken." "Spring" becomes "sprang" becomes "sprung." "Steal" becomes "stole" becomes "stolen." "Strive" becomes "strove" becomes "striven." "Swear" becomes "swore" becomes "sworn." "Swim" becomes "swam" becomes "swum." "Take" becomes "took" becomes "taken." "Tear" becomes "tore" becomes "torn." "Throw" becomes "threw" becomes "thrown." "Wake" becomes "woke" or "waked" becomes "woken" or "waked." "Wear" becomes "wore" becomes "worn." "Write" becomes "wrote" becomes "written."

Parallel structure is both intelligent and a necessity.

Some irregular verbs stay the same in the past tense and past participle. Examples: "Bend" becomes "bent" (past) becomes "bent" (past participle). "Bring" becomes "brought" in both forms. "Catch" becomes "caught." "Creep" becomes "crept." "Dig" becomes "dug." "Dive" becomes "dived" or "dove" becomes "dived." "Fight" becomes "fought." "Hold" becomes "held." "Kneel" becomes "knelt." "Lay" becomes "laid." "Lead" becomes "led." "Lie" (falsehood) becomes "lied." "Lose" becomes "lost." "Prove" becomes "proved" becomes "proved" or "proven." "Say" becomes "said." "Show" becomes "showed" becomes "showed" or "shown." "Teach" becomes "taught."

Some irregular verbs stay the same in the present, past, and past participle: "burst" and "hurt."

The trickiest verb in English is "to be." Here are the variations in the present: "I am," "you are," "he (or she or it) is," "we are," "you are," and "they are." Here are the variations in

the past: "I was," "you were," "he (or she or it) was," "we were," and "they were." The past participle: "I have been," "you have been," "he (or she or it) has been," "we have been," and "they have been."

6. Gerunds. A gerund is the subject or object of a verb, infinitive, or preposition that ends in "ing." Use gerunds to avoid nominalizations, or converting verbs to nouns. *Incorrect:* "The impeachment of his testimony will be difficult." *Becomes:* "Impeaching his testimony will be difficult."

A gerund error occurs when the gerund modifies the wrong word in the sentence. Solve a gerund error in one of three ways: (1) degerundize and place the verb after the subject; (2) bifurcate the sentence; or (3) subordinate. *Incorrect:* "The court granted the motion to suppress finding that the police lied." This sentence suggests that the motion to suppress found that the police lied. Here's a way to correct the sentence by degerundizing the verb after the subject: "The court found that the police lied and therefore granted the motion to suppress." You may also split the sentence into two: "The court found that the police lied. It therefore granted the motion to suppress." Another way to correct the sentence is to subordinate: "After finding that the police lied, the court granted the motion to suppress."

7. Agreement. A verb must agree in numbers with its subjects. *Incorrect:* "The color of the clouds are gray." *Becomes:* "The color of the clouds is gray." (Color is gray.) *Incorrect:* "The difference between Cardozo and Holmes, and between Frankfurter and Jackson, are striking." *Becomes:* "The difference between Cardozo and Holmes, and between Frankfurter and Jackson, is striking." (Difference is striking.) *Incorrect:* "Justice Jackson, as well as the hundreds of judges who emulate his writing style, rely on plain Anglo-Saxon English." *Becomes:* "Justice Jackson, as well as the hundreds of judges who emulate his writing style, relies on plain Anglo-Saxon English." (Justice Jackson relies.) Nothing in a

phrase contained in a subject affects the number of the verb that follows.

When you use "neither . . . nor," "either . . . or," or "not only . . . but also," make sure that the verb agrees with its nearest subject. When all the elements are singular, the verb should also be singular. When all the elements are plural, the verb should be plural. When the elements are different in number, the verb takes the number of the closer. *Incorrect:* "Neither the judge nor his court attorney are in chambers." *Becomes:* "Neither the judge nor his court attorney is in chambers." *Incorrect:* "Neither the judge nor his court attorneys was in chambers." *Becomes:* "Neither the judge nor his court attorneys were in chambers." *Incorrect:* "Neither the judges nor their court attorney were in chambers." *Becomes:* "Neither the judges nor their court attorney was in chambers." *Incorrect:* "Neither you nor I are in chambers." *Becomes:* "Neither you nor I am in chambers."

Multiple subjects modified by "each," "every," and "many" take a singular verb. *Correct:* "Every court attorney and every law clerk has been told to attend."

8. Parallelism. Sentences are parallel when nouns match nouns, verbs match verbs, gerunds match gerunds, and so on. *Incorrect:* "A rule that is both intelligent and a necessity." *Becomes:* "A rule both intelligent and necessary." *Incorrect:* "The rule is found in the cases, statutes, and in the contracts." *Becomes:* "The rule is found in the cases, statutes, and contracts." *Incorrect:* "No drinking, smoking or food." *Becomes:* "No drinking, smoking, or eating."

Parallelism requires that parallel coordinates form matching pairs: "although/nevertheless," "although/ yet," "as/as," "both/and," "either/or," "if/then," "just as/so," "neither/nor," "not/but," "not only/but also," and "whether/or." *Incorrect:* "Not only do I like landlord-tenant practice but also family law." *Becomes:* "Not only do I like landlord-tenant practice, but I also like family law." *Or:* "I like not only landlord-tenant practice but also

family law." Or, in the positive: "I like landlord-tenant practice and family law."

Exceptions: Use "neither . . . or," "not . . . or," or "not . . . nor" only if the first negative doesn't carry over to the second negative or for dramatic emphasis.

9. Sentence Fragments. A sentence fragment isn't a short sentence. It's a sentence that can't stand on its own, an incomplete sentence. A sentence fragment lacks a subject or a verb. *Example:* "The attorney questioning the witness." "Questioning" is a participle modifying "attorney." To create a complete sentence, change "questioning" from a participle to a main verb or add a main verb. *Becomes:* "The attorney questioned the witness." Or: "The attorney was questioning the witness."

Sometimes a fragment is a subordinate clause posing as a complete sentence. If you add "although," "when," or "until" in front of a main,

or independent, clause, the clause becomes a subordinate, or dependent, clause. Example of a main clause: "The attorney questions the witness." Subordinate clause: "When the attorney questions the witness." Attach subordinate clauses to main, or independent, clauses. *Example:* "When the attorney questions a witness [subordinate clause], the judge will interrupt the testimony [main clause]." Here's a list of other subordinating conjunctions: "after," "as," "as if," "as long as," "as soon as," "as though," "because," "before," "even if," "even though," "if," "if only," "in order that," "in that," "no matter how," "now that," "once," "provided," "rather than," "since," "so that," "than," "that," "though," "till," "unless," "whenever," "where," "whereas," "wherever," and "while."

Exceptions: Use sentence fragments for stylistic effect. *Examples:* "The rape victim had the courage to testify. More courage than most people would have had." "The witness's testimony was

consistent. Consistently false." Use sentence fragments for commands. *Examples:* "Stop!" "Evacuate the building!" "Get out!" Use sentence fragments as a transition. *Example:* "First, the facts. Second, the law." Use sentence fragments to negate: "The witness's testimony was honest. Not." Also use sentence fragments to answer questions: "Have you told us the truth? Probably not."

10. "And" versus "To." Don't use "and" to show causality or in an infinitive phrase. Use "to." *Incorrect:* "I went to the courthouse and got the judgment." *Becomes:* "I went to the courthouse to get the judgment." *Incorrect:* "Look and see whether the judge is on the bench." *Becomes:* "Look to see whether the judge is on the bench."

In the next issue, the Legal Writer will continue with a second set of 10 grammar issues. Following that column will be columns on punctuation and usage controversies. ■

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Journal



Don't
monkey
around when
it comes to
Kids!



Jayla

*Our Children,
Our Future*

A special issue on
New York's children



Do's, Don'ts, and Maybes: Legal Writing Grammar — Part II

In the last column, the Legal Writer discussed 10 grammar issues. We continue with another 10.

11. The Run-on Sentence. A run-on sentence isn't a long sentence. A run-on sentence is formed when (1) a conjunctive adverb separates two independent clauses (clauses that could serve as separate sentences) and a semicolon or a period doesn't precede the adverb; (2) no punctuation separates two independent clauses; or (3) a comma splices two independent clauses.

Example 1 — the conjunctive adverb run-on: "Judge Doe wrote the opinion, however, he never read it to the litigants." In this example, "however" is the conjunctive adverb separating two independent clauses, or clauses that could be a full sentence. Examples of conjunctive adverbs are "accordingly," "again," "also," "anyway," "besides," "certainly," "consequently," "finally," "for example," "further," "furthermore," "hence," "however," "incidentally," "indeed," "instead," "likewise," "meanwhile," "moreover," "nevertheless," "next," "nonetheless," "on the other hand," "otherwise," "rather," "similarly," "still," "then," "thereafter," "therefore," "thus," and "undoubtedly." In Example 1, no semicolon or period precedes the conjunctive adverb "however." To fix this sentence, put a semicolon or a period after "opinion." Then put a comma after the conjunctive adverb. *Example 1 becomes:* "Judge Doe wrote the opinion; however, he never read it to the litigants." *Or:* "Judge Doe wrote the opinion. However, he never read it to the litigants."

Example 2 — the no-punctuation run-on: "It's cold in the courtroom I should

put on a jacket." In this example, there's no punctuation between the two independent clauses. The first clause is "It's cold in the courtroom"; the second is "I should put on a jacket." To fix this run-on sentence, put a semicolon or a period between the independent clauses. If appropriate, include one of the conjunctive adverbs listed above. *Becomes:* "It's cold in the courtroom; I should put on a jacket." *Or:* "It's cold in the courtroom. I should put on a jacket." *Or:* "It's cold in the courtroom. Thus, I should put on a jacket."

Example 3 — the comma-splice run-on: "It's cold in the courtroom, I should put on a jacket." In this example, a comma separates the independent clauses. Fix this run-on sentence the same way as in Example 2: Put a semicolon or a period between the independent clauses and include a conjunctive adverb.

It's not a run-on sentence to separate two independent clauses with a coordinating conjunction such as "and," "but," "or," "for," "nor," "so," or "yet." *Example:* "Lawyer X read the decision, but he didn't understand a word of it."

Exception: It's not a run-on sentence to use asyndetons: independent clauses not joined by conjunctions. *Example:* "I came, I saw, I conquered."

Run-on sentences are hard to read; therefore, never use them.

12. Articles. "A" and "an" are indefinite articles that refer to someone or something general. Use "a" and "an" to begin a noun phrase. *Example:* "A juror was disqualified for speaking with the press." Use "a" or "an" as

a subject complement. *Example:* "The attorney is an intelligent man." "A" precedes a word that begins with the sound of a consonant, even if the word begins with a vowel, such as "eulogy." "An" precedes a word that begins with a vowel sound, even if the word begins with a consonant. Use "an" before a silent "h": "an heir." Use "a" before an aspirated, or pronounced, "h": "a historic occasion," "a history book." "The" is a definite article that refers to someone or something specific. "The" begins a noun phrase to refer to something already known to listeners or to assert the existence of something. *Examples:* "The courthouse is across the street." "The shortest attorney in New York County was the most successful attorney."

Use an article before a count noun: a noun that names something that can be counted. Don't use an article before a noncount noun or a mass noun: a noun that can't be counted. *Incorrect:* "My law clerk celebrated birthday yesterday." *Becomes:* "My law clerk celebrated a birthday yesterday." ("Birthday" is a count noun.) *Incorrect:* "The witness asked for glass of water." *Becomes:* "The witness asked for a glass of water." (Glasses can be counted.) *Incorrect:* "He showed a courage when he jumped into the lake to save the baby." *Becomes:* "He showed courage when he jumped into the lake to save the baby." ("Courage" is a mass noun. An article may not precede "courage," which can't be counted.)

13. Adverbs. Adverbs are words that modify a verb, an adjective, or

CONTINUED ON PAGE 74

another adverb. Adverbs tell when, where, why, or under what conditions something happens or has happened. Most adverbs end in “ly.” *Examples:* “badly,” “completely,” “happily,” “lazily,” “quickly,” and “slowly.” You can’t rely on this rule to recognize adverbs; some adjectives end in “ly”: “friendly,” “lovely.”

Some adverbs are hard to recognize. *Examples:* “afterward,” “almost,”

**Run-on sentences
are hard to read,
therefore, never
use them.**

“already,” “back,” “even,” “far,” “fast,” “hard,” “here,” “how,” “late,” “long,” “low,” “more,” “near,” “never,” “next,” “now,” “often,” “only,” “quick,” “rather,” “slow,” “soon,” “still,” “then,” “today,” “tomorrow,” “too,” “when,” “where,” and “yesterday.”

Put the adverb next to the word it modifies. *Incorrect:* “It almost seems impossible to finish the brief by July.” *Becomes:* “It seems almost impossible to finish the brief by July.” *Incorrect:* “Don’t you ever remember writing the brief?” *Becomes:* “Don’t you remember ever writing the brief?”

Incorrect: “He drove slow.” In this example, you want “slow” to modify the verb “drive.” To determine whether “slow” is correct, ask yourself: How did he drive? Slowly. *Therefore:* “He drove slowly.” *Incorrect:* “Use adverbs correct.” Ask yourself: How should I use adverbs? Correctly. *Therefore:* “Use adverbs correctly.”

Put adverbs at the beginning of sentences for emphasis or when you want to qualify the entire sentence. *Correct:* “Fortunately, no one was in the courtroom when the ceiling fell down.”

14. Modifiers. Writers encounter four modifier problems: (1) misplaced modifiers; (2) squinting modifiers;

(3) dangling modifiers; and (4) awkward separations.

A misplaced modifier occurs when you improperly separate a word, phrase, or clause from the word it describes. Some commonly misplaced words: “almost,” “even,” “exactly,” “hardly,” “just,” “merely,” “nearly,” “only,” “scarcely,” and “simply.” *Example of a misplaced word:* “She almost sold all her used law books at the garage sale.” The writer isn’t trying to say that “she almost sold all her used law books.” The writer means to say, “She sold almost all her law books at the garage sale.” *Example of a misplaced phrase:* “Throw your sister out the window the Bluebook.” The writer isn’t trying to say “Throw your sister out the window.” The writer means to say: “Throw the Bluebook to your sister.” *Therefore:* “Throw the Bluebook out the window to your sister.” *Example:* “She served punch to the attorneys in paper cups.” The writer isn’t trying to say that “the attorneys were in paper cups,” but that’s the effect. *Therefore:* “She served punch in paper cups to the attorneys.” *Example of a misplaced clause:* “She returned the car to the dealer that was defective.” This sentence suggests that the dealer, not the car, was defective. *Therefore:* “She returned the defective car to the dealer.” *Example:* “He remembered that he forgot his brief when he reached the courthouse.” This suggests that “he forgot his brief when he reached the courthouse.” *Therefore:* “When he reached the courthouse, he remembered that he forgot his brief.” *Or:* “He remembered when he reached the courthouse that he forgot his brief.”

A squinting modifier is a modifier that might refer to a preceding or a following word. Like a misplaced modifier, a squinting modifier creates confusion. Unlike a misplaced modifier, the adverb might function perfectly in the sentence structure but its meaning might be ambiguous. *Example:* “Eric told his daughter when the meeting was over he would play with her.” Is it that Eric spoke to his daughter when the meeting was over? Or that

Eric told his daughter he would play with her after the meeting? Two correct versions: “Eric told his daughter he would play with her when the meeting was over.” *Or:* “When the meeting was over, Eric told his daughter that he would play with her.”

Where you position a squinting adverb (“almost,” “even,” “exactly,” “hardly,” “just,” “merely,” “nearly,” “only,” “scarcely,” “simply,” or “solely”) affects the sentence. *Incorrect:* “The court attorney only made one mistake.” *Becomes:* “The court attorney made only one mistake.” *Examples:* “She only nominated Matthew for partner.” (She didn’t vote for him.) “She nominated only Matthew for partner.” (She didn’t nominate anyone else.)

A modifier dangles when the noun or pronoun to which a phrase or clause refers is in the wrong place or missing. Sometimes the dangling modifier is at the beginning of the sentence. Sometimes it’s at the end. *Example of a dangling participle:* “Once edited and rearranged, Bill received an A+.” This suggests that “Bill” was edited and rearranged. *Therefore:* “Once he edited and rearranged his law-school paper, Bill received an A+.” *Example of a dangling gerund:* “After editing for an hour, the brief looked good.” This suggests that “the brief” was editing for an hour. *Therefore:* “After I edited the brief for an hour, the brief looked good.” *Example of dangling infinitive:* “To write a brief, a computer is needed for efficiency.” Because “a brief” is positioned next to “a computer,” the writer suggests that a computer can write a brief. *Therefore:* “For efficiency, a computer is needed to write a brief.” *Or:* “To write a brief, you’ll need a computer for efficiency. *Or:* “To write a brief, an attorney needs a computer for efficiency.” *Example of a dangling elliptical clause:* “When just five years old, my father taught me how to cross-examine my sister.” Because “when just five years old” is positioned next to “my father,” the sentence suggests that “my five-year-old father taught me how to cross-examine my sister.” *Therefore:* “When I was just five years

old, my father taught me how to cross-examine my sister."

An awkward separation creates confusion. *Incorrect*: "Many students have, by the time they finish law school, interned for a judge." The sentence is confusing because the auxiliary verb "have" is separated from the main verb "interned." *Therefore*: "By the time they finish law school, many students have interned for a judge." *Or*: "Many students have interned for a judge by the time they finish law school."

Misplaced prepositions lead to miscues. Make sure, for example, not to put the word "with" in the final position of a sentence. *Incorrect*: "The defendant robbed a bank with money." In this example, the reader might wonder why the defendant didn't use a gun.

15. Problem Words and Pairs. You can't "bare" it when two words sound alike or when they're spelled alike. Or is it "bear" it? Don't let it "affect" you. Or is it "effect" you?

Use "accept" when you mean "take." Use "except" when you mean to "leave out." *Example*: "Please accept my apology." *Or*: "Everyone except for Lawyer Lee went to court." Use "affect" when you mean "to influence" or "a feeling or state." Use "effect" when you mean "something resulting from another action" or "to come into being." *Example*: "Mr. X, whose manner is affected, put his theory into effect. His theory had a profound effect. It affected many things." Use "already" when you mean "before." Use "all ready" when you mean "prepared." *Example*: "She already left for court." *Or*: "She was all ready to go to law school." Use "all together" when you mean "everyone at once." Use "altogether" when you mean "completely." *Example*: "We jumped off the courthouse stairs all together." *Or*: "Lawyer Lee is altogether lazy." Use "bare" to mean "uncovered." Use "bear" to mean "animal" or "endure." *Examples*: "The baby's head was bare." "I saw the bear climb a tree." "I can't bear to sit in court." Use "desert" to mean "leave behind" or "arid region." Use

"dessert" to mean "sweet." *Examples*: "His partner deserted him in the hall." "Bring plenty of water and a hat when you travel in the desert." "I love decadent desserts." Use "its" to show possession. Use "it's" to mean "it is" or "it has." *Examples*: "What is its color? It's beige." "It's freezing in the courtroom." Use "less" for things that can't be counted or which can be counted, but only as a group, not individually. Use "fewer" for things that can be counted individually. *Example*: "Less sand; fewer grains of sand." Use "loose" when you mean "unfastened." Use "lose" when you mean "misplace." *Example*: "My button is loose." "I'll lose my tie if I don't fasten it." Use "principal" when you mean "main" or "head of school." Use "principle" when you mean "rule." *Examples*: "In this town, this is the principal road." "The principal, Mr. Discipline, isn't my friend." "I follow all the principles of writing." Use "than" to compare. Use "then" to mean "at that time." *Examples*: "New York has more attorneys than Hawaii." "New York was then unpopulated." Use "their" when you mean "belong-

ing to them." Use "there" when you mean "place." Use "they're" when you mean "they are." *Examples*: "They used their car to get to New York." "How do I get there?" "They're coming to New York." Use "weather" to mean "environmental conditions." Use "whether" to mean "if." *Examples*: "The weather will be hot and muggy tomorrow." "I don't know whether it will be hot or muggy tomorrow." Use "your" when you mean "belonging to you." Use "you're" when you mean "you are." *Examples*: "Your argument was brilliant." "You're brilliant."

16. Who and Whom. It isn't egregious to use "who" instead of "whom." But it's unforgivable to use "whom" instead of "who" to sound erudite.

"Who" is the subject. *Example*: "Who wrote the brief? Jane!" "Whom" can be an object or a subject. *Object example*: "Whom did you see at the corner?" *Subject example*: "Jane is the person whom defendant shot." Here's a tip: Answer the implicit question the sentence raises to see whether "he" ("she") or "him" ("her") can replace "who" or "whom." "He" or "she" replaces "who." "Him" or "her" replaces "whom." *Incorrect*: "Who do you want to argue the case?" *Becomes*: "Whom do you want to argue the case?" *Answer*: I want *him* or I want *her* to argue the case. An unnecessary "whom": "Jane is the person whom defendant shot." An unnecessary "who": "Jane is the person who defendant shot." *Becomes*: "Jane is the person defendant shot."

17. The Sentence Extra. Eliminate the unnecessary "that" in a string of clauses. *Incorrect*: "The law clerk said that although she will draft the opinion, that no one will read it." *Correct*: "The law clerk said that although she will draft the opinion, no one will read it." Also eliminate extra prepositions. Consider this James Bond lyric from

Misusing words will effect your writing.
Pick on the right idiom.
Use adverbs correct.

the Wings' classic "Live and Let Die": "But if this ever changing world in which we live in . . ." *Boring but correct*: "But if this ever changing world in which we live . . ." *Or*: "But if this ever changing world *that we live in . . .*"

18. "That" Versus "Which." "That" is a demonstrative pronoun. "Which" is an interrogative pronoun. *Examples*: "that brief"; "which brief?" "That" is restrictive or defining. "That" introduces a restrictive clause: a clause necessary to the sentence's meaning. "Which" isn't restrictive or nondefining. "Which" introduces a nonrestrictive clause: a clause unnecessary to the sentence's meaning. Use "that" to introduce essential information. Use "which" to define, add to, or limit

information. Commas usually set off a clause beginning with “which.”

Here’s a tip: If the word or concept before the “that” or the “which” is one of several, use “that.” If the word or concept before the “that” or the “which” expresses a totality, use “which.” *Example 1:* “Judge Right must impose a sentence, *which* he doesn’t want to impose.” *Example 2:* “Judge Right must impose a sentence *that* he doesn’t want to impose.” Use “which” if Judge Right must impose but one sentence and doesn’t want to impose it. Use “that” if Judge Right, who has several sentences to impose, doesn’t want to impose only one of them.

Another tip: If you can drop the clause and still retain the meaning of the sentence, use “which.” If you can’t, use “that.” *Example 1:* “The trial exhibits that were damaged in the fire were my exhibits.” *Example 2:* “My trial exhibits, which were 8 x 10 inch color photographs, were damaged in the fire.” In Example 1, if you drop the “that” clause (“that were damaged”), the entire sentence would lose its meaning. In Example 2, if you drop the “which” clause (“which were 8 x 10 inch color photographs”), the sentence would make sense. The “which” clause in Example 2 adds information. In Example 1, the “that” clause defines the entire sentence and gives it meaning.

19. Comparisons. Use the comparative degree to compare two persons or things. Use the superlative degree when you want to compare more than two persons or things.

For some adjectives that have one syllable and some adjectives that have two syllables, form the comparative by adding “er” and form the superlative degree by adding “est.” *Examples:* “Fine” becomes “finer” or “finest.” “Friendly” becomes “friendlier” or “friendliest.”

For some two-syllable adjectives and most adjectives that have more than two syllables, form the comparative by adding “more” or “less.” For these adjectives, form the superlative by adding “most” or “least.” *Examples:* “The recent decision seemed more

hopeful.” “Jack is the least competent attorney in the firm.” “As a litigator, he became most successful.”

Some adjectives have irregular comparative and superlative forms. *Examples:* “bad” (ill) becomes “worse” or “worst.” “Far” becomes “farther” (distance) or “farthest.” “Far” also becomes “further” or “furthest” (additional or distance). “Good” (well) becomes “better” or “best.” “Little” becomes “less,” “lesser,” or “littler” in the comparative form. “Little” becomes “least” or “littlest” in the superlative form. “Much” (many) becomes “more” or “most.”

20. The Right Idiom. An idiom is a phrase whose meaning is greater than the sum of its parts. Some incorrect idiomatic expressions in legal writing: “Abide from a ruling” becomes “abide by a ruling.” “Accord to” becomes “accord with.” “Adverse against” becomes “adverse to.” “Angry at” becomes “angry with.” “Appeal at a court” becomes “appeal to a court.” “As regards to” becomes “as regards.” “Authority about” becomes “authority on.” “Blame it on me” becomes “blame me for it.” “Centers around” becomes “revolves around” or “centers on,” “centers in,” or “centers at.” “Comply to” becomes “comply with.” “Contrast to” becomes “contrast with.” “Convicted for [or in] a crime” becomes “convicted of a crime.” “Correspond with,” as a comparison, becomes “correspond to.” You “correspond with” when you write a letter to someone. “Desirous to” becomes “desirous of.” “Dissent from this case” becomes “dissent in this

case” or “dissent from the majority opinion.” “Equivalent with” becomes “equivalent to” or “equivalent of.” “Free of” becomes “free from.” “Graduated law school” becomes “graduated from law school” or “was graduated from law school.” “Identical to” becomes “identical with.” “In accordance to” becomes “in accordance with.” “Inadmissible for evidence” becomes “inadmissible into evidence” or “inadmissible for the purpose of impeachment.” “In search for” becomes “in search of.” “Insured from a loss” becomes “insured against loss” or “insurance on the property” or “insurance for the business.” “Plead the Fifth Amendment” becomes “take [or invoke] the Fifth Amendment.” “Prefer . . . over” becomes “prefer . . . to.” “Relation with” becomes “relation to.” “Relations to” becomes “relations with.” “Released from a debt” or “released into custody” or “released by the court.” “Stay for awhile” becomes “stay a while” or “stay for a while.” “Ties with” becomes “ties to.” “Warrant for eviction” becomes “warrant of eviction.”

In the next issue, the Legal Writer will discuss the do’s and don’ts of punctuation. ■

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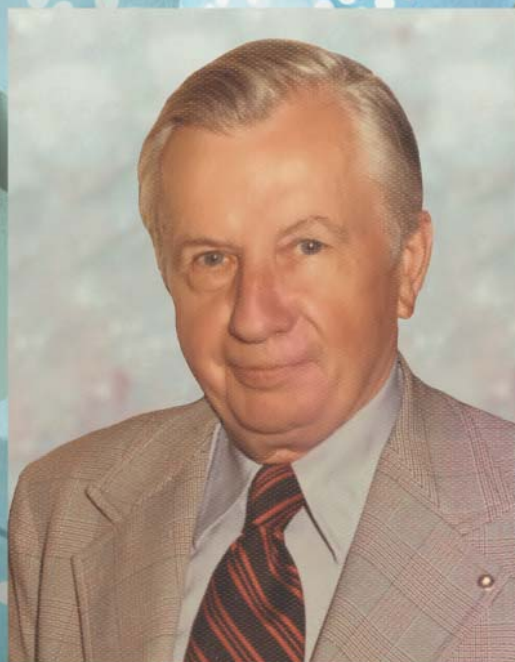
August 30, 1966

Mr. James M. Flavin
State Reporter
Court of Appeals Hall
Albany, New York

Dear Mr. Flavin:

Your request to proceed with an expenditure of \$7500 to continue your experimental efforts to retrieve court decisions on court of Appeal cases by means of EDP process is approved, with the understanding that you will try to absorb this sum from this year's savings. If you are unable to do so, report to this office and we shall entertain a deficiency request in January. Any subsequent requests will be based on the findings of your experiment, and we will be most anxious to be apprized of the results of the program.

Sincerely,



Remembering Mr. Flavin

*The Origins (and Unintended Consequences)
of Online Legal Research*

by Gary D. Spivey

Also in this Issue

Eugene C. Gerhart and
Justice Robert Jackson
Immigration Compliance
2007 Criminal Law
Legislation
Consumer Protection
Law in 2007



Do's, Don'ts, and Maybes: Legal Writing Punctuation — Part I

In six of the last seven columns, the Legal Writer covered legal writing's do's, don'ts, and maybes. The last two columns discussed grammar. We continue with seven punctuation issues and, in the next two columns, eight more. This three-part series addresses periods, question marks, exclamation points, colons, semicolons, parentheses, brackets, commas, hyphens, quotation marks, apostrophes, dashes, slashes, ellipses, and accent marks.

Punctuation refers to symbols that organize and give structure to writing. Punctuation lets you change the inflection of your voice and give meaning to your words.

Punctuation helps speed up or slow down language. *Example of speeding up language:* "The associate won her first trial today." In this example, the reader reaches the end of the sentence without stopping for any punctuation. The period tells you when to rest. *Example of slowing down language:* "The associate, fresh out of law school, won her first trial today." The commas in this example cause the reader to slow down twice before reaching the end of the sentence. Commas tell you when to breathe.

Punctuation lets writers emphasize some words and de-emphasize others. *Example:* "Mr. Roe — a professional and diligent attorney — argued the motion." Or: "Mr. Roe argued the motion. (He's a professional and diligent attorney.)"

Punctuation tells readers when to feel emotion. *Example:* "Wonderful!"

Punctuation tells readers when to pay attention. *Example:* "When will he be released from jail?"

Punctuation clarifies. Consider this classic example: "Woman without her man is nothing." Depending on how you punctuate, the sentence will have different meanings. *Example 1:* "Woman: Without her, man is nothing." *Example 2:* "Woman, without her man, is nothing." The punctuation you use and where you put it will alter how readers will interpret what you write.

Good punctuation makes you feel, hear, and understand language. Bad punctuation is confusing and off-putting.

1. Periods. Three punctuation marks end a sentence: periods, question marks, and exclamation points. Lawyers don't use enough periods. Thoughts without periods are lengthy and convoluted.

Use periods at the end of a declarative sentence. A declarative sentence states an argument, fact, or idea. It doesn't require the reader to take action or answer. *Examples:* "Some writers don't know how to punctuate." "If you know how to punctuate, you'll be seen as a good writer."

Use periods at the end of commands. *Examples:* "Submit your briefs by Friday." "Evacuate the courtroom quietly."

Use periods at the end of a citation before a new sentence. *Incorrect:* "Landlord v. Tenant, 100 A.D.3d 21, 22, 111 N.Y.S.2d 41, 42 (4th Dep't 2007) In Tenant, the court applied the rule against perpetuities." *Correct:* "Landlord v. Tenant, 100 A.D.3d 21, 22, 111 N.Y.S.2d 41, 42 (4th Dep't 2007). In Tenant, the court applied the rule against perpetuities."

Use periods, not question marks, after indirect questions. *Examples:* "The judge asked me why wasn't I ready for trial." "My client wanted to know why he paid the filing fees." "She asked whether I could argue the motion."

Use one period, not two, when the sentence ends in an abbreviation. *Incorrect:* "I reached the courthouse at 9:30 a.m.," *Correct:* "I reached the courthouse at 9:30 a.m." If the sentence ends in a question mark or an exclamation point, use a period after the abbreviation. *Examples:* "How was your trip to Washington, D.C.?" "Court begins at 9:30 a.m.!"

Abbreviated American and British weights and measures end in periods. *Examples:* "qt." for "quart" and "pt." for "pint." Don't put periods after degrees and metric abbreviations. *Examples:* "C" for "Centigrade," "cm" for "centimeter," "cms" for "centimeters," and "F" for "Fahrenheit."

Put a period at the end of an abbreviated title, even if the title isn't a true abbreviation. *Example:* "Ms." Put a period at the end of an abbreviated title, even if the last letter of the abbreviated title wouldn't end with a period were it unabbreviated. *Incorrect:* "Dr Smith." ("Dr Smith" is correct in British usage.) *Correct:* "Dr. Smith." *Other examples:* "C.P.A.," "D.D.S.," "Hon.," "Jr.," "M.D.," "Mr.," "Ph.D.," "Sen."

Add no space between periods when using initials. *Incorrect:* "Mary Smith, J. D." *Correct:* "Mary Smith, J.D." *Incorrect:* "J. O. Doe." *Correct:* "J.O. Doe." *Exception:* Use spaces if the person prefers them: "John D. B. Jones."

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Don't use periods for acronyms. To create an acronym, take the first letter from a series of words to form a pronounceable word that stands for something. *Examples:* "AIDS" and "NATO." "AIDS" stands for Acquired Immune Deficiency Syndrome. "NATO" stands for North Atlantic Treaty Organization. Because you can pronounce acronyms as words, you don't need periods.

Use periods for abbreviations. Abbreviations are different from acro-

nym; you pronounce each individual letter in an abbreviation. *Examples:* U.S.A., N.A.A.C.P., N.C.A.A., F.B.I. Newspapers and magazines omit the periods from common abbreviations to save space. If your readers are familiar with the abbreviation, don't use periods.

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Don't use a question mark for a command. *Example:* "Would you write the brief now, please."

Don't put a question mark at the end of a sentence that begins with "whether." "Whether" is a statement, not a question. *Correct:* "Whether the defendant's conviction should be reversed is the only issue before the court."

Put a question mark inside quotation marks if the question is in the original. Put it outside if it's not in the original. *Example of a question mark in the original:* The judge asked, "How long will you cross-examine this wit-

emphatic declaration, or interjection. *Examples of commands:* "Stop!" "Quiet in the courtroom!" *Examples of emphatic declarations:* "Wow!" "His direct examination was brilliant!" *Examples of interjections:* "Excuse me!" "Cheers!"

Put an exclamation point inside the quotation mark if the exclamation point is in the original. Put an exclamation point outside if the exclamation point is not in the original. *Example of an exclamation point in the original:* The judge said, "Stop screaming at the witness!" *Example of an exclamation point not in the original:* The partner

Good punctuation makes you feel, hear, and understand language.

ness?" *Example of a question mark not in the original:* Does the judge always need to say, "Counselor, let's move it along"?

If the sentence and the quoted material are questions, don't use two question marks. *Incorrect:* Did I just say, "May I use your telephone to call my client?"? *Correct:* Did I just say, "May I use your telephone to call my client?"

When a question ends with a series of brief questions that are follow-up questions to the main question, each follow-up question should begin with a lowercased letter and end with a question mark. *Example:* "Who's responsible for this mistake? the associate? the partner? the paralegal?"

Question marks denote uncertainty: "Judge Abe wrote two (?) opinions today."

Place question marks inside parentheses when asking a question: "Judge Z's opinion (when did she learn to write so well?) is stellar."

Rhetorical questions, or questions a writer asks for which the writer doesn't expect an answer, should end with a question mark. *Example:* "How else should we end the brief, after all?" But avoid using question marks unless you're quoting. Good legal writers answer questions, not ask them.

3. Exclamation points. Use an exclamation point at the end of a command,

told her to rewrite her brief because it was "ungrammatical and incomprehensible trash"!

Exclamation points may accompany mimetically produced sounds: "All night long, I heard the dogs woof! in my neighbor's apartment." "The dog went Grr!, and I left the room."

Avoid exclamation points in legal writing. They tell readers that you're exaggerating or screaming at them. Use exclamation points for informal writing, like birthday wishes to a loved one or the occasional informal e-mail. Instead of using exclamation points to intensify your writing, use concrete nouns and, even better, vigorous verbs.

4. Colons. Colons press readers forward. Use a colon after a salutation in formal writing. *Example:* "Dear Ms. Doe:" Use a comma, not a colon, after a salutation when writing to friends. *Incorrect:* "Dear Joe:" becomes "Dear Joe,"

Separate hours from minutes with a colon. *Example:* "2:15 p.m." Separate book titles from subtitles with a colon. *Example:* "Advanced Judicial Opinion Writing: A Handbook for New York State Trial and Appellate Courts." Separate chapter from verse with a colon. *Example:* "Thou shall not kill."

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Exodus 20:13 (King James). Use a colon to introduce a definition. *Example:* “Lawyer: An individual with a briefcase who can steal more than a hundred men with guns.”¹ Use a colon to replace “is” or “are.” *Example:* “The diagnosis; terminal double-speak.”

Use a colon after an independent clause — defined as a clause that has a subject, a verb, and can stand on its own as a sentence — to (1) introduce lists, (2) introduce an illustrative quotation, or (3) show that something will follow. *Example of an independent clause introducing a list:* “The defendant asserted three defenses; insanity, extreme emotional disturbance, and self-defense.” But consider the following example: “The attorney determined that his client’s best defenses included insanity, extreme emotional disturbance, and self-defense.” You don’t need a colon after “included”; the preceding clause isn’t an independent clause. *Example*

“Parentheses are (usually) too informal for legal writing.”

of an independent clause introducing a quotation: The court ruled against the petitioner; “Doe proved she’s the real tenant.” *Example of an independent clause showing that something will follow:* “The Civil Court instituted a new rule; Guardians ad litem must complete a case summary form.” Colons signal that clarifying information will follow.

Unless what follows is a quotation, a colon may not follow a dependent clause, defined as a clause that can’t stand on its own as a sentence. *Incorrect:* “The area codes she calls most often are; (212), (718), (917), and (646).” *Correct:* “The area codes she calls most often are (212), (718), (917), and (646).” *Correct:* His advice was; “Be confident but not over-confident.” *Better:* His advice; “Be confident but not over-confident.”

Uppercase the first word after a colon when an independent clause fol-

lows the colon. *Examples:* “The judge gave her a useful suggestion; Evaluate a case before you accept a client.” “The judge made one finding; The defendant failed to prove her insanity defense.” Don’t capitalize after a colon when a dependent clause follows the colon. *Examples:* “The judge gave her a useful suggestion; to evaluate the merits of a case before accepting a client.” “The judge made one finding; defendant’s failure to prove her insanity defense.” If more than one independent clause follows the colon, begin each independent clause with a capital letter: “Andrea was acquitted for two reasons; First, the People failed to prove that she committed the crime beyond a reasonable doubt. Second, the jurors didn’t find the People’s witnesses credible.”

Colons always go outside quotation marks. *Example:* She described her legal career as a “roller-coaster ride”; some successes, some failures, and everything in between.

Spacing: Use two spaces after a colon in typing and one space in publishing.

5. Semicolons. Don’t confuse colons with semicolons. Colons press readers forward. Semicolons slow readers down.

Use semicolons to connect closely related independent clauses. *Example:* “In straightforward cases, the judge issues a decision in three days; in complicated cases, it’s 30 days.” Don’t use semicolons — use commas — to connect dependent clauses to independent clauses. *Incorrect:* “While we were waiting in court; the defendant attacked the prosecutor.”

Use semicolons to avoid run-on sentences. Use semicolons, not commas, to separate two independent clauses if the second independent clause begins with a conjunctive adverb (“accordingly,” “again,” “also,” “besides,” “consequently,” “finally,” “for example,” “furthermore,” “hence,” “however,” “moreover,” “nevertheless,” “on the other hand,” “otherwise,” “rather,” “similarly,” “then,” “therefore,” “thus”). *Example:* “In straightforward

cases, the judge issues a decision in three days; therefore, litigants don’t have to wait for justice.” Use a semicolon to separate two independent clauses if the second independent clause has a conjunctive adverb somewhere in the sentence, usually after the subject. *Example:* “The judge told his law clerk to evaluate the merits of the case; he therefore told his law clerk to prefer logic to emotion.”

Use semicolons in lists that contain internal commas or an “and” or “or.” *Example of a list with an internal comma:* “On trial for embezzlement were Lawyer A of Queens, New York; Lawyer B of White Plains, New York; and Lawyer C of The Bronx, New York.” *Example of a list containing “and”:* “For the firm’s holiday party, please buy roast beef and turkey sandwiches; red and white wine; and diet and regular soda.” *Example of a list containing “or”:* “Check-in at 9:30 a.m. in Parts A or B; at 11:30 a.m. in Parts C or D; or at 2:15 p.m. in Parts E or F.” It’s acceptable in lists to use two or more semicolons in the same sentence.

Use semicolons to replace commas and coordinating conjunctions (“and,” “but,” “for,” “nor,” “or,” “yet”). *Example (replacing “but”):* “The respondent didn’t agree with paragraph seven of the stipulation; he agreed with everything else.” *Example (replacing “or”):* “Arrive at the courthouse by 9:30 a.m.; your case will be dismissed at 10:30 a.m.”

The first letter after a semicolon is lowercased, unless the word is a proper noun. *Examples:* “John Doe takes a week to pick a jury; James Roe, his partner, takes an hour to pick a jury.” “The attorney takes a week to pick a jury; his partner takes an hour to pick a jury.”

Use a semicolon between string citations. *Example:* *Plaintiff v. Defendant*, 999 U.S. 999 (2009); *Plaintiff v. Defendant*, 98 U.S. 890 (2008). Use commas, not semicolons, within a parallel citation. *Incorrect:* *Plaintiff v. Defendant*, 99 N.Y.3d 123; 100 N.E.2d 100; 500 N.Y.S.2d 799 (2009).

Overusing “[sic]” suggests you’re insulting or embarrassing the original quotation’s author.

Put semicolons after and outside parentheses. *Example*: “Lawyer F lost the case (his tenth loss in 12 months); this year he might not get a bonus.”

When a semicolon follows an abbreviation with periods, it’s acceptable to put a semicolon after a period. *Example*: “The witness testified that in 1993 he received his B.A.; he graduated from SUNY Plattsburgh.”

Semicolons always go outside the quotation mark. *Example*: The judge told the defendant, “I want to make sure you never get out of jail”; thus, he sentenced the defendant to life without parole.”

Spacing: Put one space after a semicolon.

6. Parentheses. Parentheses direct readers to additional and slightly different information. They also set off explanations, interruptions, or phrases that obscure the main text. *Examples*: “Parentheses are (usually) too informal for legal writing.” “Settle this case (trust me!).”

Parentheses introduce abbreviations and acronyms. *Example*: The New York City Police Department (NYPD).

Use parentheses for citations in official New York State (Tanbook) style.² *Example*: “Because the landlord knew about the subtenant’s presence, the court found no illusory tenancy. (*Plaintiff v Defendant*, 50 AD2d 50, 50 [5th Dept 2009].)” Use parentheses to explain ambiguous citations following citations, according to the Bluebook.³ Use brackets, according to the Tanbook.⁴ *Bluebook example*: *Plaintiff v Defendant*, 99 N.Y.S.2d 500, 511 (3d Dep’t 2009) (finding that plaintiff was not “closely related” to victim). *Tanbook example*: (*Plaintiff v Defendant*, 99 AD3d 500, 501 [3d Dept 2009] [finding that plaintiff was not “closely related” to victim].)

Enclose your parentheses. *Incorrect*: “1).” *Becomes*: “(1).” Unenclosed parentheses are difficult to read.

If the parentheses appear at the end of a sentence, punctuate after the final parenthesis. If the parentheses contain an independent clause, punctuate inside the final parenthesis. *Example of parentheses at the end of a sentence*:

“Lawyers must read carefully (and write carefully).” *Example of an independent clause inside parentheses*: “Lawyers must read carefully. (They must also write carefully.)”

Use double parentheses in a sentence or sentence citation. *Correct Bluebook example*: *Plaintiff v Defendant*, 99 N.Y.S.2d 500, 511 (3d Dep’t 2009) (citing *C v. D*, 999 U.S. 999 (2007)).

Parentheses de-emphasize. To emphasize, use “em” dashes (“—”).

7. Brackets. In a quotation that contains a factual, spelling, or usage error, use “[sic],” meaning “thus,” after the error. If the context makes it clear that the mistake was in the original, don’t add “[sic].” *Correct*: “The attorney subjected [sic] to the exhibit’s admission in evidence.” The author meant to write “objected,” not “subjected.” Use “[sic]” sparingly. Overusing “[sic]” suggests you’re insulting or embarrassing the original quotation’s author. Consider using brackets to correct the quotation.

Use brackets in a quotation to show alterations or additions to a letter or letters in a word. *Examples*: “Clearly” becomes “Clear[.]” “Proof” becomes “Pro[ve].” “Clearly” becomes “[c]learly.” “Clerly” becomes “Cle[a]rly.” *Consider the following original text in a judicial opinion*: “For the above-mentioned reasons, the court finds that Defendant has no proof to substantiate her affirmative defense.” *Alteration example (end of a word)*: The court determined that Defendant did not “pro[ve] . . . her affirmative defense.” *Alteration example (capitalizing)*: The court made the following finding: “[T]he court finds that Defendant has no proof to substantiate her affirmative defense.” *Addition and alteration example*: “[T]he court f[ou]nd[] that Defendant ha[d] no [documentary or testimonial] proof to substantiate her affirmative defense.”

Never add within quotation marks long bracketed text after a quotation. *Incorrect*: The court found that Defendant failed “to substantiate her affirmative defense [by a preponderance of the credible evidence].”

According to the Tanbook, use brackets to add information like years and names of courts.⁵ *Example*: (*Plaintiff v Defendant*, 50 AD3d 50, 50 [4th Dept 2009].)

Brackets go inside parentheses.⁶ *Tanbook example*: (*Plaintiff v Defendant*, 50 AD3d 50, 50 [4th Dept 2009].)

Add a space between parentheses and brackets. *Example of spacing between parentheses (Bluebook example)*: *Plaintiff v Defendant*, 55 N.Y.S.2d 55, 56 (2d Dep’t 2009)_(finding that plaintiff had no exclusive control over instrumentality). *Example of spacing between a parentheses and a bracket (Bluebook example)*: Judith S. Kaye, *Inaugural Hon. Joseph W. Bellacosa Distinguished Jurist-in-Residence Lecture*, 81 St. John’s L. Rev. 743 (2007) [hereinafter *Lecture*]. *Example of spacing between two brackets (Tanbook example)*: (*Plaintiff v Defendant*, 99 NY3d 100, 101 [2009]_[finding that plaintiff had no exclusive control over instrumentality].)

In the next issue, the Legal Writer will continue with more punctuation. ■

1. Mario Puzo, *The Godfather* 52 (1969). Original quotation: “A lawyer with his briefcase can steal more than a hundred men with guns.”

2. New York Law Reports Style Manual (Tanbook) R. 1.2(a), at 2 (2007), available at http://www.nycourts.gov/reporter/New_Styman.htm (html version) and <http://www.nycourts.gov/reporter/NYStyleMan2007.pdf> (pdf version) (last visited Dec. 11, 2007).

3. *The Bluebook: A Uniform System of Citation* R. 10.4, 10.5, 10.6, at 89–92 (Columbia Law Review Ass’n et al. eds., 18th ed. 2005).

4. Tanbook R. 1.1(a), at 2.

5. *Id.*

6. *Id.*; R. 1.2(c)(2), at 3.

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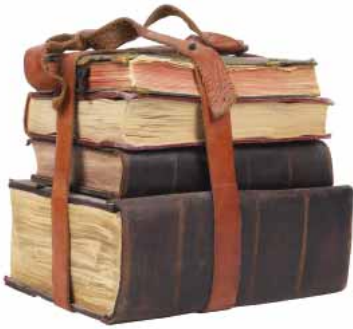
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Do's, Don'ts, and Maybes: Legal Writing Punctuation — Part II

In the last column, the Legal Writer discussed seven punctuation issues in legal writing. We continue with two more.

8. Commas. Commas are meant to slow down language or replace words. To create a pause, add a comma.

Put commas after salutations in informal writing. *Example:* “Dear Grandma Jane,₁” Use colons in formal writing. *Example:* “Dear Mr. Johnson:” In formal and informal writing, use commas after closing. *Examples:* “Sincerely,₁” “Very truly yours,₁”

Put commas before titles. *Examples:* “Jane Smith,₁ Esq.” “Bob Jones,₁ Ph.D.” “Tom Roe,₁ M.D.” In a sentence, put commas after titles. *Example:* “Sam Smith, Ph.D.,₁ conducted the psychiatric evaluation.” Insert commas before “Jr.” or “Sr.” only if the person uses a comma. If the person uses a comma, use commas before and after. *Examples:* “Judge John Smith, Jr.,₁ is presiding.” “Judge John Smith, Sr.,₁ is presiding.”

Don't use commas to separate nouns from restrictive terms of identification. *Example:* “Alexander the Great.”

Use commas to set off dates. *Example:* “The deposition is scheduled for Wednesday, October 31,₁ 2007.” Don't put a comma between a month and the year. *Correct:* “July 2008 will be her sixth anniversary since she passed the bar exam.”

A controversy exists about whether to put a comma after the date if the date appears within a sentence. The comma is optional, but the Legal Writer recommends it. *Example:* “On August 29, 2007,₁ she started law school.”

Use commas to separate parts of an address and after the address. *Correct:*

“The attorney has worked at 123 Justice Avenue,₁ Elmhurst,₁ New York 11373,₁ since 2001.” Don't use commas between the state and the zip code. In typing, add two spaces after the state and before a zip code. *Example:* “New York, New York,₁ 10013.”

Use commas to separate digits. The Bluebook tells writers to insert commas only in figures containing five or more digits.¹ The Association of Legal Writing Directors (ALWD) Citation Manual instructs writers to insert commas in numbers containing four or more digits.² The New York State Official Style Manual (Tanbook) doesn't discuss the issue. The Bluebook: “4500.” Insert a comma only when the number exceeds four digits: “45,000.” ALWD: “4,500.”

Use commas to contrast or emphasize words. *Example:* “Jane deposed three,₁ not five, witnesses.” “William met his client in Ithaca,₁ not Schenectady.”

Set off interruptive phrases or transitional expressions with commas. The most common interruptive phrases or transitional expressions are the conjunctive adverbs “additionally,” “for example,” “however,” “moreover,” “therefore,” and “thus.” *Examples:* “The attorney,₁ however,₁ spent too much time asking the witness irrelevant questions.” “The attorney,₁ for example,₁ asked the witness what she ate for breakfast.” “The plaintiff,₁ therefore,₁ failed to prove negligence.”

A controversy exists about introductory commas. Use introductory commas to clarify an introductory word, clause, or prepositional or participial phrase or subordinate clause, to avoid ambiguity or miscues, and

after a lengthy introductory clause. A clause has a subject and a verb. A phrase has a subject or a verb, but not both. *Introductory word examples:* “Honestly,₁ I remember nothing about the accident.” Writers often omit introductory commas. *Incorrect:* “Thanks Bob.” *Correct:* “Thanks,₁ Bob.” *Correct:* “Therefore,₁ the plaintiff failed to prove negligence.” *Also correct (without the comma):* “Therefore the plaintiff failed to prove negligence.” *Introductory phrase example:* “In Quebec City and Montreal,₁ students read and write in French.” *Introductory clause:* “Although Jane wrote the appellate brief,₁ Mary argued it on appeal.” *Ambiguity or miscue:* “After the house blew up Mary sued.” Without the comma, the house is a homicide bomber that blew Mary up. *Correct:* “After the house blew up,₁ Mary sued.”

“After the house
blew up Mary sued.”
Without the comma,
the house is a
homicide bomber that
blew Mary up.

Use commas to set off introductory phrases that add nonessential information to a preceding clause. Introductory phrases will begin with words like these: “although,” “according to,” “after,” “despite,” “first,” “if,” “including,” “irrespective of,” “particularly,” “perhaps,” “preferably,” “probably,”

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“provided that,” “regardless of,” and “usually.” *Examples:* “Although she was sick, Ms. Jones finished the trial.” “If the defendant appears this morning, we’ll continue the trial.”

Use commas to set off tag questions. *Examples:* “She finished cross-examining the witness, didn’t she?” “She’s an eloquent attorney, don’t you think?”

Use commas to separate coordinate adjectives. *Examples:* “He’s a meticulous, efficient attorney.” “After winning the trial, Joe bought a new, trendy convertible.” Because noncoordinate adjectives carry equal weight, don’t use commas to separate them.

Two tips to figure out whether the adjective is coordinate or noncoordinate: (1) Reverse the order of the adjectives to see whether the sentence makes sense. Or (2) insert “and” between the adjectives to see whether the sentence makes sense. If the adjectives pass test 1, they’re coordinate adjectives and need commas. If the adjectives pass test 2, they’re coordinate adjectives and need commas. If the adjectives pass neither test, the adjectives are noncoordinate and won’t need commas.

Using the examples above for tests 1 and 2: “He’s an efficient, meticulous attorney.” (Sentence makes sense when you reverse the adjectives.) “He’s a meticulous and efficient attorney.” (Sentence makes sense when you insert “and.”) “After winning the trial, Joe bought a trendy, new convertible.” (Sentence makes sense when you reverse the adjectives.) “After winning the trial, Joe bought a trendy and new convertible.” (Sentence makes sense when you insert “and.”)

Consider this: “The firm bought three new affordable computers.” Using test 1 to reverse the adjectives: “The firm bought new three affordable computers.” “The firm bought affordable three new computers.” “The firm bought affordable new three computers.” “The firm bought new affordable three computers.” The sentences make no sense regardless which test you use. The adjectives are noncoordinate; they

don’t need commas. Using test 2 to insert “and”: “The firm bought three and new and affordable computers.” (No sense.)

Use a comma to separate two parts of a double-comparative. *Correct:* “The sooner, the better.” “The more, the merrier.”

Put a comma before a coordinating conjunction (“and,” “but,” “for,” “nor,” “or,” “so,” “yet”) that joins two independent clauses. Don’t put a comma before a conjunction if the conjunction joins a dependent clause: a sentence that has no subject, verb, or both can’t stand on its own as a sentence. *Examples of conjunction joining two independent clauses:* “She lost her first trial, but she won every trial since then.” “The court attorney studied in the law library, and while there he drafted an opinion.” *Examples of conjunction joining a dependent clause:* “She won her first trial but never won again.” “The court attorney studied in the law library and drafted an opinion there.” If the two independent clauses are short, don’t insert a comma except to emphasize the second clause. *Example:* “Lawyers speak and judges listen.” *Or:* “Lawyers speak, and judges listen.”

Use commas to enclose appositives: nouns or pronouns that rename or explain the nouns or pronouns that follow. *Examples:* “Lawyer A, who practices in state court, and Lawyer Z appeared in federal court.” (Note the absence of a comma after “Lawyer Z.”) “Harry argued before the Supreme Court, Appellate Division, Third Department.” “Anne, the celebrated trial attorney, answered questions from the press.” “The defendant, according to witnesses, shot the victim three times in the chest.”

If a conjunctive adverb (“accordingly,” “again,” “also,” “besides,” “consequently,” “finally,” “for example”) joins two independent clauses, use semicolons or periods, not commas, to set off the clauses. *Incorrect:* “The court denied petitioner’s summary-judgment motion, consequently, the court set the matter for trial next week.” *Correct:* “The court denied peti-

“Where’s the beef jerky?” Don’t use a comma unless you mean “Where’s the beef, jerky?”

tioner’s summary-judgment motion; consequently, the court set the matter for trial next week.” *Or:* “The court denied petitioner’s summary-judgment motion. Consequently, the court set the matter for trial next week.” Using a comma instead of a semicolon or a period will create a comma-splice run-on sentence.

Separate a series of three or more words or phrases by putting a comma between them. The last comma in the series — the serial comma — is optional but preferred. (More on serial commas will appear in the Legal Writer’s forthcoming column on legal-writing controversies.) *“And” example:* “To prepare for trial, Mike drafted the opening, Mary drafted the closing, and I prepared the exhibits.” *“Or” example:* “After he leaves the courthouse, John eats at Forlini’s Restaurant, Bagel Place, or Peking Duck House.” *Exceptions:* Don’t add commas if you join all the words, phrases, or statements with “and.” *Example:* “To prepare for trial, Mike drafted the opening and Mary drafted the closing and I prepared the exhibits.”

Don’t use a comma before an ampersand in a firm or organization’s name unless the firm or organization’s name uses a comma. *Examples:* “Mr. White works for Johnson, Brown & Roe LLP.” “Howard, Doe & Jones, P.C., represents the plaintiff in the lawsuit.”

Never put commas after exclamation points or question marks following a quotation. *Incorrect:* “I declare a mistrial!,” the judge said. *Correct:* “I declare a mistrial!” the judge said. *Incorrect:* “Are you finished with this witness?,” the judge asked. *Correct:* “Are you finished with this witness?” the judge asked.

Don’t use a comma after a “that” before quotation marks when the “that” precedes a quotation. *Incorrect:*

The judge found that, “the witness is incredible.” *Correct:* The judge found that “the witness is incredible.” *Or (without a “that”):* The judge found “the witness . . . incredible.”

Don’t use a comma when other material precedes and follows the quotation. *Correct:* “The judge’s repetitions of “Stop arguing like children” didn’t pacify the attorneys.

Use a comma to introduce a quotation only (1) when the quotation is an independent clause and (2) when what precedes the quotation is inapposite to the quotation or to replace a “that” or a “whether” before the quotation. If you wouldn’t add a comma if the sentence had no quotation marks, don’t add a comma before the quotation marks just because there are quotation marks.

Example when the quotation is an independent clause: The witness stated, “I was walking down Centre Street when I noticed the defendant.” *Example of what precedes the quotation is inapposite to the quotation:* “The attorney worked as an associate at Roe & Doe, “and for three years he never tried a case.” *Examples of a comma replacing “that”:* Judge Doe ruled, “The case must be dismissed on jurisdictional grounds.” “As Judge Doe explained, “The case must be dismissed on jurisdictional grounds.” *Example of a comma replacing “whether”:* The issue is, “City Court had the authority to order petitioner to write a reference letter for respondent.”

Use commas to set off parenthetical expressions, or unimportant comments or information. *Example:* “His argument is, in my opinion, frivolous and weak.”

Put commas after parentheticals, not before them. *Incorrect:* “The attorney attended New York University School of Law, (NYU) graduating summa cum laude in 2001.” *Correct:* “The attorney attended New York University School of Law (NYU), graduating summa cum laude in 2001.

Use commas to set off nonrestrictive phrases. A phrase is nonrestrictive when it isn’t essential to the meaning of a sentence. Nonrestrictive phrases are nondefining: They don’t identify which things or people the clause

refers to. “Which” often precedes nonrestrictive phrases. If you remove a nonrestrictive phrase from a sentence, the sentence will retain its meaning. Restrictive phrases don’t need commas. A phrase is restrictive when it’s essential to the meaning of the sentence. Restrictive phrases are defining: They identify which things or people the clause refers to. “That” often precedes restrictive phrases. *Example of a nonrestrictive phrase:* “The car, which was light blue, slammed into the pedestrian.” That example presupposes that one car among others on the road hit the pedestrian. *Example of a restrictive phrase:* “The courtroom that seats 250 occupants had a back room for special events.” That example presupposes the existence of more than one courtroom.

Use a comma to omit an elliptical word, a word a reader can replace immediately. *Example:* “He picked juror number 4; she, juror number 6.” The comma replaces “picked.”

Never use a comma before a verb. *Incorrect:* “Knowing when to use commas, creates problems for lawyers.” Eliminate that comma.

Don’t use a comma before “because” unless the sentence is long or complex. *Example of an unnecessary comma:* “The associate was late, because she had a flat tire.” *Example of a necessary comma:* “I knew that James would be promoted to partner that morning, because Fred’s sister worked in the same firm and she called me with the news.” The comma is necessary here because the reader might believe that James was promoted because Fred’s sister worked in the same firm.

Never use a comma after a compound subject. *Incorrect:* “Court attorneys use Westlaw, Lexis, and Loislaw, nearly every day.” *Correct:* “Court attorneys use Westlaw, Lexis, and Loislaw nearly every day.”

Use commas to eliminate confusion. *Example:* “You’re a better attorney than I, Mary Beth.” Include the comma unless you mean “I Mary Beth.” *Example:* “Where’s the beef jerky?” Don’t use a comma unless you mean “Where’s the beef, jerky?” *Incorrect:*

“How’s your wife Samantha?” Leaving out the comma in this example would be correct if the person has more than one wife. *Correct:* “How’s your wife, Samantha?” (But even that example can be a miscue. Is the reader discussing Samantha, or is Samantha the person’s wife?)

In Bluebook and ALWD format, put commas after citations when citing in text:³ “The court in *X v. Y*, 99 F.4th 99 (14th Cir. 2002), held that” This issue doesn’t arise under the Tanbook, which requires that parentheses enclose a citation in the text and forbids commas to surround the parentheses: “The court in *X v Y* (99 F4th 99 [14th Cir 2002]) held that”⁴

According to ALWD, the Bluebook, and the Tanbook, don’t put commas after signals.⁵ *Incorrect:* *Accord,* *But see,* *Compare,* *Id.,* *See,* *See also,* In Bluebook format, use a comma before and after “e.g.” when you use it with other signals.⁶ *Example:* “*See, e.g.,*” “*But see, e.g.,*”

Put commas inside quotation marks. *Example:* “I have no further questions for this witness,” the attorney said.

9. Hyphens. Hyphens divide single words into parts or join separate words into single words.

Use hyphens (“-”) to divide words between syllables from one line to the next. Put the hyphen after the last letter on the first line, not at the beginning of the second line. Don’t put any spaces before or after the hyphen.

Never use a hyphen to divide a one-syllable word.

Hyphenate names if the individual uses that style. *Example:* “Ms. Smith-Green.”

Words evolve. Long ago, we said “tele phone,” not-so-long-ago we said “tele-phone,” and now we say “telephone.” With frequent use, compound words join to become single words. *Examples:* “backpack,” “bumblebee,” “copyright,” “deadlock,” “headlight,” “weekend.” Other compound words haven’t become single words; they’ve kept their hyphens. *Examples:* “simple-minded,” “well-being.” Some

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are spelled as separate words: “lame duck,” “mountain range.” Always check a dictionary to see whether a word takes a hyphen or whether it’s become a single word.

Some writers oppose combining words with hyphens to form compound adjectives. The Legal Writer recommends hyphenating to avoid confusion and miscues. *Example*: “He’s a small claims arbitrator.” If you don’t hyphenate, readers might believe that he’s a claims arbitrator who’s short. *Correct*: “He’s a small-claims arbitrator.” *Or*: “He’s a Small Claims arbitrator.”

Some tips: Hyphenate a compound adjective appearing before a noun. *Examples*: “The attorney had a chocolate-colored briefcase.” “He’s a criminal-defense practitioner.” Don’t hyphenate when the compound adjective appears after the noun. *Examples*: “The attorney’s briefcase was chocolate colored.” “He practices criminal defense.” Don’t use a hyphen to join an adverb ending in “ly” to another word. The modifier “ly” already trips off the tongue. *Incorrect*: “The jury found him guilty of criminally-negligent homicide.” *Correct*: “The jury found him guilty of criminally negligent homicide.”

Hyphenate uppercased nonproper-noun adjectival phrases. *Example*: “Legal-Writing Seminar.” Don’t hyphenate capitalized proper-noun adjectival phrases. *Incorrect*: “Off-Centre-Street Jam, Inc.” *Correct*: “Off Centre Street Jam, Inc.”

Don’t insert a hyphen in a compound predicate adjective whose second element is a past or present participle. *Incorrect*: “The effects were far-reaching.” *Correct*: “The effects were far reaching.” *But*: “The judge’s opinion had far-reaching effects.”

Don’t hyphenate foreign words used in an adjectival phrase. *Incorrect*: “Mens-rea element.” *Correct*: “Mens rea element.”

Some writers recommend against hyphenating a two-word modifier if the first word is a comparative (“first,” “greater,” “higher,” “lower,” “upper”)

or a superlative (“best,” “better,” “more”). The Legal Writer recommends hyphenating. *Example*: “The law textbooks were the highest priced books.” *Becomes*: “The law textbooks were the highest-priced books.” *Example*: “New York State judges are no longer in the upper income bracket.” *Becomes*: “New York State judges are no longer in the upper-income bracket.” *Example*: “He was the best qualified candidate for Surrogate’s Court.” *Becomes*: “He was the best-qualified candidate for Surrogate’s Court.”

Hyphenate compound numbers from twenty-one to ninety-nine under the Bluebook.⁷ Under the Tanbook, use figures for the figure 10 and higher.⁸

Use hyphens to write fractions: “one-fourth.”

Hyphenate after “well” when you use “well” in an adjectival phrase. *Examples*: “He’s a well-known attorney.” “The firm’s summer interns are a well-matched team.” Otherwise, hyphenate after “well” if the phrase doesn’t mean the same thing if it’s flipped around. *Example*: “Judge Roe is well-read.” Hyphenate because Judge Roe can’t be read well, unless he has lots of tattoos.

Hyphenate suspension adjectival phrases. *Examples*: “First-, second-, and third-year associates will attend the holiday party.”

Some writers don’t hyphenate titles denoting a single office. *Examples*: “Attorney at law,” “editor in chief,” “vice president.” The Legal Writer, like the Tanbook,⁹ recommends that you hyphenate. *Becomes*: “Attorney-at-law,” “editor-in-chief,” “vice-president.”

Hyphenate a title that precedes “elect.” *Examples*: “Treasurer-elect,” “President-elect.”

Hyphenate to join words thought of as one expression. *Example*: “Secretary-treasurer.”

Hyphenate prefixes, or letters added to the beginning of a word, when omitting the hyphen will confuse the reader. *Examples*: “pre-judicial” versus “prejudicial,” “re-sign” versus “resign,” “re-count” versus “recount,” “re-cover” versus “recover,” “re-sent” versus “resent.”

Hyphenate when not hyphenating is visually troubling, such as when the prefix ends with the same letter that begins the word. *Example*: “anti-injunction,” “anti-intellectual,” “de-emphasize.” *Exceptions*: “coordinate,” “cooperate,” “unnatural.”

Hyphenate when the base is a proper noun. *Examples*: “anti-Nixon,” “pro-Washington.”

Hyphenate when using the words “all,” “ex,” “quasi,” or “self.” *Example of “all”*: “all-inclusive.” *Example of “ex”*: “an ex-court attorney.” But consider “ex-patriot” versus “expatriot.” *Example of “quasi”*: “quasi-contractual,” “quasi-complete.” *Examples of “self”*: “self-control,” “self-defense,” “self-employed.” Don’t hyphenate when adding “self” to a suffix, or letters added to the end of a word: “selfless.”

On your computer keyboard, the “hyphen” key is next to the “symbol” keys, usually after the “zero” key. Don’t press the “Shift” key; if you do, you’ll insert an underscore “_” instead of a hyphen “-”.

The Legal Writer continues with punctuation in the next column. ■

1. The Bluebook: A Uniform System of Citation R. 6.2(a)(vii), at 73 (Columbia Law Review Ass’n et al. eds., 18th ed. 2005).

2. Association of Legal Directors (ALWD) Citation Manual R. 4.2(h)(1), at 31 (3d ed. 2006).

3. Bluebook R. 10.2, at 81; ALWD R. 43.1(c) (3), at 318.

4. New York Law Reports Style Manual (Tanbook) R. 1.2(b), at 2 (2007), available at http://www.nycourts.gov/reporter/New_Styman.htm (html version) and <http://www.nycourts.gov/reporter/NYStyleMan2007.pdf> (pdf version) (last visited Dec. 11, 2007).

5. ALWD R. 44.6(a), at 325; Bluebook R. 1.2, at 46-47; Tanbook R. 1.4(a), at 6.

6. Bluebook R. 1.2 (a), at 46.

7. Bluebook R. 6.2(a), at 73 (“[S]pell out the numbers zero to ninety-nine in the text and in footnotes . . .”).

8. Tanbook R. 10.2 (a)(1), at 72 (2007).

9. *Id.* app. 5, at 127.

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Do's, Don'ts, and Maybes: Legal Writing Punctuation — Part III

In the last two columns, the Legal Writer discussed nine punctuation issues in legal writing. We continue with six more.

10. Quotation marks. Quotation marks come in three forms: single quotation marks (' '), double quotation marks (" "), and triple quotation marks (" " "). To save space, British writers and American newspaper headlines use single quotation marks around quotations instead of double quotation marks. Other than for headlines, American usage requires that the first quotation mark be a double quotation mark and that the first internal quotation mark be a single quotation mark. The second internal quotation mark is a double quotation mark. *Example of a first quotation mark with single and double internal quotation marks:* "The judge noted that he'd never seen 'such "brilliant" lawyering' in all his years on the bench."

Use quotation marks for direct quotations, including a speaker's words. *Example:* "I told him I pulled the trigger because he deserved it." Don't use quotation marks until you start the quotation. *Incorrect:* "[The witness testified that she] pulled the trigger because he deserved it." *Correct:* The witness testified that she "pulled the trigger because he deserved it."

Don't use quotation marks and hyphens together. *Incorrect:* "Exculpatory-no" doctrine. *Correct:* Exculpatory-no doctrine or "exculpatory no" doctrine. *Incorrect:* "So-called" Spiegel Law. *Correct:* So-called Spiegel Law or "so called" Spiegel Law.

Use quotation marks to note that a word or phrase is inappropriate in

context, but do so sparingly. *Example:* The "litter" of the law.

Overusing quotation marks will make you look egotistical or sarcastic. *Example:* My adversary's appellate brief was anything but "brief." Language loses impact with overused quotation marks. Make readers focus on content, not style, and especially not exaggerated style.

Use quotation marks to set off definitions or to explain or express words and phrases. *Examples:* "Sui generis" comes from Latin and originally meant "of its own kind." You should have a guilty conscience if you write "mens rea" instead of "guilty intent."

Use quotation marks to signal a newly invented word or phrase or an old word or phrase used in a new context. *Example:* He spent all his free time in front of a computer. Some would call him a "mouse potato."

Don't enclose indirect quotations — what someone says but not in the exact, original language — with quotation marks. *Example:* The judge told the attorneys to take their clients to the conference room.

In official New York State (Tanbook) style, enclose all quotations, including blocked quotations — single-spaced and double-indented quotations having 50 words or more — with quotation marks.¹

According to the Bluebook, only quotations of 49 words or fewer should have quotation marks.² Quotations of 49 words or fewer should not be set off from the rest of the text. Quotations of 50 or more words (blocked quotations) should not have quotation marks around the text.³

According to the Association of Legal Writing Directors (ALWD) Citation Manual, use quotation marks for quotations of 49 or fewer words or if the quotation runs fewer than four lines of typed text and is not an epigraph or a quotation of verse or poetry.⁴ For blocked quotations — if the quotation has 50 or more words, if it exceeds four lines of typed text, or if the material quoted is a verse or poem — don't use quotation marks at the beginning or end of the quotation.⁵

Single-paragraph quotations have quotation marks at the beginning and end of the quoted language. Multiple-paragraph quotations have quotation marks only at the beginning of each paragraph and at the end of the last paragraph.

Footnote and endnote numbers always go outside quotation marks. See text accompanying endnote 8 in this column for an example.

Parenthetical citations always go outside quotation marks. *Tanbook example:* "The court found no illusory tenancy." (See *Plaintiff v Defendant*, 50 AD2d 50, 50 [5th Dept 2009].)

Finally, the most important rules: Don't overquote; overquoting substitutes for analysis. Quote accurately; accurate quoting makes readers trust you. And use quotation marks if you're quoting; quote to be seen as a scholar, not a plagiarist.

11. Apostrophes. Use apostrophes to show ownership or possession, indicate a contraction, or form plurals.

Use apostrophes to form possessive nouns or pronouns. *Examples:* "She went to the judge's chambers

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to use the telephone." "The court's rules require the parties to appear at 9:30 a.m." Apostrophes for some inanimate objects look inelegant. *Inelegant:* "Section 8's provisions require plaintiffs to seek administrative review." *Therefore:* "The provisions of Section 8 require plaintiffs to seek administrative review." Another inelegant apostrophe: "ABC Corporation's (ABC) stock certificates." *Therefore:* "The stock certificates of ABC Corporation (ABC)."

Some writers recommend using an apostrophe "s" after a singular possessive ending in a sibilant (ch, s, sh, x, z, and zh sound). Others use an apostrophe but omit the "s" after the apostrophe. The Legal Writer recommends adding an apostrophe "s." *Examples:* "Schwartz's brief"; "Myers's letter"; "boss's memo"; "witness's statement." The apostrophe "s" rule applies to sibilants, not to words that merely end in ch, s, sh, x, or z. *Incorrect:* Illinois's. *Correct:* Illinois'. The "s" in Illinois is

attorneys moved for a mistrial." (Mary had an attorney; Jane had her own attorney.) When one of the possessors in a compound possessive is a personal pronoun, put both possessors in the possessive form to avoid confusing the reader. *Incorrect:* "Josh and my computers were erased last night." If you don't put an apostrophe "s" here, the reader will believe that Josh was erased last night. *Correct:* "Josh's and my computers were erased last night."

For numbers and abbreviations, it's optional to put an apostrophe before the "s." Use them to eliminate confusion. If your reader will understand you if you don't use an apostrophe, don't use one. 1960's or 1960s? "1960s" is more common, but "1960's" isn't tragic. Consider, however, the following example: "Judge Roe presided in the '40s." Putting an apostrophe before the "s" will confuse readers; leave it out.

"As" or "A's? *Example:* "She received only As in law school." "As" will confuse the reader: It could stand for the plural of "A" or the word "as." *Therefore:* "She received only A's in law school." UFOs or UFO's? Use an apostrophe if the reader will be confused without it.

Don't add an apostrophe to pluralize an abbreviation that has no internal periods. *Incorrect:* "OK's." *Correct:* "OKs." Add an apostrophe to the "s" to abbreviations that have internal periods. *Incorrect:* "J.D.s." *Correct:* "J.D.'s." *Incorrect:* "R.N.s." *Correct:* "R.N.'s." *Incorrect:* "Ph.D.s." *Correct:* "Ph.D.'s."

American holidays and greetings: "April Fool's Day," "Father's Day," "Mother's Day," "New Year's Day," "St. Patrick's Day," "St. Valentine's Day," and "Season's Greetings" all have their singular possessive form. "All Souls' Day" (Halloween) and "Parents' Day" take the plural form. "Martin Luther King Jr. Day" has no possessive. "Presidents Day" and "Veterans Day" are plural but not possessive; we celebrate the holiday in honor of Presidents Washington and Lincoln

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Overusing quotation marks will make you look egotistical or sarcastic.

In informal writing (and Legal Writer columns), use apostrophes to indicate a contraction: "Cannot" becomes "can't." "Do not" becomes "don't." "He is" becomes "he's." "I am" becomes "I'm." "It is" or "it has" becomes "it's" (different from the possessive "its"). "She is" becomes "she's." "They are" becomes "they're" (different from the possessive "their" or the location "there"). "We are" becomes "we're" (different from the subjunctive or the past plural "were"). "Who is" becomes "who's" (different from the possessive "whose"). "Would not" becomes "wouldn't." "You are" becomes "you're" (different from the possessive "your"). "You have" becomes "you've." *Examples:* "He's the firm's hardest-working attorney." "Who's going to cross-examine the witness?" "Don't argue with the judge."

Use apostrophes to omit letters. *Examples:* "Rockin' with the Oldies" (omitting a "g"). "Good ol' boy" (omitting a "d"). "Bucket o' chicken" (omitting an "f"). "Wishin' you luck" (omitting a "g"). Use apostrophes to omit figures. *Examples:* "The Supreme Court wrote the decision in '01."

Use apostrophes to omit "of" in dates. *Example:* "He was released after 25 years' imprisonment."

Never use an apostrophe for pronouns that express ownership. *Correct:* "hers," "his," "its," "ours," "theirs," and "yours."

pronounced as a "y": "ill-in-oy," not "ill-in-oise."

Don't use an apostrophe "s" after a plural possessive ending in a sibilant. *Incorrect:* "The courts's rules require 15 copies." *Correct:* "The courts' rules require 15 copies."

Pluralize a proper noun ending in a sibilant by adding an "es." *Correct:* "The Fishes" (members of the Fish family). Form the plural possessive by adding an apostrophe after the "es." *Example:* A book that belongs to more than one Fish is "the Fishes' book," not "the Fish' book" or "the Fishes's book." *Incorrect:* "The Jones' house" or "the Joneses's house." *Correct:* "The Joneses' house."

Use an apostrophe "s" for possessive-case plurals. *Examples:* "daughters-in-law's," "fathers-in-law's," "mothers-in-law's."

Some nouns look like plurals and are pronounced like singulars but take no apostrophe, even when they're possessive. *Incorrect:* "United States's brief" or "United States' brief." *Correct:* "United States brief" or "brief for the United States."

Use an apostrophe "s" after a second singular proper noun to show unity. *Example:* "Joe and Bob's firm hired three new attorneys." (Joe and Bob work for the same firm.)

Use an apostrophe "s" after each singular proper noun to show disunity. *Example:* "Mary's and Jane's

and for our veterans, but the holiday is everyone's holiday. "Daylight Saving Time" isn't possessive or plural.

12. Em and en dashes. An "em" dash ("—") is as wide as the capital letter "M" or sometimes longer, depending on the printer. In typing, the em dash is represented by two hyphens ("--"). An "en" dash ("–") is as wide as the capital letter "N." In print, an en dash is twice as wide as a hyphen ("-").

Use em dashes to emphasize. Em dashes are more emphatic than en dashes, colons, or parentheses. Parentheses are the least emphatic.

Em dashes set off abrupt changes in thought, interruptions, or supplemental explanations. If the change of thought, explanation, or interruption is in the middle of the sentence, add a closing em dash to signal the end of the change of thought, explanation, or interruption. What's enclosed between em dashes is an interpolated clause. *Examples:* "I submitted my brief — I believe it was Friday — to the court." "Accuracy, brevity, clarity, and honesty — these are virtues in legal writing." Use em dashes for emphasis. *Examples:* "The attorney charges \$525 an hour — the rate for the firm's partners — for complicated cases."

Use em dashes to set off a phrase that has commas within it. *Example:* "Call only the witnesses — such as Dr. White, Ms. Brown, and Mr. Tan — essential to your case." Use em dashes to list the source of a quotation after the quotation. *Example:* "Nobody has a more sacred obligation to obey the law than those who make the law." — Sophocles.

Insert spaces before and after em dashes in typing when the text is fully justified, when the text appears distorted, or in publishing. Otherwise, do what you want.

Use en dashes to separate dates, locations, and numbers. Think of the en dash as a substitute for "to" or "through." *Examples:* "Please turn to pages 15–16 of the trial transcript." "After I left the courthouse, I went

to the Buffalo Sabres–New York Islanders hockey game." "From 2004–2006, my client endured a hostile work environment." "The judge has Czechoslovakian–Romanian roots." "Plaintiff–appellee requests that the Fourth Department's decision be reversed." "This morning, I took the Albany–Syracuse flight."

In this example, the hyphen, en dash, and em dash are used correctly: "Ms. Smith–Jones spent five minutes reading the Finkestein–Ferrara text on landlord–tenant practice — and promptly fell asleep."

In WordPerfect: To insert an en dash, put your cursor at the text where you want to insert the en dash. Go to "Insert," then "Symbol," then "Typographical Symbols." The en dash is the symbol on the seventh line, third from the left (keystroke number 4,33). When you click "Insert and Close," the en dash will be inserted in the text where you've left your cursor. To insert an em dash, put your cursor in the text where you want to insert the em dash. Go to "Insert," then "Symbol," then "Typographical Symbols." The em dash is the symbol on the seventh line, fourth from the left (keystroke number 4,34).

In Microsoft Word: To insert an en or an em dash, put your cursor in the text where you want to insert the en or the em dash. Go to "Insert," then "Symbol," then "Special Characters." Click the first option, "Em dash," to insert an em dash or the second option, "En dash," to insert an en dash in your text.

Depending on how you've programmed your computer for WordPerfect's autocorrect feature, you can also create an en dash by tapping your keyboard hyphen key twice and then the space bar once. Create an em dash by tapping your keyboard hyphen key three times and the space bar once.

13. Slashes. Use slashes for "per." *Examples:* "James Roe, a partner in the firm, charges \$525/hour." "The defendant traveled at 85 mi./hr." Use slashes in fractions: "20 3/4 inches."

Use slashes to divide one line of verse from the next in text; use a space

before and after the slash. *Example:* "Some are born great, some / achieve greatness, and some have greatness thrust upon 'em."⁶

Use slashes to separate equally applicable terms. *Example:* "A minor's parent/legal guardian must be present during interrogation."

Use slashes to separate parts of a date in informal writing: "3/6/07."

Use slashes to set off things like "a/k/a" ("also known as"), "d/b/a" ("doing business as"), or "c/o" ("in care of"). *Correct:* "Robert Jones a/k/a

Em dashes are more emphatic than en dashes, colons, or parentheses.

Bobby Jones." "Johnny's Club d/b/a Johnny's Rock and Roll Bar." Putting a comma before "a/k/a," "d/b/a," or "c/o" is acceptable. *Example:* "Robert Jones, a/k/a Bobby Jones." "Johnny's Club, d/b/a Johnny's Rock and Roll Bar."

Don't use a slash for "and/or." Use only "or" if the conjunction is disjunctive: if it separates two or more options. *Example:* "I'm taking Legal Writing on a pass-or-fail basis." Use only "and" if the connection is conjunctive: if it joins and combines two or more options. If the phrase is disjunctive and conjunctive, write "x or y or both" or "x, y, or both." *Example:* "A defendant found guilty of driving while intoxicated may be sentenced to jail, a fine, or both."

Don't write "she/he/it" to make your writing gender-neutral.

14. Ellipses. Use ellipses to omit words from a quotation.

Use three-dot ellipses (" . . ."), all separated by spaces, to show omissions of punctuation or a word or more in the middle of your sentence.

Use four-dot ellipses (""), all separated by spaces, to show omissions at the end of the sentence if (1) the end of the quotation is omitted;

(2) the part omitted is not a citation or a footnote; and (3) the remaining portion is an independent clause. Unless all three criteria are satisfied, use a period, not an ellipse.

According to the Tanbook, use brackets “[]” to indicate that language has been added or modified.⁷ If the bracketed language replaces omitted language, don’t use ellipses.⁸ If you’ve omitted internal quotation marks, case citations, footnotes, or endnotes, note that omission in a parenthetical, not with ellipses. *Example:* The court found no illusory tenancy. (See *Plaintiff v Defendant*, 50 AD2d 50, 50 [5th Dept 2009] [citation omitted].)⁹

According to the Bluebook, use “a parenthetical clause after the citation to indicate when the source quoted contains any addition of emphasis, alteration to the original in the quoted text, or omission of citations, emphasis, internal quotation marks, or footnote call numbers.”¹⁰ *Example:* *Plaintiff v Defendant*, 99 N.Y.S.2d 500, 511 (3d Dep’t 2009) (finding that plaintiff was not closely related to victim) (internal quotation marks omitted).

Never use ellipses before a quotation. You’re already telling the reader you’re omitting something by how you introduce your quotation. *Incorrect:* “. . . the parties submitted post-trial briefs.” *Correct:* “[T]he parties submitted post-trial briefs.”

To omit words from the end of a sentence, insert the correct punctuation to end the sentence, and then insert the ellipses. *Original quotation:* “This morning, the parties in *A v. B* submitted briefs and argued the motion. By the afternoon, the judge issued a decision.” The following is incorrect because it doesn’t include ellipses to show omission: In the “morning, the parties in *A v. B* submitted briefs.” *Correct:* In the “morning, the parties in *A v. B* submitted briefs . . .” *Omission from the middle of a sentence:* In the “morning, the parties . . . submitted briefs and argued the motion.”

Example 1: Omission from the end of a sentence: After the parties “submitted briefs and argued the motion. . . . the

judge issued a decision.” *Example 2: Omission from the end of a sentence:* Last week, “the parties in *A v. B* submitted briefs” The ellipses in these examples might look the same, but the spacing is different. In the first example, the writer must include the period from the original quotation directly after “motion” and then insert ellipses (with a single space between them). In the second example, the writer extracts a portion of the sentence, not including the original period.

Pre-2004 Tanbook style required asterisks instead of ellipses to show omission. The Tanbook no longer allows asterisks.

Don’t use ellipses instead of dot leaders in a document’s table of contents or table of authorities.

To create dot leaders on WordPerfect, go to “Format,” then “Line,” then “Flush Right with Dot Leaders.” The dot leaders will appear immediately after the place at which you’ve placed your cursor.

In Microsoft Word pre-2007 versions, go to “Format,” then “Tabs.” A screen will pop up. Under the “Tab stop position,” type “6” so that the dot leaders are positioned six inches from the left-hand margin. Click on “Right” under “Alignment” and “2” under “Leader.” Hit “OK.” Return to your document. Immediately after the text (where you want to insert the dot leaders), hit the “Tab” key on your keyboard to insert the dot leaders.

In Microsoft Word 2007 version, go to “Home,” then “Paragraph.” Once the “Paragraph” screen opens, press the bottom key, “Tabs.” Follow the directions set forth above for Word pre-2007 to insert the dot leaders.

The easiest way to create a table of contents or a table of authorities in WordPerfect is to go to “Tools,” then “Reference,” then “Table of Contents” or “Table of Authorities.” In Microsoft Word (2007 version), the easiest way is to go to “Reference,” then “Table of Contents” or “Table of Authorities.”

15. Accent marks. Use accent marks in names. *Examples:* “Aimée,” “André,” “Béatrice.”

Use accent marks if they are in current English usage. *Examples:* “cliché,” “divorcée,” “fiancé” (male), “fiancée” (female). Use accent marks if the English word means something other than the one intended. *Example:* “résumé” as opposed to “resume” (resume).

In Microsoft Word (2007 version): To insert an accent mark, put your cursor at the text where you want to insert the accent mark. Go to “Insert,” then “Symbol,” then “More Symbols.” Choose font: “normal text.” Choose subset, for example “Arabic,” “Basic Latin” (which includes French and Spanish), “Cyrillic,” “Greek and Coptic,” “Hebrew.” With your mouse, click on the accent mark or accented letter of your choice.

In WordPerfect: To insert an accent mark, put your cursor at the text where you want to insert the accent mark. Go to “Insert,” then “Symbol,” then set the symbol to “Multinational.” With your mouse, choose the corresponding accent or accented letter.

In the next column, the Legal Writer will discuss legal-writing controversies. ■

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1. New York Law Reports Style Manual (Tanbook) R. 11.1 (a), at 77 (2007), available at http://www.nycourts.gov/reporter/New_Styman.htm (html version) and <http://www.nycourts.gov/reporter/NYStyleMan2007.pdf> (pdf version) (last visited Dec. 11, 2007).
2. The Bluebook: A Uniform System of Citation R. 5.1(b)(i), at 69 (Columbia Law Review Ass’n et al. eds., 18th ed. 2005).
3. Bluebook R. 5.1(a)(i), at 68.
4. Association of Legal Directors (ALWD) Citation Manual R. 47.4(a), at 341 (3d ed. 2006);
5. ALWD R. 47.5(a), at 344.
6. William Shakespeare, Twelfth Night act 2, sc. v.
7. Tanbook R. 11.1(d), at 78.
8. *Id.*
9. *Id.* R. 11.1(c), at 78.
10. Bluebook R. 5.2(d), at 69-70.

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Making Sense of New York's Corporate Opportunity Doctrine

Fiduciaries' duty of loyalty versus personal opportunity

by Jonathan Rosenberg and Kendall Burr

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2007 Insurance Law Update –
Part I

BY GERALD LEBOVITS



Do's, Don'ts, and Maybes: Usage Controversies — Part I

In the last nine of ten columns, the Legal Writer discussed legal writing's do's and don'ts. The series ends with a list of legal-writing maybes — the things about which experts disagree but about which the Legal Writer will take a position nevertheless. The answers to these maybes, or controversies, don't represent the most important aspects of legal writing. Far more important than resolving the controversies are getting law and fact right; using the right tone and format; adopting good large- and small-scale organization; and knowing your audience and the purpose of your document. But many lawyers, and all Law Review types, focus on the controversies. This two-part column resolves the controversies for the merely curious and especially the Law Review types who believe them important.

1. Starting sentences with transitions. Some legal writers believe that starting a sentence with "also," "and," "but," and "or" is bad style. They're wrong, but there's more to it than that.

Transitions link sentences, paragraphs, and ideas. The best way to move a reader forward is not to link with transitional words like "however" or "but." The best way is to use thesis paragraphs, topic sentences, and thesis sentences, and then to join sentences by ending them with a thought or word used in the beginning of the next sentence or paragraph. Sentences should go from old to new and from short to long. Sentences should end with emphasis.

A weak way to move a reader forward is with transitional words.

Writers use them lazily to substitute for the hard work of connecting ideas with ideas. Worse, writers use them in the false hope that they join sentences in logical progression.

Common, weighty, legalistic transitions include "accordingly," "again," "besides," "consequently," "finally," "for example," "furthermore," "however," "indeed," "moreover," "nevertheless," "on the other hand," "otherwise," "then," "therefore," and "thus." If you must begin with transitional words, at least prefer the plain English transitions: "also," "and," "because," "but," and "or." Despite what your sixth grade teacher incorrectly told you, it's better to start sentences with "and" and "but" than with "moreover" and "however." It's a myth that good sentences may not begin with "and" or "but." Conjunctive-adverb transitions like "moreover" and "however" are weak. "Also," "and," "but," and "or" are one-syllable words that start sentences quickly. "Because" is useful in legal writing to describe cause-and-effect relationships. But don't begin sentences with "because" too often. Your writing will be boring. The same is true for all transitions. Whichever transition you use, don't overuse it.

Example of starting sentence with "And": "The attorney cross-examined the witness for five hours. And then the court took a recess." *Example of starting a sentence with "Because":* "Because the parties drafted the contract poorly, they had to resolve their differences in court." *Example of starting a sentence with "But":* "The judge wasn't impressed with his trial techniques. But she was impressed with his writ-

ing skills." *Example of starting a sentence with "Or":* "The defendant might take a plea before trial. Or the People might have to try the case and call every witness to the stand."

Notice how the above sentences are stronger without the opening transitions. *No "And":* "The attorney cross-examined the witness for five hours. Then the court took a recess." *No "Because":* "The parties drafted the contract poorly. They had to resolve their differences in court." *No "But":* "The judge wasn't impressed with his trial techniques. She was impressed with his writing skills." *No "Or":* "The defendant might take a plea before trial. The People might have to try the case and call every witness to the stand."

If you must use weighty conjunctive adverbs, don't use them at the beginning of a sentence or paragraph, a point of emphasis. And almost never use them at the end of a sentence, the point of greatest emphasis. Move the conjunction one third into the sentence. *Correct:* "The attorney, however, conceded that the defendant fled the jurisdiction. He argued, nevertheless, that the defendant should not be remanded."

2. Ending sentence with prepositions. Some readers — the purists — are offended by phrases and sentences ending with prepositions like "at," "by," "for," "in," "under." They believe that ending sentences with prepositions is informal and ungrammatical.

Readers sometimes don't recognize the difference between ending a sen-

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tence with a preposition whose object (noun or pronoun) appears earlier in the sentence and ending a sentence with a preposition that has no object. Eliminate the preposition at the end of the sentence when it's ungrammatical. *Incorrect example:* "Where is my briefcase at?" In this example, the preposition "at" has no object. *Correct:* "Where is my briefcase?" Or: "My briefcase is where?" *Preposition at end of a sentence that has an object:* "What do you need to go to court for?" "Which courtroom is she in?"

Occasionally a sentence must end with a preposition. Otherwise, the sentence will be incomprehensible. Other sentences sound tortured or stilted without a preposition at the end. Here's an example attributed to Winston Churchill, who was talking about the alleged rule not to end sentences with prepositions: "This is the kind of tedious nonsense up with which I will not put."¹ Churchill's line is brilliant, partly because it makes no sense: The preposition is in the middle — not the end — of the sentence. The sentence has lost all meaning. *Correct:* "I will not put up with this kind of tedious nonsense."

Some words that function as prepositions can also function as adverbs, or what grammarians call a phrasal verb. Verbs change in meaning when the adverb is part of the phrasal verb. In Churchill's example above, the verb "to put up with" means "to tolerate," which is different from "to put," meaning "to set" or "to place." Sentences that end with these phrasal verbs appear to end with prepositions, but they really don't. *Examples:* "to get" versus "to get up" and "get by"; "to look" versus "to look up," "to look out," and "to look over"; "to break" versus "to break down" and "to break in"; "to check" versus "to check out" and "to check up on"; "to run" versus "to run over" and "to run down"; "to shake" versus "to shake up" and "to shake down"; and "to blow" versus "to blow up," "to blow over," "to blow out," "to blow

off," and "to blow away." *Used correctly in sentences:* "This evening I have four briefs to look over." "The attorney was worried that his witness would break down." "As soon as an attorney interrupted the testimony with an objec-

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good sentences
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or "but."**

tion, the judge blew up."

Ending sentences with prepositions helps eliminate formality. *Ending in a preposition:* "The attorney I spoke with on the telephone was the attorney I had written to." *Eliminating the preposition at the end:* "The attorney with whom I had spoken on the telephone was the attorney to whom I had written." Both examples are correct. The first one is clearer and less formal than the second example, which needs "with whom" to make sense. Eliminating the preposition from the end of sentences will cause you to add too many "with whoms," "to whoms," and "of whiches."

The greatest emphasis in a sentence is at the end. That's where the sentence carries its weight. On a scale of one to ten, one being the lightest and ten being the heaviest, prepositions are a one: light and airy. Nouns are a five: just right. Adjectives and adverbs are an eight: heavy. Nominalizations (verbs turned into nouns) are a ten: the heaviest. *Example of ending a sentence with a noun:* "She saw the defendant once a month for a year." *Example of ending a sentence with an adjective:* "Of all the judges in New York, he's the one I like the most." *Ending a sentence with an adverb:* "The judge waited patiently." *Ending a sentence with a nominalization:* "After the judge listened to the arguments, she made a decision."

Readers want strong sentences that move them to emphatic climax. Aim to

end sentences with powerful words. Ending with a preposition is often a rather weak way to conclude. But from time to time ending a sentence or clause with a preposition will give readers a reprieve from an earlier sentence that ended with a powerful noun. Vary sentence endings. Use light and heavy words to emphasize or deemphasize. Do what's right for you.²

3. Using serial commas. Some writers believe it's pointless to insert the last comma in a series.

Serial commas, also known as Harvard or Oxford commas, refer to the commas that separate a series of three or more words or phrases.³ The last comma in the series — the serial comma — is optional. The goal is to be consistent. Use them always or never. But most legal-writing teachers prefer serial commas. *Examples:* "Before submitting the brief, Tom edited the brief, Marilyn printed the brief, and I prepared the appendix." "After work, Scott enjoys a drink at Reade Street, Lafayette Grill, or Brady's Pub." Don't add commas if you join all the words, phrases, or statements with "and." *Example:* "Before submitting the brief, Tom edited the brief and Marilyn printed the brief and I prepared the appendix."

Those who believe that serial commas are unnecessary contend that the "and" or "or" already separates the final two elements of a series. Others, such as newspapers and magazines, omit serial commas to save space.

Serial commas are helpful for two reasons. They reflect a natural pause in spoken English. Sound out this phrase: "Gavel, robe, and pen." You paused before the "and," didn't you? That's why you need the last comma. Serial commas also promote clarity. *Example:* "Yesterday the police arrested five criminals, two robbers and three burglars." Your reader won't know whether police arrested five or ten criminals.⁴ Without a serial comma, your reader might answer "five" or "ten." If you use serial commas, your reader will answer "ten": "Yesterday

the police arrested five criminals, two robbers, and three burglars."

Serial commas are required to divide elements from sub-elements: "Juice, fruits and nuts, and dairy. Or "Juice, fruits, and nuts and dairy." Or "Juice, fruits and nuts and dairy."

Don't use a serial comma before an ampersand. Correct: "Blake, Hall & Johnson."

4. When to correctly split infinitives. H.W. Fowler, the great grammarian and stylist, once wrote the

Your language will be flabby and conclusory if you use weak words like adverbs and adjectives.

following about split infinitives: "The English-speaking world may be divided into (1) those who neither know nor care what a split infinitive is; (2) those who do not know, but care very much; (3) those who know and condemn; (4) those who know and approve; and (5) those who know and distinguish."⁵

An infinitive is the basic form of a verb: "to cry," "to eat," "to read," "to sleep." To split an infinitive is to insert a word or phrase between the component parts of the infinitive. *Example of splitting "to finish":* "She hopes to quickly finish the decision so that she can start another one." *Not splitting:* "She hopes to finish the decision quickly so that she can start another one."

George Bernard Shaw, who loved to split infinitives, once wrote the following note to the *Times* of London: "There is a busybody on your staff who devotes a lot of time to chasing split infinitives: I call for the immediate dismissal of this pedant. It is of no consequence whether he decides to go quickly or to quickly go or quickly to go. The important thing is that he should go at once."⁶ The earliest example of splitting an infinitive is in Shakespeare's *Sonnet 142*: "Root pity in thy heart, that when it grows thy pity

may deserve to pitied be." (Splitting "to be.") The most famous example of splitting an infinitive comes from *Star Trek*: "To boldly go where no man has gone before."⁷ The TV show would be different had the author written "Boldly to go where no man has gone before" or "To go boldly where no man has gone before."

If you use verbs and nouns instead of adverbs and adjectives, you'll rarely need to think about whether to split infinitives. Achieve power in language

by using strong words like nouns and, better, verbs. Your language will be flabby and conclusory if you use weak words like adverbs and adjectives. Think of the adverb "boldly" in the *Star Trek* example. What's "bold" to you is different from what's "bold" to me. Write with power by explaining in a non-conclusory way what makes the going bold.

Splitting some infinitives creates emphasis, secures effective word order, and avoids confusion. *Example 1:* "The clerk is instructed periodically to check the computer." *Example 2:* "The clerk is instructed to periodically check the computer." *Example 3:* "The clerk is instructed to check the computer periodically." Example 1 avoids splitting the infinitive, but it's possibly ambiguous: Is the clerk instructed periodically, or should the checking be done periodically? Example 2 splits the infinitive but makes it clear that "periodically" modifies the verb "check." Example 3 doesn't split the infinitive, but it's ambiguous: Readers might understand that "instructed" rather than "to check" is modified. If you can maneuver the words to avoid splitting the infinitive, then do so.

If you want to split the infinitive and splitting it won't hurt the writing, go ahead and split it. *Example of*

splitting an infinitive to avoid confusion: "The law student decided to promptly return the library book." Changing the sentence in the following ways leads to loss of meaning: "The law student promptly decided to return the library book." "The law student decided to return the library book promptly." This example is unclear. You can't tell whether "promptly" goes with "decided" or "return": "The law student decided promptly to return the library book."

Never split an infinitive with a "not." *Incorrect:* "Try to not ever split infinitives."

In the next column, the Legal Writer will discuss more controversies. ■

1. Famous Quotations/Stories of Winston Churchill, available at <http://www.winstonchurchill.org/i4a/pages/index.cfm?pageid=388> (last visited Apr. 20, 2008).
2. For more, see Gerald Lebovits, Legal Writer, *Do's, Don'ts, and Maybes: Legal Writing Do's — Part II*, 79 N.Y. St. B.J. 64 (June 2007).
3. For more, see Gerald Lebovits, Legal Writer, *Do's, Don'ts, and Maybes: Legal Writing Punctuation — Part II*, 80 N.Y. St. B.J. 64 (April 2008).
4. Readers might answer "none." Those arrested are alleged criminals until they're convicted.
5. Excerpt from H.W. Fowler, *A Dictionary of Modern English Usage* (1965), available at <http://www-users.cs.york.ac.uk/susan/cyc/s/split.htm> (last visited Apr. 20, 2008).
6. Common Usage Dilemmas, available at <http://www.infoplease.com/cig/grammar-style/split-infinitives-boldly-go-everyone-else-goes.html> (last visited Apr. 20, 2008).
7. The Phrase Finder, available at <http://www.phrases.org.uk/meanings/385400.html> (last visited Apr. 20, 2008). This lead comes from the original *Star Trek* series. The sequel, *Star Trek: The Next Generation*, improved the lead somewhat by making it gender neutral. Instead of the "man," the writers used a "one": "To boldly go where no one has gone before." The sequel retained the redundancy "before." If no one has gone there, no one has gone there "before."

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Don't turn a promising relationship into a one-off representation

*by Richard B. Friedman
and Carla M. Miller*

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2007 Insurance Law Update

Derivative Actions on Behalf of LLCs



Do's, Don'ts, and Maybes: Usage Controversies — Part II

In the last column, the Legal Writer discussed four controversies in legal writing. We continue with 10 more.

5. Placing quotation marks. Many legal writers believe that periods and commas go inside or outside quotation marks depending on the quotation. They'd be right in England. They're wrong in America.

Use quotation marks to introduce and close quotations.¹ Periods always go inside quotation marks. *Correct:* The attorney told the jury "you must find the defendant not guilty of murder in the second degree."

Commas always go inside quotation marks. *Correct:* The attorney told the judge that the plaintiff had "moved for legal, or attorney, fees," but the attorney was wrong. *Exceptions:* "I want to settle," she said, "but my client doesn't." My boss always said, "It is what it is."

Semicolons go outside quotation marks. *Correct:* The prosecutor told the jury that "the defendant bought the gun from a local pawn shop"; the prosecutor then published the gun to the jury.

Colons always go outside quotation marks. *Correct:* The attorney asked the following question: "Did you take any medications today?" The judge noted that "the attorney gave us a list of colors": red, blue, green and orange.

Whether quotation marks go before or after a question mark depends on whether the question is in the original. *Example of question in the original:* The clerk asked me, "Sir, do you want to submit opposition papers?" *Example of question not in the original:* Who said,

"I have nothing to offer but blood, toil, tears and sweat"?

Putting quotation marks before or after an exclamation point depends, like the question mark, on whether the exclamation point is in the original. *Example of exclamation point in the original:* "Counselor, you know exactly what I mean!" said the judge. *Example of exclamation point not in the original:* "Counselor, stop calling me "ma'am"!

6. Footnotes and endnotes. Some overuse them. Others don't use them at all.

Avoid putting substance or deep analysis in footnotes or endnotes. Footnotes or endnotes are acceptable for collateral thoughts, special effects, excerpts of testimony, and quoting statutory or constitutional provisions. If the material is important enough to warrant a footnote or an endnote, then it's important enough to include in the text. Being a substantive argument in a footnote or endnote is like being a middle child — you'll be ignored. Footnotes or endnotes are an unpleasant interruption for readers: "Having to read a footnote resembles having to go downstairs to answer the door while in the midst of making love."²

For legal briefs, use footnotes, if at all, and not endnotes. Unless you're writing a law review or journal article, don't include citations in footnotes or endnotes. The Legal Writer does not recommend citational footnotes. Those who favor citational footnotes argue that footnoting citations makes sentences shorter; paragraphs more forceful and coherent; ideas, not numbers, more controlling; poor writing more laid bare; caselaw better discussed;

and string citations less bothersome.³ Opponents of citational footnotes — like the Legal Writer — argue that looking up and down at the footnotes is distracting.⁴ Readers need to find citations quickly.

Having few footnotes or endnotes will draw the reader's attention to the footnote or endnote. If the footnote or endnote isn't important or necessary, cut it out. Draw the reader's attention with your text.

Having too many footnotes or endnotes will cause readers to lose focus, and your footnotes or endnotes will lose value.

Don't try to cheat on page limit by putting the bulk of your text in footnotes or endnotes. Everyone will see right through this tactic.

7. S'ors's. Singular possessive: Some legal writers add only an apostrophe and leave out the "s." The Legal Writer recommends putting an apostrophe "s" after a singular possessive ending in a sibilant (Ch, S, X, or Z sound). That way you'd write it the way you'd say it out loud. *Example:* John Adams's Thoughts on Government. *Not:* John Adams' Thoughts on Government. *Example:* John Roberts's opinion. *Not:* John Roberts' opinion. Without the apostrophe "s," the pronunciation would be incorrect.

Plural possessives: Don't use an apostrophe "s" after a plural possessive ending in a sibilant. *Example:* "The attorneys' rules directed all internal disputes to arbitration." *Not:* "The attorneys's rules directed all internal disputes to arbitration."

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8. Choosing the right font. Many writers believe that any font will do for legal documents.

Typefaces, also called fonts, affect the readability of documents. Use fonts that make the text easy to read. In legal writing, that means fonts like Times New Roman, Courier New, or any font with the word “book” in it rather than the Arial font. Times New Roman and Courier New are serif fonts. Arial is a sans serif font. A serif font has small lines at the top and bottom of each letter. A sans serif font has no lines. The lines in the serif font draw the reader’s attention and let the eye move easily from letter to letter. The writer’s goal is to make it easy for the reader to move through the text.

Don’t mix fonts in the same document. Keep it professional.

rupts readers: It forces readers to stop and readjust to the spacing on each line. Although full justification presents a clean and crisp document, it’s difficult to read. Right-ragged promotes reading flow.

You’ll find the right-ragged effect in textbooks more than in novels. Because justified text is more formal than non-justified text, most newspapers use justified text.

To create a right-ragged effect, use the left justification (or align left) feature on your computer program.

10. Word and line spacing. Word spacing: The trend is to put one space between sentences in publishing. For unpublished, typed documents, put two spaces between sentences.⁵

Line spacing: Single-spaced final copies of a document are easier than double-spaced documents for readers to see and comprehend. Single-space

the Bluebook. New York practitioners should use the Tanbook when writing for New York courts.

Under the Tanbook, citations are surrounded by parentheses and supporting information is added in brackets. Periods are omitted in key places, such as after the “v” in “versus.” Three examples from the 2007 Tanbook: Caselaw: (*Matter of Ganley v Giuliani*, 253 AD2d 579, 580 [1st Dept 1998], *revd* 94 NY2d 207 [1999].) Statute: (Penal Law § 125.20 [4].) Secondary authority: (The Bluebook: A Uniform System of Citation [Colum L Rev Assn et al. eds, 18th ed 2005].)

Unlike the Bluebook, ALWD makes no distinction between citing for law reviews and law journals and citing in practitioners’ legal documents.

12. The one-sentence paragraph. Some readers believe that a one-sentence paragraph signals undeveloped

Leave plenty of white space on the right-hand side of the page; it’s easier on the eye.

9. Right-ragged effect. Some legal writers recommend full justified text. Others recommend non-justified text.

Also known as non-justified or flush-left, a right-ragged effect refers to allowing lines of text to end naturally on a page. The text is aligned, or flush, to the left. It creates a loose, or ragged, right edge. A right-ragged effect leaves varying amounts of white space (no words appear) at the end of lines. It doesn’t force the text to line up flush with the margin. Ragged right is the most common ragged alignment. The opposite — full justification, or flush-right — creates a straight right-hand edge to the text.

Leave plenty of white space on the right-hand side of the page; it’s easier on the eye. Readers prefer unjustified text. It’s easier to follow. Full justification causes the spacing between words to fluctuate from line to line. Full justification cramps or stretches out words. The text must be even on the left- and right-hand sides. Full justification dis-

rupts correspondence, but double-space between paragraphs.

Make sure you know your audience. If you’re writing to a judge, check the court’s rules for spacing requirements. If you’re writing to your boss, know your boss’s rules on spacing.

11. Citations. Some legal writers believe that lawyers should cite according to the Bluebook. Others rely on ALWD,⁶ the Association of Legal Writing Directors Citation Manual. Still others follow the New York Law Reports Style Manual, New York’s Official Style Manual (Tanbook).⁷

How you cite depends on your audience.⁸ Most federal judges and practitioners, law-review and law-journal editors, and Moot Court associations use the Bluebook.⁹ Some law school legal-writing programs use ALWD instead of the Bluebook. New York judges use the Tanbook for opinions published in the official reports. If you’re an attorney who writes to or for a New York state court, don’t use

ideas in an unsophisticated, juvenile style. But one-sentence paragraphs are acceptable to transition between two large paragraphs in a document. Doing so forms a bridge between two lengthy paragraphs. In a lengthy paragraph, readers must work overtime to understand the meaning of the words and the connections between them. A one-sentence paragraph eliminates some work for the reader. A one-sentence paragraph also gives readers a chance to catch their breaths between long paragraphs. But be careful. Use one-sentence paragraphs sparingly for dramatic effect: to emphasize an important point.

13. Spelling out numbers. From a tradition that evolved during the typewriter era and primarily to avoid forgery, some legal writers spell out numbers and then identify the number in parentheses. *Example:* “Respondent’s apartment has six (6) bedrooms and three (3) bathrooms.” Imagine if you were to say this to someone: “His

apartment has six six bedrooms and three three bathrooms." The point is that you wouldn't say it: It's redundant. If you wouldn't say it out loud, don't write it.

Having too many footnotes or endnotes will cause readers to lose focus.

The Tanbook recommends spelling up to and including the number nine and denoting with figures numbers above nine.¹⁰ The Bluebook¹¹ and ALWD explain that the legal convention is to spell out zero to ninety-nine and use numerals for higher numbers.¹² ALWD advises readers to designate numbers with numerals or spell out the numbers, but not both.

The Legal Writer recommends following the Tanbook. Spelling numbers from zero to nine and denoting numbers above nine with figures is easier to read.

14. Hyphenating phrasal adjectives. Hyphens are thought to be old-fashioned and needlessly complex. Others believe that correctly used hyphens eliminate confusion.

The Legal Writer recommends hyphenating compound adjectives. *Example:* "I'm a real estate practitioner." *Or:* "I'm a real-estate practitioner." In the first example, without the hyphen, the reader understands that your real-estate practice is fake. In the second example, with the hyphen, the reader understands that you practice real-estate law. Correct hyphenation signals formality and adds clarity. Adding the hyphen won't bother anyone. It might even impress your reader that you know the correct rule.

Don't hyphenate when the compound is not an adjective phrase. *Correct:* "Family-law practitioner." *Also correct:* "Practitioner of family law." *Correct:* "Real-estate owner." *Also correct:* "Owner of real estate."

Don't hyphenate when the first word in the adjectival phrase ends in "ly." *Incorrect:* "Physically-incapacitated defendant." *Correct:* "Physically incapacitated defendant."

Some writers say you shouldn't hyphenate two-word modifiers whose first element is a comparative or a superlative. The Legal recommends hyphenating. *Examples:* "Lowest-priced suit"; "upper-level apartment"; "best-dressed attorney." *Also acceptable:* "Lowest priced suit"; "upper level apartment"; "best dressed attorney."

Don't hyphenate in a compound predicate adjective whose second element is a past or present participle. *Incorrect:* "His judicial opinions were wide-reaching." *Correct:* "His judicial opinions were wide reaching."

Hyphenate suspension adjectival phrases. *Incorrect:* "Ten and twenty dollar bills." *Correct:* "Ten- and twenty-dollar bills." *Or:* "10- and 20-dollar bills."

Conclusion. This ends the Legal Writer's 11-part Do's, Don'ts, and Maybes series. ■

1. See Gerald Lebovits, Legal Writer, *Do's, Don'ts, and Maybes: Legal Writing Punctuation — Part I*, 80 N.Y. St. B.J. 64 (Feb. 2008); Gerald Lebovits, Legal Writer, *Do's, Don'ts, and Maybes: Legal Writing Punctuation — Part II*, 80 N.Y. St. B.J. 64 (Mar./Apr. 2008); Gerald Lebovits, Legal Writer, *Do's, Don'ts, and Maybes: Legal Writing Punctuation — Part III*, 80 N.Y. St. B.J. 64 (May 2008).

2. Robert J. Kapelke, Judges' Corner, *Some Random Thoughts on Brief Writing*, Colorado Lawyer, 29, 29 (Jan. 2003).

3. *Contra* Bryan A. Garner, *Clearing the Cobwebs from Judicial Opinions*, 38 Court Review 4, 6-8, 10, 12 (2001).

4. Richard A. Posner, *Against Footnotes*, 38 Court Review 24 (2001).

5. See Gerald Lebovits, Legal Writer, *Do's, Don'ts, and Maybes: Legal Writing Punctuation — Part I*, 80 N.Y. St. B.J. 64 (Feb. 2008); Gerald Lebovits, Legal Writer, *Do's, Don'ts, and Maybes: Legal Writing Punctuation — Part II*, 80 N.Y. St. B.J. 64 (Mar./Apr. 2008); Gerald Lebovits, Legal Writer, *Do's, Don'ts, and Maybes: Legal Writing Punctuation — Part III*, 80 N.Y. St. B.J. 64 (May 2008).

6. Association of Legal Directors (ALWD) Citation Manual (3d ed. 2006).

7. New York Law Reports Style Manual (Tanbook) (2007), available at http://www.nycourts.gov/reporter/New_Styman.htm (html version) and <http://www.nycourts.gov/reporter/NYStyleMan2007.pdf> (pdf version) (last visited Apr. 20, 2008).

8. See Gerald Lebovits, Legal Writer, *Tanbook, Bluebook, and ALWD Citations: A 2007 Update*, 79 N.Y. St. B.J. 64 (Oct. 2007).

9. The Bluebook: A Uniform System of Citation (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

10. Tanbook R. 10.2(a)(1), at 58.

11. Bluebook R. 6.2(a), at 73.

12. ALWD R. 4.2(a), at 29.

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