

# OPINION WRITING AND OPINION READERS

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## INTRODUCTION

A judge is a professional writer. Whether the judge writes well or poorly, he or she writes for publication. By force of circumstance, everything he or she does in the conduct of the judicial office must be expressed in words, preferably—but alas, not always—with a high degree of clarity and precision. Other writers may have the assistance of elegant typography and graphic illustration. The judge is armed only with the figurative pen.

Because appellate judges, trial judges, administrative law judges, and government board or commission members—along with their trusted law clerks or staff attorneys—are professional writers, there is much from which to pick and choose in examining our opinion writing. Moreover, what we write is as important as what we decide. This is so because a judicial opinion performs as well as explains. To use J.L. Austin’s phrase, it becomes a “performative utterance,”<sup>1</sup> because the decision that it explains performs as a declaration of law. In this respect, writings of the government’s judicial branch are unique. Written explanations of decisions in the executive and legislative branches (and in the private sector) do not possess the power of judicial opinions. They possess neither the bite of precedent nor the authority of case law. It is no wonder, then, that this power may go to judicial officers’ heads, resulting in the unwieldy, overlong, pseudo-academic drivel that clogs the pages of federal and regional reporters across the land. Because courts tend to overwrite opinions, it is often said that the “discussion outran the decision.”<sup>2</sup>

Unfortunately, readers and users of judicial opinions—litigants, lawyers, other judges, clerks, researchers, and law students—tend to be very busy. As a result, they have highly selective reading habits. Opinion readers, especially the vast majority who were not parties to a given case, need and expect to learn quickly what the case is about, what the key issues and the relevant facts are, what legal precedent governs the situation and how it applies, and what ultimate conclusion and resulting rule of law emanates from the case. Detective mysteries

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<sup>1</sup> J.L. AUSTIN, *PHILOSOPHICAL PAPERS* 220-39 (1961).

<sup>2</sup> *Wells v. Garbutt*, 30 N.E. 978, 979 (N.Y. 1892).

and narratives with O. Henry surprise endings have their place—in fiction. Apply these techniques to the writing of opinions and you risk losing your audience. In the words of Henry Weihofen, “[e]conomy of the reader’s attention requires that we minimize friction in the process of communication between writer and reader.”<sup>3</sup> With the number of published opinions constantly increasing, and with the constant competition for readers’ attention, it is important that opinion writers bear in mind their potential readers and strive to produce a serviceable, cogent and elegant end product.

Likewise, harried opinion readers will benefit from a better understanding of opinion structure and opinion writing technique as they struggle to parse—whether as students in a first year classroom or as advocates researching a case to be argued before the highest court in the land—just exactly what these dang opinions are intended to convey and why they are even written in the first place. The emphasis of this Article is on appellate court opinions, but much of it also applies to opinions of trial judges, administrative law judges, and government agencies.<sup>4</sup>

The authors—a judge and his law clerks—bring unique perspectives to bear on the topic of opinion writing and opinion readers. Judge Aldisert has been writing judicial opinions for nearly fifty years: since 1968 as a federal appellate judge on the U.S. Court of Appeals for the Third Circuit, and for eight years before that on the Pennsylvania Court of Common Pleas. (The Pennsylvania Supreme Court required trial judges to write an opinion in every case that was appealed; to play it safe, Judge Aldisert wrote an opinion in every final judgment.) Few, if any, judges today have had more experience when it comes to the opinion-writing phase of the judicial process. For years, Judge Aldisert has also been an avid opinion watcher (using the word “watcher” advisedly, because he has lacked the time to read opinions word for word except those of the U.S. Court of Appeals for the Third Circuit and the U.S. Supreme Court). To be sure, over the years he has meticulously examined sample opinions from student judges in his role as discussion leader in opinion-writing seminars. It might be more accurate to describe Judge Aldisert as a full-fledged “opinion skimmer.” As a hobby, or as some might say, “obsession,” he likes to skim opinions for style and form. We suppose that qualifies him for a title never seen before—opinion critic.

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<sup>3</sup> HENRY WEIHOFEN, *LEGAL WRITING STYLE* 281-302 (1961).

<sup>4</sup> For a more nuanced discussion of opinion writing for trial courts and administrative agencies, see RUGGERO J. ALDISERT, *OPINION WRITING* ch. 11 (2d ed. 2009) (available through [www.authorhouse.com/bookstore](http://www.authorhouse.com/bookstore)). For a discussion of writing concurring and dissenting appellate opinions, see *id.* ch. 12.

But federal judges do not work, or write, alone. Almost fifty generations of law clerks have served in Judge Aldisert's chambers; the coauthors are the most recent in this long line of apprentice opinion writers and avid opinion readers and researchers.

The contents of this Article were inspired in large part by the work done by the authors in editing and preparing the second edition of Judge Aldisert's classic book *Opinion Writing*,<sup>5</sup> which for many years was distributed to all federal trial and appellate judges and to all state appellate judges when they took the bench.<sup>6</sup> A broader audience of professional opinion writers and students of the judicial process now has access to the second edition.<sup>7</sup> *Opinion Writing, 2nd Edition*,<sup>8</sup> is an updated, comprehensive guide intended to be of wide practical use to members of the judiciary, judicial staff attorneys and law clerks, state and federal administrative judges, hearing officers, commissioners and private arbitrators, law librarians, law school moot court advisers, legal writing instructors, scholars, and students. This Article draws from and complements topics addressed in *Opinion Writing, 2nd Edition* while specifically highlighting the relationship between opinion writing and opinion readers.

In Part I, we survey some of the considerations facing opinion writers as they decide whether to write an opinion at all, examine the decision-making process engaged in by courts prior to writing an opinion, and summarize the various types of written "opinions" that may be produced, such as per curiams, judgment orders, and precedential and non-precedential opinions. In Part II, we identify primary and secondary "readership markets" for judicial opinions and discuss how the purpose of writing opinions is affected by the intended audience. In Part III, we dissect the ideal structure of an opinion, offer basic mechanics of draftsmanship, and address some of the criticisms of judicial opinions lodged by readers. In Part IV, we briefly touch on opinion writing style and editing. In conclusion, we reaffirm the need for wider understanding of the judicial process and for increased clarity of communication between opinion writers and readers. To this end, we hope this Article will serve as a useful resource for all opinion readers

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<sup>5</sup> RUGGERO J. ALDISERT, *OPINION WRITING* (1990).

<sup>6</sup> Judge Aldisert was commissioned to write the first edition of *Opinion Writing* by West Publishing Company as an expansion of discussions held at the Senior Judge Seminars sponsored by the Institute of Judicial Administration at New York University in 1970-1971, 1973-1982 and 1985. The book also reflected ideas discussed in opinion writing seminars that Judge Aldisert taught for newly appointed judges at the Federal Judicial Center in Washington, D.C., in 1974-1980 and 1982.

<sup>7</sup> The first edition of *Opinion Writing* was difficult for non-judges to acquire; it was not offered for sale to the general public and the rare used copies that found their way out of judicial chambers have been in high demand by law librarians, professors and former judicial clerks.

<sup>8</sup> ALDISERT, *supra* note 4.

and writers, including scholars, practitioners, judges, students, and aspiring law clerks.

### I. TO WRITE OR NOT TO WRITE

Before an opinion is written, some preliminary questions face the court: Should an opinion be written at all? (In other words, do any readers really need it?) If so, should it be precedential and therefore published? Should it be a signed opinion or per curiam? Or rather, should it be a non-precedential opinion filed in the record and made available to the public, but designed not to be cited or used as precedent and prepared solely for the benefit of the litigants and the trial court in order to explain the decision?<sup>9</sup> Should the court simply issue a terse statement announcing its judgment? It is useful for readers to understand what these different kinds of “opinions” are and to understand the forces that affect the decision of what, or whether, to write.

#### A. *Considerations in Deciding When to Write and When to Publish Opinions*

A judicial opinion may be defined as a publicly stated, reasoned elaboration that justifies a conclusion or decision. Its purpose is to set forth an explanation for a decision that adjudicates a live case or controversy that has been presented before a court. To put it another way, a quality opinion will predict how similar factual scenarios will be treated. This explanatory function of the opinion is paramount. In the common law tradition, the court’s ability to develop case law finds legitimacy only because the decision is accompanied by a publicly recorded statement of reasoning available to all future readers. As Professor Charles A. Miller has said, “[t]he law is not majestic enough in the American system to endure for good but unexplained or unexplainable reason.”<sup>10</sup> The decision that emanates from the

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<sup>9</sup> West Group publishes non-precedential opinions of the U.S. Courts of Appeals in the Federal Appendix. The intention that non-precedential opinions should not be cited has been somewhat altered by a 2006 amendment to the Federal Rules of Appellate Procedure, which provides that “[a] court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been . . . designated as “unpublished,” “not for publication,” or the like . . .” FED. R. APP. P. 32.1(a).

<sup>10</sup> CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 14 (1969).

opinion—the case law—is used to inform, guide, and govern future private and public transactions.<sup>11</sup>

But where there is an unqualified right to appeal, as in federal courts of appeals, the sheer volume of cases has forced most courts to depart from the practice of publishing an opinion in every case. Readers should know that a paper storm of blizzard force has made it virtually impossible to write full-blown opinions in all cases. Look at the deluge that descended upon the West Publishing Company over a 100-year span:

#### Cases Received for Publication 1895-1994

Year	Number of Cases
1895	19,476
1929	27,527
1942	23,283
1950	21,450
1964	27,336
1970	36,892
1977	46,983
1981	54,104 <sup>12</sup>
1985	63,508
1989	61,901
1990	62,637
1991	65,333
1992	66,500
1993	62,911
1994	61,474 <sup>13</sup>

<sup>11</sup> This future use of the decision is a necessary product if we accept Holmes's insightful definition that law is nothing more pretentious than a prediction of what the courts will do in fact. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897).

<sup>12</sup> Reprinted in Charles G. Douglas, III, *How to Write a Concise Opinion*, 22 JUDGES' J. 4, 4 (1983).

<sup>13</sup> West Publishing Co. initially supplied these statistics to Judge Aldisert for the first edition of *Opinion Writing*. See ALDISERT, *supra* note 5, at 1-2. West updated the statistics in 1996 for RUGGERO J. ALDISERT, *WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 7* (rev. 1st ed. 1996). Further updates were provided by West in 2002 for the second edition of *Winning on Appeal*. Letter from Kate MacEachern, Manager, West Group, to Ruggero J. Aldisert (Nov. 15, 2002) (on file with author); see also RUGGERO J. ALDISERT, *WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 7* n.4 (2d ed. 2003) [hereinafter ALDISERT, *WINNING ON APPEAL 2D EDITION*]. Although the number of published opinions dropped to a twenty-year low of 54,059 from 1991 to 2001, this number is deceptive. With the increase in unpublished opinions over that same time, the total number of opinions has continued to increase. ALDISERT, *WINNING ON APPEAL 2D EDITION*, *supra*, at 7. West has not made more recent statistics available.

By 1983, Justice Charles G. Douglas, III, of the New Hampshire Supreme Court, observed that “[t]he number of opinions received by West in 1929 was the same number it received in 1964—some thirty-five years later. Yet the number has [almost] doubled to 54,104 in 1981 in just half that time!”<sup>14</sup>

The avalanche is not only the product of the expansion of trial and appellate litigation. Not surprisingly, the increase in the number of published opinions reflects an increase in the number of appeals. Appellate judges today are flooded with cases. In 2008, the average active judge on the twelve regional U.S. Courts of Appeals was responsible for deciding 448 cases and writing 152 opinions.<sup>15</sup> This is a marked increase from 1969, Judge Aldisert’s first full year as a member of the U.S. Court of Appeals for the Third Circuit, when the U.S. district courts were sleepy little tribunals handling bankruptcy, admiralty, FELA, and Jones Act cases. Then, each judge on the court was responsible for deciding ninety cases per year and writing for publication either an opinion or per curiam opinion in one-third of them. The national average was ninety-three cases per active judge.

The original dramatic increase in a federal judge’s caseload can be traced to two Supreme Court cases that were decided in the 1960s and reached the Courts of Appeals in the late 1960s and early 1970s. These were *Monroe v. Pape*,<sup>16</sup> in which the Supreme Court resurrected 42 U.S.C. § 1983, and *Fay v. Noia*,<sup>17</sup> which opened the habeas floodgates to federal court review of state criminal convictions. More recently, the U.S. Courts of Appeals have been inundated with sentencing and immigration appeals following the partial death of the U.S. Sentencing Guidelines in *United States v. Booker*<sup>18</sup> and new legislation responding to the massive influx of immigrants from Mexico, Central America, China, and Indonesia.

Courts have installed “paper storm controls” and resorted to substitutes for full-length published opinions. To handle the crushing caseload increases, the U.S. Courts of Appeals have implemented the memorandum opinion and judgment order—truncated explanations for a decision with no institutional or precedential value. These may be stark one- or two-sentence judgment orders or memoranda dispositions, published per curiam opinions, or unpublished opinions. Unpublished dispositions of the U.S. Courts of Appeals are recorded in specific

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<sup>14</sup> Douglas, *supra* note 12, at 4.

<sup>15</sup> U.S. COURT OF APPEALS, FEDERAL COURT MANAGEMENT STATISTICS 2008, JUDICIAL CASELOAD PROFILE, <http://www.uscourts.gov/cgi-bin/cmsa2008.pl> (use the “Generate” feature to access the “NATIONAL TOTALS” statistics) (last visited Sept. 2, 2009).

<sup>16</sup> 365 U.S. 167 (1961).

<sup>17</sup> 372 U.S. 391 (1963).

<sup>18</sup> 543 U.S. 220 (2005).

tables appearing in the Federal Reporter. All federal circuits have established rules and internal operating procedures (I.O.P.s) to determine when a signed, published opinion is necessary.<sup>19</sup>

Thus, it becomes important for a court to decide which cases merit published opinions and which do not. Our view tracks the framework articulated by the great Benjamin Cardozo in *The Nature of the Judicial Process*.<sup>20</sup> Cardozo distinguished three categories of cases. The first category, the majority of the docket, is comprised of those cases where “[t]he law and its application alike are plain.”<sup>21</sup> Such cases “could not, with semblance of reason, be decided in any way but one. Such cases are predestined, so to speak, to affirmance without opinion.”<sup>22</sup> To publish an opinion in such cases would contribute nothing new to the body of law or to the reader. These cases do not merit even a non-precedential opinion. Instead, a plain judgment order or citation to the district court opinion in the appendix is sufficient.

Cardozo’s second category of cases, a “considerable percentage” of the docket, is comprised of those cases where “the rule of law is certain, and the application alone doubtful.”<sup>23</sup> In such cases,

[a] complicated record must be dissected, the narratives of witnesses, more or less incoherent and unintelligible, must be analyzed, to determine whether a given situation comes within one district or another upon the chart of rights and wrongs. . . . Often these cases . . . provoke difference of opinion among judges. Jurisprudence remains untouched, however, regardless of the outcome.<sup>24</sup>

It is in this second category that a non-precedential opinion is legitimate. The rule of law is settled, and the only question is whether the facts come within the rule. Such fact-oriented opinions do not add to our jurisprudence and thus do not require publication.

It is only in Cardozo’s third and final category where an opinion for publication should be written. The final category, the remaining “percentage, not large indeed, and yet not so small as to be negligible,”<sup>25</sup> is comprised of cases “where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law. These are the cases where

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<sup>19</sup> See, e.g., 1ST CIR. R. 36; 2D CIR. R. 32.1; 3D CIR. I.O.P 5; 4TH CIR. R. 36; 5TH CIR. R. 47; 6TH CIR. R. 206; 7TH CIR. R. 32.1; 8TH CIR. R. 32.1A; 9TH CIR. R. 36; 10TH CIR. R. 36; 11TH CIR. R. 36, I.O.P 5; D.C. CIR. R. 36; FED. CIR. R. 32.1, 36. Practices of the state intermediate courts vary.

<sup>20</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

<sup>21</sup> *Id.* at 164.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 164-65.

<sup>25</sup> *Id.* at 165.

the creative element in the judicial process finds its opportunity and power.”<sup>26</sup> From such cases, each modestly articulating a narrow rule, emerge the principles that form the backbone of a court’s jurisprudence and warrant the full-length, signed published opinions that are the major focus of this Article.

B. *Alternatives to Signed Published Opinions: Per Curiams, Judgment Orders, and Non-Precedential Opinions*

A published per curiam is written when a case does not warrant a signed published opinion. It fits somewhere between an unpublished or memorandum opinion and a full-blown signed published opinion. Opinion writers use the per curiam when the rule of law and its application to relatively simple facts are clear, or when the law has been made clear by an appellate decision subsequent to the trial court’s judgment. It may be used to reverse the trial court or deny the requested relief from or enforcement of administrative agency action. It may also be used for affirming the trial court or granting relief from or enforcement of administrative action under circumstances where a signed opinion is unnecessary, but there is a need for some published statement of the court’s reasoning. A per curiam may be as brief as one or two sentences that cite a controlling precedent or adopt the published opinion of a lower court.

Per curiams are not necessarily unimportant and still carry precedential weight. The U.S. Supreme Court, for instance, used truncated one- or two-sentence per curiams with citations in three segregation cases greatly extending the reach of the landmark *Brown v. Board of Education*.<sup>27</sup> Reprinted in their entirety, they state:

*Mayor and City Council of Baltimore City v. Dawson*

Appeal from the United States Court of Appeals for the Fourth Circuit.

Facts and Opinion, *Lonesome v. Maxwell*, D.C., 123 F. Supp. 193; 4 Cir., 220 F.2d 386.

Messrs. C. Ferdinand Sybert, Atty. Gen. of Maryland, Norman P. Ramsey, Deputy Atty. Gen., and Ambrose T. Hartman, Asst. Atty. Gen., for appellants.

Messrs. Robert L. Carter, Thurgood Marshall and Jack Greenberg, for appellees.

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<sup>26</sup> *Id.*

<sup>27</sup> 347 U.S. 483 (1954).

Nov. 7, 1955. *Per Curiam*. The Motion to affirm is granted and the judgment is affirmed. [Public beaches and bathhouses].<sup>28</sup>

*Holmes v. City of Atlanta*

On Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Facts and Opinion, D.C., 124 F. Supp. 290; 5 Cir., 223 F.2d 93.

Messrs. Robert L. Carter, Thurgood Marshall and E.E. Moore, for petitioners.

Messrs. J. C. Murphy and Henry L. Bowden, for respondents.

Nov. 7, 1955. *Per Curiam*: The petition for writ of certiorari is granted, the judgments both of the Court of Appeals and the District Court are vacated and the case is remanded to the District Court with directions to enter a decree for petitioners in conformity with *Mayor & City Council of Baltimore City v. Dawson*, 350 U.S. 877, 76 S. Ct. 133. [Municipal golf course].<sup>29</sup>

*Gayle v. Browder and Owen v. Browder*

Facts and Opinion, D.C., 142 F. Supp. 707.

Nov. 13, 1956. *Per Curiam*. The motion to affirm is granted and the judgment is affirmed. *Brown v. Board of Education*, 347 U.S. 483; *Mayor and City Council of Baltimore v. Dawson*, 350 U.S. 877; *Holmes v. Atlanta*, 350 U.S. 879. [Buses].<sup>30</sup>

Rampant proliferation of published opinions is disfavored by the courts, however, in order to promote cohesion in the law, curb the volume of precedential opinions, and reduce the potential for intra-circuit conflicts.<sup>31</sup> Alternatives to a published opinion or per curiam are widely used by courts and take various forms. At one end of the spectrum of unpublished opinions is the terse judgment order,<sup>32</sup>

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<sup>28</sup> 350 U.S. 877 (1955).

<sup>29</sup> 350 U.S. 879 (1955).

<sup>30</sup> 352 U.S. 903 (1956).

<sup>31</sup> The philosophy of the U.S. Courts of Appeals on publication is reflected in an Eleventh Circuit I.O.P.:

*Publication of Opinions.* The policy of the court is: The unlimited proliferation of published opinions is undesirable because it tends to impair the development of the cohesive body of law. To meet this serious problem it is declared to be the basic policy of this court to exercise imaginative and innovative resourcefulness in fashioning new methods to increase judicial efficiency and reduce the volume of published opinions. Judges of this court will exercise appropriate discipline to reduce the length of opinions by the use of those techniques which result in brevity without sacrifice of quality.

11TH CIR. R. 36, I.O.P. 5.

<sup>32</sup> The Third Circuit has developed the following suggested forms for judgment orders:

summary order, or affirmance without opinion—all used for cases with no institutional or precedential value.<sup>33</sup> The Fifth Circuit was the pioneer in these efforts with its Rule 47.6.<sup>34</sup>

Finally, the short “non-precedential” or “memorandum” opinion constitutes the majority of opinions issued by the U.S. Courts of Appeals. It falls somewhere between the judgment order and the published opinion. In practice most courts frown on setting forth facts in a non-precedential opinion. In the Third Circuit, a non-precedential opinion carries the statement: “Because we write only for the parties who are familiar with the facts, the procedural history and the contentions presented, we will not recite them except as necessary to the discussion.”

### C. *Opinion Writing Guidelines*

Opinion writing guidelines can be quickly summarized. The type of opinion to be prepared depends upon what appellate review purpose

#### 1. *Civil Cases*

##### JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed. Costs taxed against appellant.

#### 2. *Criminal Cases*

##### JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that the court erred: (1) in refusing to charge on the testimony of an accomplice as requested by appellant; (2) in admitting hearsay testimony of a witness; and (3) in refusing to grant a motion of acquittal on the theory of insufficiency of evidence, it is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

3D CIR. I.O.P. CH. 16. A judgment order affirming the district court in a direct criminal appeal includes a statement of those issues raised by appellant and considered by the panel.

<sup>33</sup> For a discussion of how judgment orders or affirmances without opinion can be used to effectively dispose of low-merit cases without resorting to sanctions for bringing a frivolous appeal, see Meehan Rasch, *Not Taking Frivolity Lightly: Circuit Variance in Determining Frivolous Appeals Under Federal Rule of Appellate Procedure 38*, 62 U. ARK. L. REV. 249 (2009).

<sup>34</sup> The text of the rule reads:

*Affirmance Without Opinion.* The judgment or order may be affirmed or enforced without opinion when the court determines that an opinion would have no precedential value and that any one or more of the following circumstances exists and is dispositive of a matter submitted for decision: (1) that a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant; and (5) no reversible error of law appears. In such case, the court may, in its discretion, enter either of the following orders: “AFFIRMED. See 5TH CIR. R. 47.6.” or “ENFORCED. See 5TH CIR. R. 47.6.”

5TH CIR. R. 47.6.

the opinion serves. Purposes of appellate review are threefold:

1. The *review-for-correctness function*. This ensures that substantial justice was done.
2. The *institutional function*. This provides a judicial mechanism for the progressive development of the law in the common law tradition. It is concerned with articulating and applying constitutional principles, authoritative interpretation of statutes, and the formulation of policy.
3. The *uniformity function*. This ensures uniform administration of justice throughout the jurisdiction.

Thus, a published opinion, classified as precedential, is generally not required where the court's decision is error-correcting, and the decision affirms the judgment or denies a petition for review of the administrative agency order. The reverse is not true. Where the opinion either reverses the trial court judgment or grants review, it may qualify as a "slam dunk" because the law is clear and the application of facts thereto is also plain, and a published opinion therefore becomes unnecessary.

A signed or per curiam opinion should be published in all cases that contribute to the progressive development of the law. Opinion readers look to published opinions for legal guidance and clarification of precedent. However, opinion writers must distinguish between those cases requiring interpretation and those simply requiring application of existing interpretation to new facts. The latter may not contribute to the progress of the law. If it does not, it should be disposed of by memorandum opinion or judgment order.

#### D. *Reaching the Decision*

Professor Richard A. Wasserstrom's analysis, which we adopt, identifies the "judicial decision process" as "denoting two quite different procedures, neither of which has as yet been carefully isolated or described."<sup>35</sup> There is what Wasserstrom describes as the "process of discovery," the manner in which a decision or conclusion is reached.<sup>36</sup> We call this the "decision-making process." In a multi-judge court, it

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<sup>35</sup> RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION* 25 (1961).

<sup>36</sup> *Id.* at 25-27.

must be a collegial function that takes place at the decision conference following oral argument or submission on the briefs. It is either followed by or performed simultaneously with the “process of justification,” which inquires whether a decision or conclusion is justifiable.<sup>37</sup> We call this the “decision-justifying process.”

Opinion writing is most intimately concerned with the decision-justifying process, but the decision-making process beforehand is also critically important. The ideal decision-making model takes place in a “hot” court. This is a court that has received briefs weeks in advance of submission, one that has read and studied them, one in which the judges and law clerks have made detailed analyses, performed substantial research, and reduced research to authoritative bench memoranda prior to the date of submission. It is a court on which the judge has an intelligent, informal understanding of the oral argument to come. It is a court that makes it possible for judges to participate in dialogue with counsel in open session.

Prior preparation leads to more understanding among the judges and tends to create a more ordered and formalized decision conference. The judges “are on the same page.” The decision is made, the opinion is assigned, and the opinion writer is given marching orders that reflect a collective output to the outline of issues the opinion will take. Under such circumstances, the writer can expect no surprises when his or her draft makes the rounds for approval, and the non-writing judges should expect no surprises from the draft. It has been Judge Aldisert’s experience in having sat as a judge on six of the eleven regional U.S. Courts of Appeals that this advanced preparation reflects the practice in the federal courts today.

Often, though, the practice does not follow the ideal—especially in some of the state appellate courts. Many courts are “cold,” that is, a court where the judges have not had the opportunity to read briefs or the record in advance or to participate in pre-argument study of the briefs or research of the law. It is a system that deprives the judge of critical law clerk research prior to oral argument. Felix Frankfurter espoused this practice, saying that he did not wish to be distracted from the oral argument of counsel. Justice Frankfurter attracted few if any disciples to his one-arm-tied-behind-the-back, bizarre practice of no advance preparation. Most “cold” courts today result from crushing calendars and antiquated scheduling of briefs (especially true in state intermediate courts). They are forced into this unfortunate practice; they do not voluntarily choose to operate this way.

At the decision conference in an appellate court there may be agreement on certain issues only, rather than unanimity. Naturally,

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<sup>37</sup> *Id.*

there may be stated disagreement on the choice, interpretation, or application of the law. When the participants are unready or cannot reach unanimity, the conference may not produce a consensus. At other times, only a very fragile consensus will emerge. Here the conference reaches only the most tentative impressions, and the opinion-writing judge is given the chore of internal advocacy and instructed to write the opinion with the ultimate goal of persuading the other members of the court to accept his or her point of view.

When the writer proceeds into the task, a conflict often appears between what Judge Aldisert calls justice *in personam* (justice for the parties to the suit) and justice *in rem* (the courts' institutional responsibility respecting consequences, consistency, and coherence). Whatever the formality or lack of formality in the decision-making process, it is clear that the opinion writer always has a unique and important responsibility to accommodate these twin concepts. The opinion writer may report back that the decision made at conference "just won't wash." More than a few judges have heard a plaintive refrain from their colleagues and clerks that goes something like this: "Here is the result we want, but I'm not sure that we can reach it without doing violence to highly respectable authority."

To be sure, the conference discussion will be skeletal. It is to the opinion writer that the decision conference allocates authority and competence to develop subsidiary details, to create a structured logical order for the court, and to polish it into accepted form. The broad strokes of collegial agreement, however, should always be present both in reaching the decision at conference and in justifying it publicly in the opinion. There should be collective agreement on the choice of the controlling legal precept where precepts compete, or on the interpretation of the controlling precept that has been selected, or on how what has been selected and interpreted may be properly applied to the findings of the fact finder.

The decision makers should agree on the specifics of analogy. They should agree on the material and relevant facts of the putative precedent. They should agree on whether the facts in the case at bar make a difference. When judges cannot agree at conference about what facts are relevant, a concurring or dissenting opinion may be forthcoming.

The decision-making and decision-justifying processes are most important in Cardozo's third category of cases where neither the rule nor its application is clear. It is these cases "where a decision one way or another, will count for the future, will advance or retard, sometimes

much, sometimes little, the development of law.”<sup>38</sup> In such cases, the court faces a series of recurring questions:

1. When confronted with competing statutes or constitutional clauses, which should prevail (and *why*)?
2. Which of several competing legal precepts should prevail (and *why*)?
3. Should the court extend one precept by analogy while restricting another to its four corners (and *why*)?
4. Should the court meet the question of statutory construction in the abstract (and *why*)? What is the legislative intent (and how may the court divine it)?
5. Is an element of a previous decision binding precedent or dictum (and *why*)?

Which questions to address depends on the precise conflict at issue. The earlier the decision makers and the opinion writers zero in on the precise conflict between the parties, the more structured the decision-making conference will be, the more precise the outline of the opinion will appear, and the more tightly drafted the opinion will be.

If the decision has been reached, and a full opinion assigned to be written in a case, the opinion writer next must give careful thought to the question of which readers the opinion is being written for.

## II. OPINION WRITERS, KNOW THY READERS

The writer of a published opinion must always be aware of the audience for whom he or she writes. Who makes up the audience for judicial opinions? This is a very deceptive question, because how you answer depends upon how you approach the purpose of an opinion. Robert A. Leflar has summarized some illuminating answers and comments of twenty-five U.S. Supreme Court and U.S. Court of Appeals judges responding to the question “To whom (or for whom) do you write your opinions?”:

1. “For posterity.” Comment: “Who is that? Is this identification of the reader group so broad as to be meaningless?”

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<sup>38</sup> CARDOZO, *supra* note 20, at 165.

2. "For the bar." Comment: "Today's or tomorrow's bar? Ordinarily both, but this depends on the problems in the case."
3. "For the future judges." Comment: "That is the common law tradition; it is the *stare decisis* function."
4. "For the legislature, to show that new legislation is needed to clean up the common law mess in the general area." Comment: "We all know cases—occasional ones—that are written or ought to be written with that in mind."
5. "For law students, both today's and tomorrow's." Comment: "It never occurred to me that I was writing my opinions for students in law school." "Assuming that we want our country to continue to live under a 'rule of law' as we know it, we'd better write for the law students, and write convincingly too." "But the opinions which make good casebook material contain lots of dicta and general explanation; they are not the neat cleanly written cases."
6. "For the readers of the *New York Times*, or comparable local newspapers." Comment: "That's just a judge's dream. Except for United States Supreme Court decisions, the newspapers quote, or even tell about, appellate opinions so rarely as to make this use of them negligible. We have to depend on the legal profession to transmit judicial decision to the lay public."
7. "For the writing judge, to satisfy himself that his decision is right." Comment: "He needs to be satisfied, true; but that should merely be the beginning of his opinion's usefulness. He ought not to be satisfied with it as an opinion unless it serves the law's further purposes."
8. "For the losing lawyer. Or for the lawyers and parties in the case." Comment: "Clearly, these are proper addressees. But an opinion that serves them only, or even primarily, ought not to be printed. Carbons or mimeographed copies would suffice. Any opinion that is to be printed and bound in the reports ought to serve wider purposes."
9. "Sometimes for my brother judges, so that I can get a majority of the court to go along with me in the decision." Comment: "This often happens, and the writing judge must within the limits set by his conscience do what is necessary. But after acceptance is gained, rewriting for the sake of better organization and presentation to the future audience often remains possible."<sup>39</sup>

Leflar's snapshot of responses shows a wide range of presumed and intended readers of judicial opinions. However, if you analyze the broad spectrum of possible ultimate consumers, you may end up with the advice that the opinion writer is necessarily communicating to every

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<sup>39</sup> Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 813-14 (1961) (footnotes omitted).

kind of reader. If this be so, the opinion should take the form of a papal encyclical, capable of covering the subject in minute detail within the four corners of an elaborate essay, an essay that can in and of itself discuss the entire breadth of the legal issues involved.

Some judges write this way, and they are wrong. Such expansive opinion writers are confusing an opinion, which is a statement of reasons explaining why and how the decision was reached, with law review articles, *Corpus Juris Secundum* segments, tomes, and endowed lectures delivered to audiences of professionals at law schools, university assemblies, bar meetings, or judicial conferences. Among appellate judges, this overexpansive manner of opinion writing is sometimes referred to as “running for the Supreme Court.” Better opinion writers understand that they write for distinct primary and secondary categories of readers and target the tenor of their opinions accordingly.

#### A. *Opinion Readership: Primary Consumers*

Drawing upon an analogy to marketing strategy, the opinion should first address a primary market. There are two discrete sectors of the primary market for judicial opinions. One sector consists of the actual participants before the appellate court—the appellant, the appellee, and the tribunal of the first instance whose judgment or order is being criticized or upheld. The basic purpose of a judicial opinion is to tell the participants in the lawsuit why the court acted the way it did. These participants have an all-pervasive interest, an interest in the error-correcting function of the appellate court. The other sector is the appellate court as an institution. Although always concerned with error-correcting, the reviewing court must at all times consider the effect the opinion will have on itself as an institution charged with responsibilities for setting precedent and for defining law.

These two sectors—one the litigants and the trial court, the other the appellate court itself—form the audience in the primary market. Opinion writing above all should be directed to them. The opinion writer must focus on these mutually interested primary readers at all times in order to make as certain as possible that they understand the contents of the written communication precisely as the writer intends. What the receiver receives should be exactly what the sender has sent. To achieve this, certain requisites demand the opinion writer’s attention.

First, the polestar should be: Will the lay parties to the lawsuit understand what is being said? “Lay parties” do not mean the public at large; the broad spectrum of society will often be unfamiliar with the context, the terms of art, and the usages or customs of the transaction

that gave rise to the litigation. The lay parties to the litigation, though, understand those elements. They will understand a decision if the opinion writer's explanation is, as it must be, clear, logical, unambiguous, and free of what has been called the *lingua franca* of the legal profession—Jabberwocky. All is lost if the parties do not know why you did what you did.<sup>40</sup>

If an opinion writer's explanation is clear to "lay parties," it should be clear to the writer's colleagues on the court. However, in writing an opinion for the parties, a judge must also consider his or her duty to the court as an institution. Neil MacCormick, Professor Emeritus of Public Law at the University of Edinburgh, Scotland, discusses this duty in terms of the "three C's."<sup>41</sup> His "three C's" are consequence, consistency and coherence. To consider consequence, the opinion writer must keep in mind that the case holding not only applies to the present case, but will apply also to future circumstances that incorporate identical or similar facts. The opinion must also be consistent with valid and binding legal precepts of the legal system. It must be coherent with an intelligible value or policy and not measured by a random set of norms. Respect for Professor MacCormick's consequence, consistency, and coherence will satisfy the institutional demands of the multi-judge court of which the opinion writer is a member. The opinion writer, for the purposes of the case, is the designated representative or spokesperson for the court to all future readers.

In sum, the opinion writer must at all times keep in mind how intelligible the opinion is to the two important sectors of the product's primary market; he or she should at all times consider the parties to the lawsuit and the judge's colleagues on the court. This requires constant concentration on maximum effective communication. U.S. Senior Circuit Judge John C. Godbold of the Eleventh Circuit has advised lawyers to sharpen communication skills: "It is not enough that counsel understands perfectly what he is saying in his written and spoken words. All is in vain unless the court understands."<sup>42</sup>

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<sup>40</sup> It is one thing to lose a case; not to understand *why* compounds the loss. Mehler summed it up thus:

[T]he gulf that often separates sender and receiver [of communications], spanned at best by a bridge of signs and symbols, is sought to be narrowed yet further so that ultimately the intended communication may have the same meaning, or approximately the same meaning, for those on the left bank as those on the right.

IRVING M. MEHLER, *EFFECTIVE LEGAL COMMUNICATION* 3 (1975).

<sup>41</sup> See NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 100-28 (1978).

<sup>42</sup> John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801, 803 (1976). Judge Godbold occupies the unique position of having served as the Chief Judge of the Courts of Appeals for the Fifth and Eleventh Circuits. He also has served as the Director of the Federal Judicial Center in Washington, D.C.

Judge Godbold's advice is also good for opinion writers. It is not enough that the opinion writer understands perfectly what is being written; it is essential that the reader does, too.

### B. *Opinion Readership: Secondary Markets*

There are also important secondary markets for judicial opinions. They must not be ignored, but their interests are subordinate to those of primary market consumers. But, fear not, beleaguered practitioners and students: Your "markets" may be far removed in space and time from the instant case, but if the opinion writer writes well enough for the primary consumers, the secondary ones will also reap the same cognitive benefits.

What and who are these secondary consumers? They vary. Some are institutions in the same judicial hierarchy, some are at a higher rung, some lower. The highest court of the jurisdiction may be called upon to carefully examine the explanations of trial and intermediate court decisions. The court or agency in which the litigation originates studies them for future direction and seeks materials that will form the grounds for future decisions. Other secondary markets, of course, embrace the lawyers, who look for prediction as to the course of future decisions; still others represent the persons and institutions in the court's jurisdiction who seek reasonable guidance for conducting themselves in accordance with the demands of the social order.

Law school faculties and students also seek the opinions as study tools and research materials. So, too, depending on the subject matter, do state legislators and academics in many fields, among them political scientists, philosophers, sociologists, behaviorists, and historians.

Representatives of the print and electronic media are counted among opinion readers, too, but it is Judge Aldisert's observation that they usually give more attention to minor magistrate proceedings and sensational courtroom trials than to appellate court opinions, except those that emanate from the U.S. Supreme Court. When the media occasionally do report opinions, the courts' statements are subject to merciless editing or compressed to sixty-second TV or radio sound bites garbled by supercilious blow-dried, self-styled experts in all matters planetary.

Ultimate consumers may be the bench and bar of other jurisdictions; the staff, counsel, and Assembly of the American Law Institute; committees of federal and state legislators; and authors of popular and professional comment.

The bottom line is that opinion writers write for the primary market. The secondary market is important, but not as important as (a)

the participants in the case whose rights, claims, demands, and defenses have been defined and refined, (b) members of the tribunal whose actions have been clearly scrutinized, and (c) the appellate court as an institution. As an opinion writer embarks on the nuts-and-bolts draftsmanship of an opinion, always keeping his or her readership markets in mind will encourage greater precision in writing and effectiveness of the final product.

### III. THE ANATOMY OF AN OPINION

Opinion writers—and readers—must resist the temptation to evaluate an opinion in terms of their agreement with the result, or according to how congenial with their personal philosophy it may be, or simply because they want to apply a value judgment in the choice, interpretation, or application of the controlling legal precept, for this too may be a personal valuation. Rather, one should measure opinions against the test inspired by Roscoe Pound and the late Cardozo Professor of Jurisprudence at Columbia University, Harry Jones: (a) how thoughtfully and disinterestedly the court weighed the conflicts involved in the case and (b) how fair and durable its adjustment of the conflicts promises to be. The first factor goes to the “reasonableness” of the court’s decision, the second to the logical validity of the reasoning.<sup>43</sup> Opinion writers must keep these maxims in mind as they prepare and then write, and then rewrite.

As a professional writer, a judge must possess literary skills. If such skills are not natural, they *must* be acquired or learned. The judge must accomplish this himself or herself. If a judge wants to write clearly and cogently, with words parading before the reader in logical order, the judge must first *think* clearly and cogently, with thoughts laid out in neat rows. To do so is to demonstrate respect for the elements of reflective thinking and the rules of deductive and inductive logic. Any judge who is unwilling or unable to do this will confuse readers and cannot perform his or her judicial duties properly.

As the appellate case loads have increased, so has the judges’ dependence upon law clerks. Law review graduates seem to be preferred because of their editorial experience. Unfortunately, that experience too often has been gained in the production of prose that only foreshadows a transfer of literary shortcomings, whole and

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<sup>43</sup> See Harry W. Jones, *An Invitation to Jurisprudence*, 74 COLUM. L. REV. 1023, 1029 (1974); RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* 4 (3d ed. 1997).

unaltered, to the writing of opinions.<sup>44</sup> Obviously, choosing the most literate law clerk is not enough. It is the judge who makes decisions and then the judge who must explain those decisions. It is the judge who holds the commission. It is the judge whose name goes on the opinion. It is the judge who must assume 100 percent of the responsibility. The law clerk is an assistant, and only an assistant.<sup>45</sup> The law clerk must help in research, in the drafting process, and in expressing views of the law, but—and this is a big “but”—every sentence the law clerk writes in the opinion must be totally understood and endorsed by the opinion-writing judge. To delegate some writing responsibilities to a law clerk is more than proper; it is an absolute necessity in this litigious age. This delegation, however, is legitimate only to the extent that the judge accepts the submitted language, understands what has been written, agrees with it, and is willing to stake a professional reputation on it.

#### A. *Reader Criticisms of Opinions*

Readers lodge a torrent of criticisms against opinions written today: Opinions are too long and burdened with too many citations. Their discussion tends to ramble, failing to clearly define and analyze issue presenting lengthy and largely unnecessary discussion of the cases compared. Opinion writers make unstructured references to other cases without indicating what facts in those cases are material or immaterial. They 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. Opinions display acute “law review-itis,” being overwritten and overfootnoted, obese and sloppy instead of clean and neat. Holdings are often expressed in terms that reflect factual scenarios not contained in the records. Writers eschew those good, plain words and sentences that communicate rather than befuddle. Finally, there are too many published opinions—far too many—with no precedential or institutional value.

Certainly, some, but not all, of these criticisms are valid. Fortunately, they do not apply to all judges or to all opinions. Nevertheless, there is enough falling from grace to justify guidance to avoid some of the most common pitfalls.

These expositions are not meant solely for opinion writers. For you, dear opinion readers, we hope you will be able to utilize this

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<sup>44</sup> While law reviews often undertake the important work of subjecting the work of the courts to serious scholarly criticism, this microscopic dissection of judicial opinions is not the same style appropriate *in* opinions.

<sup>45</sup> For an example of duties of law clerks, see Ruggero J. Aldisert, *Sample Instructions to Law Clerks: Duties of Law Clerks*, 26 VAND. L. REV. 1251 (1973).

anatomical guide to further develop your understanding and reading of case law. As Judge Aldisert has advised elsewhere, “There are rules and measures of a good opinion which must be followed by the opinion writer. Those who would review the opinion must use the same rules and measures.”<sup>46</sup> For law students, neophyte practitioners and law clerks, recognize the components and structure of every opinion you read, whether or not the opinion writer assists you in the task. “Always be certain that you examine the entire anatomy of the opinion, that you know the proper nomenclature for all its relevant parts . . . .”<sup>47</sup> Scholars, law review writers, and other critics of opinions should be advised that “if the critic casts stones at the opinion writer’s reasoning, the stone thrower should recognize the distinctions among the court’s reasoning process, the weight given to the arguments, and the court’s exercise of value judgment.”<sup>48</sup> Effective opinion critics must also be able to pinpoint the exact legal dispute between the parties and fully understand the judicial decisionmaking process and legal reasoning structure.<sup>49</sup> Recognizing the (sometimes shrouded) parts of an opinion will assist you throughout your careers in communicating effectively with your primary audience, whether that be a client, judge, or other practitioners and scholars. All opinion readers, critics, and users will benefit from a “behind the scenes” look at the very object they are dissecting.

The purpose of all legal writing is communication and persuasion. We hope that this overview will sharpen readers’ figurative lens in reading judicial opinions, and writers’ figurative pens in drafting the same.

### B. *Let the Reader Recognize an Outline*

A lengthy discussion of a multifaceted single issue or of multiple issues should be segmented. Each segment should be preceded by a Roman numeral or a letter. In this way, the reader has a visual outline to aid in understanding the opinion.

No one style fits all opinion writers. We prefer the U.S. Supreme Court style of segmenting each identifiable segment of the opinion, using Roman numerals. The writer proceeds with each segment as a self-contained unit. This encourages coherent, concise, issue-centered

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<sup>46</sup> Ruggero J. Aldisert, *Opinion Writers and Law Review Writers: A Community and Continuity of Approach*, 16 DUQ. L. REV. 139, 155 (1977-78).

<sup>47</sup> Ruggero J. Aldisert, *Introduction to the Third Circuit Review: Advice to Law Review Writers*, 30 VILL. L. REV. 828, 838 (1985).

<sup>48</sup> *Id.* at 828.

<sup>49</sup> *Id.*

writing. It separates the issue, facts, and rationale into easily identifiable segments. It eliminates the need for stodgy, artificial transitional phrases because the numeral serves to indicate the transition to a new subject. In many cases the most important reason for the use of segments indicated by Roman numerals is that it shortens and clarifies the separate opinions written by judges on the same panel. A judge wishing to join in an opinion except a portion of the discussion on damages can say: “Judge Alpha concurs in the opinion of the majority and dissents only to Part III of the opinion.” The net effect of this is that the reader can quickly understand where there is unanimity in the court and, if there is disagreement, precisely where it exists.

Not all opinion writers agree. Some prefer the opinion to be uninterrupted; they like it to flow like a legal essay. Others prefer subheadings to introduce the issues, in law review style.<sup>50</sup> Still others follow the styles of legal memoranda by compartmentalizing with subheads titled “Facts,”<sup>51</sup> “Discussion,” and “Conclusion.” It is a matter of personal style. There is no specific convention giving the seal of approval to one over the other. Unless the opinion is very short, however, either a Roman numeral (sometimes followed by letters) or a subheading should be used to assist the reader in segmenting discrete parts of the opinion.

We suggest the following outlines:

### **Simple Opinion Outline**

- Orientation Paragraph
- Statement of Jurisdiction
- Summary of Issues
- Statement of Standards of Review
  - I. Facts and Procedural History
  - II. First Issue
  - III. Second Issue
  - IV. Conclusion and Disposition

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<sup>50</sup> Certain considerations militate against the use of a subhead to introduce each issue. First, there is the common law tradition. Through the years, the great courts, state and federal, here and in England, have eschewed subheads in judicial opinions. Second, the subhead is usually a restatement of the topic sentence. You don’t need to tell us what you are going to say; then say it; then tell the reader what you said. That exercise is tautological. Furthermore, in the modern era, West or Lexis numbered headnotes immediately direct you to the location of each issue.

<sup>51</sup> If the writing is clear, it is not necessary to label one section “Facts.” The reader will know. Such a label is necessary in the trial court where the judicial officer makes findings of fact. With the exception of the Louisiana Intermediate Court of Appeals (and there only in civil cases), American appellate courts do not “find” facts.

### **More Sophisticated Opinion Outline**

Orientation Paragraph(s)

Statement of Jurisdiction

I. Summary of Issues

Statement of Standards of Review

II. General Statement of Facts and Procedural History

III. First Issue

Statement of Relevant Facts

Introduction

IV. Second Issue

V. Third Issue

VI. Summary

VII. Conclusion and Disposition

#### *C. Five Parts Necessary for Any Opinion*

These five parts form the structure of every well-written opinion. Each is absolutely essential. They are not new to the art of persuasive discourse, for they can be traced to Greco-Roman rhetoric. Examine the following table for a summary of each element:

	<i>Greco-Roman Rhetoricians</i>	<i>George Rose Smith's Primer</i> <sup>52</sup>	<i>Description</i>
<i>Opening paragraph(s); the orientation</i>	Exordium	Opening paragraph	Traditional form: explanation of the nature of the action below, of the parties, the judgment, and the issues on appeal; Issue form: also includes major issue to be discussed
<i>Summary of issues discussed</i>	Divisio	Indication of issues on appeal	Statement of issues to be discussed
<i>Material or adjudicative facts</i>	Narratio	Statement of the facts	Narrative or adjudicative facts
<i>Analysis of the issues presented by litigants</i>	Confirmatio a. Confutatio	Discussion of the law	Proof of case a. Refutation of rejected argument
<i>Conclusion</i>	Peroratio	Conclusion	Conclusion

#### D. *The Orientation Paragraph(s)*

The orientation paragraph or *exordium*, the opinion writer's opening, sets the stage for the history and analysis to follow. It tells the reader at once what area of jurisprudence he or she should begin thinking about and provides a preliminary outline of the instant case. Professor Stevenson observes that as readers, we crave an immediate sense of overview. At the beginning of an opinion, readers are not interested in hearing all the details of the case. Opinion readers want to know whether we should continue reading; we want to know what kind of case this is, what issues it addresses, and what the judge has concluded. Opinion readers do not want to be forced to read a detailed history of the case until we know that the case is relevant to our interests.<sup>53</sup> "Such a statement also establishes at the outset the roles of the plaintiff and defendant as appellant or appellee. It may also supply other essential information. For example, the orientation paragraph may

<sup>52</sup> See George Rose Smith, *A Primer of Opinion Writing, for Four New Judges*, 21 ARK. L. REV. 197 (1967).

<sup>53</sup> Dwight W. Stevenson, *Writing Effective Opinions*, 59 JUDICATURE 134, 136-37 (1975).

inform a reader as to whether there was a jury trial and if so, whether the judgment follows the verdict.”<sup>54</sup>

The orientation paragraph is the first thing an opinion writer should write when drafting an opinion, and the last thing he or she should rewrite. In it, the opinion writer must let the reader know the scope, theme, content, and outcome of the opinion, all within the confines of one or two paragraphs.<sup>55</sup> The writer must state the major issue (or issues) as concisely as possible. Consider how a headnote writer at Lexis or West would express it. Writing the opening should discipline the opinion writer to focus on the central issues of the case and to verify the procedural history of the case. The orientation paragraph should also pique the opinion reader’s interest with its language. Crafting the opening or orientation paragraph takes skill and concentration. Professional opinion writers should be highly adept at this—trained to describe an issue for the reader as comprehensively as possible, with minimal wordage.

In the opening, the opinion writer should answer these questions:

1. *Who*: Who is taking the appeal? Who won in the trial court?
2. *What*: What is the specific nature of the main issues and the area of law implicated in the appeal?
3. *When*: When was the alleged error committed? Is the appeal from an adverse verdict because of insufficiency of evidence? Is it alleged that error was committed during the pleading stage, at pretrial, trial, or post-trial?
4. *Where*: Where does the appeal come from? A trial court? An administrative agency?
5. *How*: How did the final judgment arise? Was the judgment entered as a result of summary judgment, a directed verdict, a jury verdict, or a nonjury award?

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<sup>54</sup> FREDERICK G. HAMLEY, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 29-37 (1961), reprinted in ROBERT A. LEFLAR, APPELLATE JUDICIAL OPINIONS 172 (1974).

<sup>55</sup> See also Smith, *supra* note 52, at 204-05 (“The readability of an opinion is nearly always improved if the opening paragraph (occasionally it takes two) answers three questions. First, what kind of case is this: Divorce, foreclosure, workmen’s compensation, and so on? Second, what roles, plaintiff or defendant, did the appellant and the appellee have in the trial court? Third, what was the trial court’s decision? A fourth question, What are the issues on appeal?, should also be answered unless the contentions are too numerous to be easily summarized. Such an opening paragraph leads the reader into the opinion with enough information for him to understand it as he proceeds.”).

Whether the holding of the case should be included at the beginning as well as at the end of an opinion is a matter of style about which reasonable opinion writers may differ. However, with both opinion readers and writers in mind, we agree with B.E. Witkin that a preview of the holding should be included in the orientation paragraph as “a guide to intelligent reading of the opinion”:<sup>56</sup>

First, its usefulness to third persons—associates on the bench, other courts, lawyers, and law writers—is obvious. Most readers today are busy readers. In magazines, the essayist or editor frequently presents just this kind of statement to announce what the text is about. In a judicial opinion, why should a reader have to wait until the fourth or fourteenth page to discover how the point was decided? With this information divulged at the outset, a reading of the facts, proceedings below, contentions on appeal, and authorities and reasoning is more informed and fruitful.

Second, the preview introductory statement also helps the opinion writer. The first draft may set forth the facts and systematically examine the contentions, large and small. If, after drafting the conclusion, the author simply duplicates it at the beginning, and then reads through the opinion, he may note, as many a reader would, that some of the issues and factual details are tangential or irrelevant to the point on which the case was finally decided and are not worth keeping in the final draft.<sup>57</sup>

From the standpoint of the opinion reader—the litigants, the trial court, the lawyers, and the commentators—the preview is extremely useful because it provides both the question posed in the opinion and the answer. The simplest form of preview statement sets forth the legal issue and the answer to it in the most concise form possible. The following opening paragraph is a classic:

We are called upon to determine whether “attempted assault” is a crime in the state of California. We conclude that it is not.<sup>58</sup>

#### E. *Statement of Jurisdiction*

Next, does the court have jurisdiction to hear the appeal? Not a word should be written on the substantive merits of a case until this question can be answered in the affirmative. State the basis for jurisdiction. The U.S. Courts of Appeals have jurisdiction if the order appealed from is a final order,<sup>59</sup> the order appealed from is an

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<sup>56</sup> B.E. WITKIN, *MANUAL ON APPELLATE COURT OPINIONS* § 57, at 93 (1977).

<sup>57</sup> *Id.* at 93.

<sup>58</sup> *In re James M.*, 9 Cal. 3d 517, 519 (1973).

<sup>59</sup> 28 U.S.C. § 1291 (2006).

interlocutory order from which an appeal is permitted,<sup>60</sup> or the question or appeal has been certified for appeal by the lower court. Generally, only a simple citation to a statute or court rule is needed. Such a statement is essential because without jurisdiction to hear the case, an opinion stands on very shaky ground.

Federal appellate judges have an additional burden. They must also ascertain whether the trial court had jurisdiction to entertain the case. Unlike their state counterparts, federal courts have limited jurisdiction. They may hear cases based only on diversity of citizenship (with the requisite amount in controversy) or federal questions.<sup>61</sup> Unlike most appellate issues placed in contention, the question of jurisdiction may be raised at any time either by the court *sua sponte* or by one of the parties.

#### F. *Statement of Issues*

The next task for the opinion writer is to present a summary of issues for review. As a general rule, opinion writers should set forth the statement of all the issues very early in the opinion. The reason is obvious: You are giving the opinion reader a preview of what the opinion will discuss. The summary of issues is prepared after preliminary research has been completed and the decision has been made as to what points the opinion will cover.

Introduce the statement of issues with a topic sentence or numeral to alert the reader that it is a separate part of the opinion. The statement of issues usually should precede the narration of the facts. This is a kind of self-imposed safeguard because it tends to restrict the necessary facts to only the material adjudicative facts, the facts necessary to the treatment of the issues that have been set forth. This does not mean that the statement of issues must *always* precede the statement of facts in the final draft of the opinion. That may depend on style. In any event, the opinion reader who knows the issues before reading the facts will find the facts much more meaningful. The effect is like reading a review of a movie before seeing it, so that one knows what to look for in the theater.

In a multi-issue case, the statement of issues may be expressed as a summary paragraph of all issues to be presented. This summary may repeat the major issue identified in the opening and a statement of its subordinate points. Some opinion writers do not present an introductory

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<sup>60</sup> 28 U.S.C. § 1292 (2006).

<sup>61</sup> 28 U.S.C. §§ 1331, 1332 (2006).

summary of issues. Instead, they state each issue separately as a topic sentence that introduces discussion of one particular segment.

At least one direction is in order: The opinion writer is not required to discuss in depth every issue presented by counsel in the briefs. Set forth the appellant's contentions you intend to discuss, and remember that you control this part of the opinion; the appellant's counsel does not. A heavily overwritten opinion is a signal that it is the product of an opinion writer who is generally not sophisticated or perhaps confident enough to separate that which is important from that which is merely interesting. Where the appellant has raised issues not worthy of discussion, give them perfunctory treatment (if at all, especially in a civil case). If the issue is subordinate but necessary to address, treat it with an extremely condensed discussion. A sophisticated opinion writer understands that there are times when one does not want to give the same dignity to each and every issue and will avoid distracting the reader with unnecessary clutter.<sup>62</sup>

The phrasing of the issues must be as fair and as neutral as possible. This is critical for several reasons. The litigants and other readers must get the impression that the court was fair and not one-sided. Opinion writers should identify the primary assumptions readers are likely to make about the topic so that they may satisfy or counter assumptions as necessary. Along the same lines, opinions should clearly articulate to the reader what assumptions the opinion writer is making. If the opinion writer inclines away from absolute neutrality, he or she should at least bend over backwards to express the question most favorable to the party you rule against. Recall Justice Frankfurter's statement: "In law also the right answer usually depends on putting the right question."<sup>63</sup> Judge Abraham Freedman, Judge Aldisert's colleague of happy memory, used to say, "How you come out here depends on how you come in."

Also, if the opinion writer is not careful in phrasing the issue, a dissenter may complain and dilute the efficacy of the opinion. Implicated here is more than the consideration of convincing the litigant

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<sup>62</sup> More than 100 years ago, in his *Treatise on Evidence*, Dean John H. Wigmore made this point very clear as he reacted to the many thousands of judicial opinions he had studied in the course of preparing his treatise. Some of the criticisms he set down then are still appropriate today:

[O]verconsideration of every point of law raised on the briefs . . . shows faithfulness and industry, for which we should be and are grateful. But it tends to remove the decision from the really vital issues of each case and to transform the opinion into a list of rulings on academic legal assertions. The opinion is as related to the meat of the case as a library catalogue is to the contents of the books. This is far from exercising the true and high function of an appellate court.

<sup>1</sup> JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 8a, at 617 (1983).

<sup>63</sup> *Estate of Rogers v. Comm'r*, 320 U.S. 410, 413 (1943).

and the reader that the court has been objective. The subsequent value of the opinion as a forceful precedent may depend upon the neutrality manifested in the statement of issues.

### G. *Standard of Review*

A reviewing court's function is to determine whether a trial court committed a mistake of sufficient magnitude to require that its judgment be reversed or vacated. Standards of review are critically important in appellate decision making. In large part, they determine the power of the lens through which the appellate court may examine a particular issue in a case. Thus, a clear understanding of the scope of review for each point in a brief or opinion should be a minimum requirement for any proposed standard of advocacy or opinion writing competence. Unfortunately, the average law student leaves law school with virtually no formal study or understanding of the standards of review, and the role of standards of review is often opaque to most opinion readers.

A comprehensive overview of standards of review is not possible here, but the importance of standards of review cannot be overemphasized.<sup>64</sup> Most basically, it is critical to know that not all judicial review is plenary. The appellate process reduces itself to limited types of review, including review of the sufficiency of the evidence to meet the required burden of persuasion at the trial level; review of the exercise of discretion; and plenary review of the choice, interpretation, and application of the controlling legal precepts. If minimum evidentiary quanta have been satisfied, reviewing courts generally may not disturb findings of fact, so the scope of review is extremely narrow when it comes to fact finding. The review of the exercise of discretion is somewhat broader but still severely circumscribed, and the broadest scope of judicial review extends to pure questions of law—to determine *de novo* whether error occurred below in the choice, interpretation, or application of a legal precept. The three most frequently used standards of review are: (1) *clearly erroneous*—the issue concerns basic or inferred facts found at a bench trial; (2) *abuse of discretion*—the issue is within the discretion of the fact finder; and (3) *plenary* (*de novo*)—the choice, interpretation, or application of a controlling legal precept is involved.

The Federal Rules of Appellate Procedure require a statement of the applicable standard of review for each argument presented in the

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<sup>64</sup> For a full discussion of standards of review, including the importance of the nature of the fact finder and the differences between basic, inferred, and ultimate fact, see ALDISERT, *supra* note 4, ch. 6.

briefs,<sup>65</sup> and opinion writers must alert the reader to the appropriate standard of review to be followed in evaluating each issue discussed in the opinion. The opinion writer should combine standards on all issues in one paragraph. It may be necessary to set forth varying standards applicable to different issues. If so, have a citation for each standard. It is not necessary to set forth multiple citations. Often the latest case will do.

#### H. *Statement of Facts*

Our common law system of *stare decisis* is a combination of antecedent facts and a consequential statement of a legal precept attached to those facts. *Stare decisis* means “keep to the decisions,” and a decision is a mix of the material facts and the legal consequences flowing therefrom. As such, the facts set forth in an opinion are more than merely informative; they guide and alert the reader to the legal ramifications of a given factual scenario. This being so, it is necessary to use care in selecting what facts you set forth in the *narratio*. For this reason, we offer two suggestions:

- Never write the facts first; do not begin writing the facts until you have decided what issues you will address.
- Write tersely; the facts should be stated as tightly as possible and confined to those material to the issues that will be discussed.<sup>66</sup>

For the opinion to possess legitimate institutional or precedential value, the common law tradition requires that the opinion reader be given signals as to what facts are adjudicative—i.e., what facts are material to the decision. Only material, adjudicative facts should be set forth in the opinion. Cardozo noted:

Often clarity is gained by a brief and almost sententious statement at the outset of the problem to be attacked. Then may come a fuller statement of the facts, rigidly pared down, however, in almost every

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<sup>65</sup> FED. R. APP. P. 28(a)(9)(B).

<sup>66</sup> One who thought otherwise was Judge Aldisert’s dear friend, the late Robert Braucher, former justice of the Massachusetts Supreme Judicial Court and former professor of law at Harvard. He believed that an extensive factual narrative should be presented so that the reader “could catch a true flavor of the case.” ALDISERT, *supra* note 4, at 131. For years they each presented their views at the Senior Appellate Judges Seminars in New York. The state supreme court justices and United States circuit judges who attended their Opinion Writing sessions got both views for the price of one.

case, to those that are truly essential as opposed to those that are decorative and adventitious. If these are presented with due proportion and selection, our conclusion ought to follow so naturally and inevitably as almost to prove itself.<sup>67</sup>

Readers of an opinion should be able to prophesy and to evaluate the effectiveness and relevance of the case, so long as the only facts stated are those material to the adjudication.<sup>68</sup>

The practical reasons for carefully stating the material facts are enshrouded in the formation of the common law tradition. We treat like cases alike. But what makes a “like case”? A like case is one where the material facts are identical with or substantially similar to those in the putative precedent:

Two cases or decisions which are alike in all material respects, and precisely similar in all the circumstances affecting their determination, are said to be or run “on all fours” with each other, or, in the more ancient language of the law, the one is said to “run upon four feet” with the other.<sup>69</sup>

If they are identical, or substantially similar, then the first case is a binding precedent for the second, and the court should reach the same conclusion it reached in the first. If the first case lacks any fact deemed material in the second case, or contains any material facts not found in the second, then it may not be a direct precedent, but only argument—albeit sometimes very persuasive argument. If facts in the case at hand do not run on all fours with those in the previous one, resort must be made to the process of analogy.

Thus, how the facts are stated may be more than a question of writing style. The opinion writer should look at the facts through the eyes of a lawyer or judge in a subsequent case. Those facts constitute an extremely important ingredient in evaluating the opinion’s precedential or institutional value—the decision of the case can be measured by the precise adjudicative facts that give rise to the rule of

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<sup>67</sup> Benjamin N. Cardozo, *Law and Literature*, 14 YALE L.J. 705 (1925), reprinted in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 339, 352-53 (Margaret E. Hall ed., 1967); see also FRANK M. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH 159 (1980) (explaining how the first words of an opinion slowly emerge on the blank sheet of paper).

<sup>68</sup> Confining the statement of facts to material facts also keeps the narrative more interesting for the opinion reader. What Barbara Tuchman described in *Practicing History* as the responsibility of the historian is equally applicable to the writer of an opinion:

The writer of history, I believe, has a number of duties *vis-à-vis* the reader, if he wants to keep him reading. The first is to distill. He must do the preliminary work for the reader, assemble the information, make sense of it, select the essential, discard the irrelevant—above all, discard the irrelevant—and put the rest together so that it forms a developing dramatic narrative. Narrative, it has been said, is the lifeblood of history.

BARBARA TUCHMAN, PRACTICING HISTORY 17-18 (1981).

<sup>69</sup> HENRY CAMPBELL BLACK, THE LAW OF JUDICIAL PRECEDENTS 61 (1912).

the case. Indeed, “[i]t is by his choice of the material facts that the judge creates law.”<sup>70</sup> Recall what has been suggested by the giants of the common law tradition:

- Oliver Wendell Holmes: “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”<sup>71</sup>
- Roscoe Pound: Rules of law are “precepts attaching a definite detailed legal consequence to a definite, detailed state of facts.”<sup>72</sup>
- Edward H. Levi: “[T]he scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar to those present when the rule was first announced. The finding of similarity or difference is the key step in the legal process.”<sup>73</sup>
- Jerome Frank: “[P]art of the judge’s function is to pick out the relevant facts. . . . [T]his means that in writing his opinion he stresses . . . those facts which are relevant to his conclusion . . . . [H]e unconsciously selects those facts which, in combination with the rules of law which he considers to be pertinent, will make ‘logical’ his decision.”<sup>74</sup>

Once selected, the facts should appear *after* the statement of issues but *before* the discussion of the issues. This is important because it enables the reader to relate the facts to the issues to be discussed.

The principal directive for the opinion writer in narrating the facts is accuracy. Be honest. Don’t steal the facts. A report of the American Bar Association warned:

Extreme care must always be taken to assure a fair and impartial statement. This is particularly true with respect to the facts favorable to the side which is going to lose on the appeal. It has been said that a lawyer may forgive a judge for mistaking the law. But, not so if

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<sup>70</sup> See Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 169 (1930). For further discussion of how to determine what constitutes a “material” fact, see ALDISERT, *supra* note 4, ch. 9.

<sup>71</sup> Holmes, *supra* note 11, at 461.

<sup>72</sup> Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475, 482 (1933).

<sup>73</sup> Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 502 (1948).

<sup>74</sup> JEROME FRANK, *LAW AND THE MODERN MIND* 134-35 (1930).

his facts are taken away from him.<sup>75</sup>

Along the same lines, always prepare the facts as if a member of the court will be writing a concurrence or dissent. Remember that in post-trial motions and appellate review, what the fact finder finds must be construed in the light most favorable to the winner of the verdict. Where the evidence has been controverted, it is helpful to indicate in the narration of facts a record page number to verify the finding for the reader. The opinion writer cooks the books when he drafts an opinion that appears to be logically sound but is grounded on unfairly edited facts.

### I. *Stating Reasons for the Decision*

We come now to the core of our subject, to the opinion's sinew and muscle and fiber, as we describe the process of stating reasons for the decision. This is the *ratio decidendi*, the how and why we have reached the decision. As described *supra* Part I.D, the judicial process is divided into two separate parts. The first is the process of discovery—reaching the decision. The second is the process of justification—writing a public explanation and analysis (*confirmatio*) that justifies the conclusion (*peroratio*) the court has reached. It is here that the major criticisms are directed by opinion readers against judicial opinions. It is here that opinion writers must buckle down to demonstrate superior writing and explanatory skills.

The justificatory purpose of a judicial opinion is to convince any reader that sound logic supports the court's decision. The rationale must offer clarity. It must provide a systematic discussion of the issues posed in the appeal. Above all, the opinion writer must cleave to one guide, paramount and ever-present: the thoughtful and disinterested weighing of conflicts inherent in the controversy. Both the opinion writer and the opinion reader have to be able to answer affirmatively to the questions: Has the court done substantial justice in the case? Is there justice between the parties? Does the decision maintain the integrity of the "body of the law" for future litigants?

For each issue in an opinion, the opinion writer must analyze the nature of the dispute between the parties. Cardozo's three categories of cases, discussed *supra* Part I.A, are equally useful in characterizing each issue presented for resolution in a given case:

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<sup>75</sup> ABA, SECTION OF JUDICIAL ADMINISTRATION, COMMITTEE REPORT: INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 31 (1961), *reprinted in* WITKIN, *supra* note 56, at 102.

- a. Where the law and its application alike are plain or, to put it another way, where the rule of law is clear and its application to the facts is equally clear.
- b. Where the rule of law is clear and the sole question is its application to the facts. In Cardozo's formulation: "[T]he rule of law is certain, and the application alone doubtful."<sup>76</sup>
- c. Where neither the rule nor, *a fortiori*, its application, are clear.

The opinion writer should not waste effort or unduly pad the opinion if the point falls within category (a); one or two sentences with relevant citation should suffice. If the point fits into category (b), do not waste effort on justifying the controlling rule. Concentrate only on the conflict, the application of the rule to the facts. If the point comes within category (c), it is necessary first to identify the flash point of the conflict. Here too, there are three subcategories:

- (1) *Choosing the law*. Here, the opinion writer must choose among competing legal precepts to determine which should control. Finding the law is another process. From a study of cases, each announcing a specific rule of law attached to a detailed set of facts, the opinion writer may be able to "find" or create a broader legal precept attached to a broad set of facts. Both these processes require the deepest development because once you choose or find, you must interpret that precept.
- (2) *Interpreting the law*. Here there is no dispute about which competing precept controls, but only the question of interpreting what has been chosen or found. This arises most frequently in statutory construction. If the conflict falls within this category, do not discuss choice of other precepts; discuss only interpretation of the law (category 2), and application to the facts (category 3).
- (3) *Application of the law to the facts*. Here, the opinion writer need only discuss the application of the precept—as chosen and interpreted—to the facts as found by the fact finder.

Having identified the flash points of controversy between the disputants, the opinion writer must proceed to resolve the difficulty and explain why one choice, or one interpretation or given application, is

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<sup>76</sup> CARDOZO, *supra* note 20, at 168-78.

preferred over the other. The starting point of every judicial decision must be a recognition of controlling dogma, doctrine, and fundamental principles. There must be exposition of analysis and selective use of legitimate case law support. The opinion writer must rely on the rules of formal logic to solve the conflict.<sup>77</sup>

Legal and logical analysis do not act in a vacuum, however. Today's opinion writer must consider Professor MacCormick's "three C's"<sup>78</sup>—consequence, consistency, and coherence—in every decision. Part of this has to do with the common law tradition that a decision in any one case may serve as ruling case law for another. There must be more than justice *in personam*, a consideration for the peculiar rights of the parties before their court; there must also be justice *in rem*, fidelity to what has been decided in the past as a guide to setting the course for the future.

Professor Kent Greenawalt has written:

Judges must decide all the issues in a case on the basis of general principles that have legal relevance; the principles must be ones the judges would be willing to apply to the other situations that they reach; and the opinion justifying the decision should contain a full statement of those principles.<sup>79</sup>

This is the jurisprudential equivalent of Kant's categorical imperative: "Act as if the maxim of your action were to become through your will a universal law . . . ."<sup>80</sup>

Modern adjudication, however, demands more than strict adherence to the common law tradition. Because of the precise nature of today's litigation, judges must now cautiously and carefully consider—especially in the dynamic fields of criminal law, tort law, and constitutional law—exactly what social, economic, or political consequences will follow from their decision. Professor MacCormick has offered excellent advice here: "[To consider the consequences w]e face the question: [W]hat, if any, limits can govern the judicial choice of rulings to test, and how, in any event, can judges begin to frame any ruling appropriate to fit the concrete case when so vast a range of possibilities is open?"<sup>81</sup>

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<sup>77</sup> For a discussion of the importance of logic in legal reasoning, see ALDISERT, WINNING ON APPEAL 2D EDITION, *supra* note 13, at 257-79; ALDISERT, *supra* note 43, at 4; Ruggero J. Aldisert, Stephen Clowney & Jeremy D. Peterson, *Logic for Law Students*, 69 U. PITT. L. REV. 1 (2007); Aldisert, *supra* note 47, at 833-38 (1985).

<sup>78</sup> See *supra* note 41 and accompanying text.

<sup>79</sup> Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 990 (1978).

<sup>80</sup> IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 89 (H.J. Paton trans., 1964) (1785).

<sup>81</sup> MACCORMICK, *supra* note 41, at 119.

When judges weigh the case for and against given rulings, they characteristically refer to certain criteria as “justice,” “common sense,” “public policy,” “convenience,” or “expediency.” Decisions should never be justified by such buzzwords without the support of reasoned elaboration. At best, an opinion that relies on these labels for its rationale begs the question; at worst, it resorts to an *ad hominem*. A decision influenced by consequential factors responds not to the rules of inductive or deductive logic, but to what we call “value judgment.” European social theorist Max Weber suggested that the term refers “to ‘practical’ evaluations of a phenomenon . . . as worthy of either condemnation or approval.”<sup>82</sup> Weber distinguished between “logically demonstrable or empirically observable facts” and the “value-judgments which are derived from practical standards, ethical standards or world views . . . .”<sup>83</sup> There are decisions that necessitate the use of value judgments, but opinion writers must not rely on value judgments to the exclusion of reasoned analysis. Set forth your rationale and explain your value-based choice, dwelling not in the murky waters of subjectively defined buzzwords.

Judges who evaluate consequences of rival possible rulings give different weight to different criteria. Not surprisingly, all judges do not agree as to what degree of either perceived injustice or predicted inconvenience will arise from the adoption or rejection of a given ruling. Sometimes they differ sharply and even passionately as to the acceptability of a ruling under scrutiny. At this level there can simply be irresolvable differences of opinion. Hence, the necessity of a multi-judge court as a reviewing tribunal, one that applies thorough ratiocination in its elaboration of the statement of reasons.

The common law system also provides an institutional device to keep the brakes on freewheeling concepts of what are and are not desirable consequences: *stare decisis*. Judicial decisions at all times must be congruent with and not antagonistic to some valid and binding rule of the system. Justice William O. Douglas noted the reservoir of conceptual grounds for decisions in hard cases: “There are usually plenty of precedents to go around; and with the accumulation of decisions, it is no great problem for the lawyer to find legal authority for most propositions.”<sup>84</sup> Still, the tradition of *stare decisis* places the judge under an obligation to follow prior judicial decisions unless exceptional circumstances are present.<sup>85</sup> This adherence to the tenet of consistency

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<sup>82</sup> MAX WEBER, *Value-Judgments in Social Science*, in SELECTIONS IN TRANSLATION 69, 69 (W.G. Runciman ed., Eric Matthews trans., 1978).

<sup>83</sup> *Id.*

<sup>84</sup> William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

<sup>85</sup> In a small percentage of cases, no legal principles exist for guidance. These cases require the court to examine some justificatory principles of morality, justice and social policy. See

keeps the march of the law at a measured cadence. So does adherence to coherence, a concept closely related to, but in a sense somewhat different from consistency (an action may be consistent without being coherent).

The careful writing of the *ratio decidendi* is critical. It is the most important part of the opinion, as it provides the reader justification for the decision. In addition, the quality of the discussion may determine the opinion's vitality or longevity as a precedent.

### J. *Disposition*

Finally, the opinion writer has an obligation to the trial court, the litigants, and other future readers to clearly articulate the action taken by the reviewing court. The opinion writer must make the disposition understandable. When the judgment or order is affirmed, this task is simple. An even greater necessity to clarify exists, however, when the judgment is reversed, vacated and remanded, or modified in some manner. The task in this instance is much more complicated.

Often it is enough to say: "The judgment of the trial court will be vacated and the cause remanded for further proceedings in accordance with the foregoing." Explain the directions to the trial court either in the discussion of issues or in the disposition. This is appropriate only when there has been a clear-cut ruling on a discrete issue—most often the issue is evidentiary, procedural, or pertaining to jury instructions.

Where the judgment is "vacated and the cause remanded for further proceedings," the trial tribunal is obligated to undertake further consideration of the case. The opinion writer should clearly and systematically set forth exactly what consideration is expected. If additional consideration of a legal issue is expected because the trial court should have addressed the issue in the first instance, the appellate court must be very clear in its directions.

If you have not discussed all the issues and it is a civil case, the opinion writer may wish to merely say: "We have considered all other contentions of the appellant and conclude they are without merit" or "We have considered all other contentions of the appellant and conclude that no discussion is necessary." In a criminal case, on the other hand, the better practice is to list any issues that have been rejected by the court without having been discussed. This is important in order to keep a record of what the court has considered, no matter how frivolous the contention. If an evidentiary ruling was presented or rejected in the direct appeal without discussion, a notation in the opinion will alert

courts in a subsequent post-conviction collateral attack (e.g. habeas corpus) that the issue has been raised and a ruling made.

The opinion writer who desires his or her reader to make it all the way through the opinion to the disposition, however, must take a careful look at the entirety of the opinion for style, readability, and clarity.

#### IV. OPINION WRITING STYLE AND EDITING

The English playwright William Wycherley offered this advice to lawyers more than three centuries ago: “[B]luster, sputter, question, cavil—but be sure [that] your argument be intricate enough to confound the court.”<sup>86</sup> Lest opinion writers be tempted to take Wycherley as a role model, remember that he spent years in debtors’ prison and was described as the most vicious and licentious of the Restoration comic dramatists.

Good prose, in opinion writing as in any genre, must be clear. It must be active. It must be lean, as lean as possible. Above all, it must excite the reader’s interest. If it does not, it produces undesirable reactions in the reader, ranging from boredom to hostility.<sup>87</sup> Sadly, boredom and hostility are not strangers to many readers of judicial opinions. As Rodell once observed: “There are two things wrong with almost all legal writing. One is its style. The other is its content.” This Article is not primarily designed to address writing style, but under the circumstances some topics of style must be mentioned and observations shared.

##### A. *Cutting Down on Citations in Opinions*

In many judicial opinions, a mishmash of citation in text and footnotes has replaced the crisply stated, clean lines of legal reasoning. Opinion writers insert citations as often as possible, three or four in a simple declaratory sentence, irrespective of how they interfere with the flow of the prose, the rhythm of the presentations, or the logical order of argument. These writers seem not to care that such static impedes the reader’s easy comprehension of a statement of reasons. It is not too unkind to suggest that often what poses as a work of scholarship is

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<sup>86</sup> WILLIAM WYCHERLEY, *THE PLAIN DEALER* act III, sc. 1 (1676), reprinted in *THE COUNTRY WIFE AND OTHER PLAYS* 283, 337 (Peter Dixon ed., reissued 1998).

<sup>87</sup> Catherine Drinker Bowen kept a sign posted above her desk to discipline herself as she wrote her books: “Will the reader turn the page?”

actually a work of journalism: “a pennyworth of content is most frequently concealed beneath a pound of so-called style.”<sup>88</sup>

Some case histories of acute, if not chronic, “citationitis” include: In a school prayer case, the Supreme Court had to use 135 citations to state what it concluded to be the obvious;<sup>89</sup> in a civil RICO case, 114 citations;<sup>90</sup> in a copyright case, 164 citations.<sup>91</sup> What makes this problem serious is that the disease is contagious. Too many state and federal opinion writers—and too many administrative, trial, and appellate lawyers—mimic the law review writing style.<sup>92</sup> Thus, in a case involving an award of attorneys’ fees in the authors’ own Third Circuit court, there were 199 citations;<sup>93</sup> in another case handed down the same month, the majority required 188 citations to discuss appropriate sanctions for an attorney’s misconduct.<sup>94</sup> This excess is not necessary. The common law tradition demands no more than a clear statement of reasons. The judicial process expects no more. The opinion reader deserves no less.

Opinion writers can help cure the overcitation malady by asking themselves, every time, why they are citing a given case. The answer to this depends upon the overarching question: Where does this case fit into the theme or focus of the opinion? The length of discussion of any cited case is determined by why the opinion writer has cited it—for the facts, for the reasons or for the conclusion, or for any combination of the three.

To further minimize use of citations, confine citations to the instant jurisdiction if at all possible. It makes no sense to refer to another court’s decision if your own court has decided the point. Similarly, opinion writers should avoid string citations if the law is settled in the jurisdiction. A single citation, one that demonstrates similar or identical facts, may give the opinion its most effective argument. Avoid exaggerating the holding of a citation or stating the citation in terms of a broad principle that will require further citations to explain. A tight, fact-specific rule of law will serve the opinion writer, and the reader, far better.

There should be similarly limited use of long quotations in opinions, too. In recent years, the parenthetical has become very popular, and we strongly recommend its use. You’ve cited the case.

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<sup>88</sup> Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936).

<sup>89</sup> *Wallace v. Jaffree*, 472 U.S. 38 (1985).

<sup>90</sup> *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).

<sup>91</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

<sup>92</sup> For a proposal for more continuity of analytical approach, if not style, between opinion writing and law review writing, see Aldisert, *supra* note 46, at 139.

<sup>93</sup> *Institutionalized Juveniles v. Sec’y of Pub. Welfare*, 758 F.2d 897 (3d Cir. 1985).

<sup>94</sup> *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557 (3d Cir. 1985).

No life history is necessary. Accompanying a citation with a parenthetical serves three important purposes: (1) it tells the opinion reader why the opinion writer is citing the case, (2) it shows where the case fits into the theme or focus of the opinion, and (3) it achieves the objective of concise opinion writing.

### B. *Appropriate Use of Footnotes*

In addition to culling citations, the time has come to re-examine the legitimacy of the ubiquitous footnote, which has proliferated to intolerable levels, especially in the federal courts. At one extreme is the U.S. Supreme Court, an institution that gorges on the unnecessary and spits out footnotes in a sort of postgraduate show-and-tell. On the other end, certain judges eschew footnotes entirely.<sup>95</sup> If the purpose of an opinion is to explain and clarify, that purpose is often defeated by a style that forces the reader's eye to yo-yo up and down from the text to the bottom of the page and dizzily upward again, over and over. Footnotes obfuscate as much as they illuminate.

Proper "middle ground" footnote use includes: (1) to authenticate a statement where the citation is not important enough to include in the text; (2) to set forth multiple citations in order to support a single proposition in the text; (3) to quote extensive text of a rule, statute, regulation, will, contract, or other document essential to the opinion; (4) to dispose of collateral issues, controlled by precedent, that would disrupt flow or organization of the text; (5) to record related issues not reached; (6) to set forth trial testimony that supports facts in the text; (7) to respond to concurring or dissenting opinions; (8) to incorporate contributions of other members of the court whose ideas interfere with organization of the text or whose writing styles do not conform with the opinion writer's; and (9) to track *all* contentions in a direct or collateral criminal appeal not discussed in the opinion so that there will be a record of the contentions for *res judicata* purposes. Improper footnote use includes: to respond to a very sophisticated argument that might have been made—but was not, and to distinguish a case that could have been cited—but was not.

As with citations, the opinion writer must take a hard look at each footnote and ask, "Is this one necessary?" If the discussion is germane, it should be placed in the text. The bottom line is that if something is important enough for opinion writers to read, it should go in the main body of the opinion, not below the bottom line.<sup>96</sup>

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<sup>95</sup> See, e.g., Abner J. Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647 (1985).

<sup>96</sup> As frequently pronounced by Burton S. Laub, a distinguished writer on legal matters and a

C. *Write and Edit to Be Clear and Interesting to the Reader*

Finally, the opinion writer must rewrite, and rewrite again. He or she must become a copy editor and examine the entire piece to see where to tighten and improve the flow of its language. Opinion writers should approach revision as a stranger, as an outside reader and editor who is seeing the copy fresh for the first time. A number of excellent resources exist on the nuances of grammar, style, and word choice in opinion writing,<sup>97</sup> and we do not presume to add to their authority here.

Merely, in this process the opinion writer should do his or her best to *edit like a reader*. That is, the opinion writer should identify problems that a reader would encounter: whether the sequence of ideas flows smoothly and logically; whether the ideas are adequately supported; and whether there are conspicuous omissions or needless repetition.

All this is not to suggest that effective opinion writing should be graded purely for literary style. Rather, the problem with cumbersome opinion writing arises because the purpose of all legal writing is persuasion. Without clear writing, communication is lessened. To the extent that opinion writers diminish communication, we dilute our powers of persuasion. In substance then, to write effectively is to sell effectively. Excessive citation, excessive footnoting, and excessive pedantry, bloated and awkward, are three mighty horsemen running against an opinion writer's sole purpose: to persuasively communicate an argument to the opinion readers.

CONCLUSION

“[A]n opinion which does not within its own confines exhibit an awareness of relevant considerations, whose premises are concealed, or whose logic is faulty is not likely to enjoy either a long life or the capacity to generate offspring.”<sup>98</sup> We are fortunate to have a large number of good opinion writers in the U.S. Courts of Appeals and in the

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charming raconteur who retired as a Pennsylvania Common Pleas judge (Erie County) and then became dean of Dickinson Law School: “Anyone who reads a footnote in a judicial opinion would answer a knock at his hotel door on his wedding night.” ALDISERT, *supra* note 4, at 211.

<sup>97</sup> See, e.g., MORTON S. FREEMAN, *THE GRAMMATICAL LAWYER* 51 (1979); JOYCE J. GEORGE, *JUDICIAL OPINION WRITING HANDBOOK* 125-36 (2d ed. 1986); LEFLAR, *supra* note 54, at 195-96; WEIHOFEN, *supra* note 3, at 59-60; Douglas, *supra* note 12; Elizabeth A. Francis, *A Faster, Better Way to Write Opinions*, 27 *JUDGES' J.* 26 (1988); James D. Hopkins, *Notes on Style in Judicial Opinions*, 8 *JUDGES' J.* 49 (1969); Heyman Zimel, *Translations*, 43 *JUDICATURE* 63 (1959).

<sup>98</sup> Walter V. Schaefer, *Precedent and Policy*, 34 *U. CHI. L. REV.* 1, 11 (1966).

state supreme and intermediate courts. Notwithstanding the complex nature of today's litigation, these opinion writers prove that a clear and cogent statement of reasons may easily explain the decision to the beleaguered reader who may be short of time and perhaps slow of comprehension. The work product of the excellent opinion writers, unfortunately, provides a stark contrast with those of their less-skilled colleagues.

Luckily, the writing of judicial opinions, like most tasks in the law, can be improved with practice. So too can the reading of opinions. A focused opinion reader who can recognize the anatomy and objective of judicial opinions will more easily absorb points the opinion writer seeks to convey. In the interest of "minimiz[ing] friction in the process of communication between writer and reader,"<sup>99</sup> we urge opinion writers to write like readers, and opinion readers to read like writers. Opinion readers only stand to benefit from wider understanding of the judicial process and of the purpose and mechanics of opinion drafting. And opinion writers must at all times keep in mind that they write for distinct primary and secondary readership markets, and craft their opinions accordingly.

Together, a better understanding and appreciation by opinion readers and opinion writers for those on the other side of the page will facilitate judicial communication and enhance the continued development of our law.

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<sup>99</sup> WEIHOFEN, *supra* note 3, at 281-302.