

APPELLATE OPINION WRITING

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Very appropriately a speaker may introduce this subject with the remark: "Do as I say, not necessarily as I do." I would like to present the subject of opinion writing, very briefly, under three main headings: first, preliminary considerations, that is, things we do before we do any writing at all; second, the anatomy of the opinion itself; and, finally, certain peripheral matters such as citations, quotations and the use of footnotes.

An initial observation, if I may. There is no such thing as an exclusive style. We each have our own particular style. There is, however, good writing as distinguished from poor writing. For each of us the question is whether the writing represents our best effort.

To emphasize the importance of thought, effort and rewriting, we are told that for most mortals there is no good writing, but only good rewriting.

Teachers of legal writing often write on the blackboard, or distribute, a statement without indicating the

author. The statement that I have used is the following:

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 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.

The question then put to the class is: "Can you improve that statement?" The teacher adds: "If you can, rewrite it." The entire class is then asked to rewrite the statement.

Think, for a moment, of the statement that I quoted:

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The quotation speaks of clarity. Do words such as "sententious" and "adventitious" aid clarity? It is with some trepidation that I add that some students have improved that quotation--even though the author was none other than Mr. Justice Cardozo.

There is nothing, as has been said by Professor Leflar, that cannot be improved. For each of us the question is: "Have we done the best we can? How well can we write with our talents and ability?"

Looking at Bernie Ward I am reminded of a story. The story is about a person who knocks on the gates of Heaven seeking admission, and Saint Peter asked: "Who is there?" When the answer given was: "It is I," Saint Peter exclaimed: "Another one of those English teachers."

Yes, it is very important that we know English and English grammar. Good English is the foundation of all effective legal writing, including judicial opinions. In legal writing classes I refer to the A, B, C of legal writing. I speak of Accuracy, Brevity and Clarity.

1. Is the writing accurate? Accuracy requires that what is written is correct and free from error. It implies an exactness or precision that often distinguishes legal writing from other forms of literary composition. What is written must be straightforward and honest. Accuracy does not permit embellishment and exaggeration which distort the truth.

2. Is it brief? Brevity requires that the presentation be concise. Brevity and conciseness imply expressing what is essential in the fewest number of words. The writing is to be as short as possible; not so short, however, that the presentation is incomplete and inadequate. In answer to the question, "how short?" one often replies, "it depends."

Could the canvas of the Mona Lisa have been larger or smaller? I have read books that are only 150 or 200 pages but are too long. And we all know of excellent books that could have been longer. Think of the speaker who says, "Ladies and gentlemen, before I deliver my address I want to say something." In your writing, are you saying something? And is it something that needs to be said? Reread your writing to determine whether it is repetitious.

The law professor who has prepared good case books knows that there are judicial opinions that can be effectively "pared down." It is true that the editor eliminates matters that are not germane to the purpose for which he is using a particular case. Nevertheless, many opinions, if not most, can be effectively "pared down."

In the course of our research we must read many cases and other relevant materials. This, however, does not mean that all, or most of them, need be referred to or cited in the opinion. Before arriving at his conclusion, the judge necessarily had to consider all of the facts, and many cases and other authorities that touched upon the legal question presented. The purpose of the judicial opinion, however, is not to record the judge's research, and all that he learned in the process of deciding the case. The function of the opinion is to communicate to the reader the decision rendered, together with its supporting reasons.

The heart of this problem is selection: which facts are essential, and which cases are particularly germane? Upon which case or cases did you rely for the position that upholds or sustains your decision? Only set forth and analyze those materials that are necessary to shed light on or explain your decision.

3. Is it clear? A writing that is clear is plain and unmistakable. It is neither equivocal nor vague. Rather, it is easily understood, and implies freedom from confusion and ambiguity.

It must be remembered that it is the reader who determines if a writing is unclear. In the judicial opinion, as in all writing, the person who judges the clarity of the literary composition is the reader, not the author. If the intelligent reader is confused, or must read and reread before he begins to understand, the writing ought to be improved--to make it clear.

I assume that I need not treat matters of spelling and punctuation. Although incorrect spelling will mar the beauty of a well-written document, incorrect punctuation may play havoc with clarity, and distort the intended meaning.

Since to accomplish our mission we are to be masters of words, reference ought to be made to the selection of the mot juste. What is the right word that expresses the thought we wish to convey? We are told that the Maximes of La Rochefoucauld were so successful because of his "taste for the right word." We ought not to be prejudiced against foreign words, particularly Latin, when they beautifully express an idea or a concept. For example, if I say sui juris, sui generis, res ipsa loquitur, or quid pro quo, the

lawyer will know precisely what I mean. Also, if I say, to an audience of lawyers, that I will talk about res judicata or stare decisis, the Latin words have expressed the thought best.

Judges who must commit the law to writing have a special responsibility to choose the right word. Lack of precision in the choice of words causes confusion and impedes progress in the development and formulation of legal principles and doctrines. An example was the use of the word "jurisdiction" here this morning. It was stated that the court had no jurisdiction to grant equitable relief, that is, an injunction. There was no question that the court had jurisdiction. The question, rather, was whether the facts and circumstances presented were such as to warrant the exercise of the traditional jurisdiction of a court of equity. Whenever a plaintiff seeks quia timet relief, because he is in fear, the court must necessarily inquire whether he is entitled to an equitable remedy. Hence, the question is whether the remedy requested--injunction or declaratory judgment--is appropriate, not whether the court has jurisdiction. I must admit, however, that often the fault is not the word, but rather the

idea, that is, an unclear grasp or understanding of the principle or concept.

A teacher of the law of negotiable instruments may give many examples of the confusion caused by the improper use of the words "negotiated" and "assigned." Assignment and negotiation are words of art with a specific meaning. If you wish a neutral term, you may refer to a "transfer."

In judicial opinions, a quotation from an earlier case often starts with the words: "In the case of Jones v. Brown the court stated," or "the court said." The words: "stated," "said" or "wrote" are often used so frequently that they become monotonous. Did the court merely "state," "say," or "write," or did it "find," "hold," or "decide"? Does the court, in the prior case, speculate, intimate, suggest, declare, or enunciate? Did it apply a particular rule, principle, or standard? Accuracy requires appropriate language distinguishing findings of fact, conclusions of law, and the holding of a case. The correct words used indicate the degree of authority or persuasiveness to which the prior case is entitled. They must distinguish the holding of the case from dictum.

The content and thoroughness of the opinion may also depend upon the nature of the case and the issue presented. Is the case unique or of novel impression so that the opinion will have precedential value? Under our system, by virtue of the doctrine of stare decisis, all cases have precedential value. Yet, all of us know that in most areas, prior opinions already offer adequate guides to the state of the law. When judicial authority is abundant, and the law is clear, an extensive opinion on the law is unnecessary. It is clearly a function of the appellate court to develop, clarify, and restate the law. Nevertheless, when prior authority thoroughly covers the field, the purpose of the opinion is simply to decide the case, that is, res judicata. In the absence of special factors that will give the judicial opinion precedential value, the judge need not be preoccupied with the stare decisis function of the judicial opinion.

Reference is made to the res judicata and stare decisis aspects of the judicial decision because occasionally an opinion seems more concerned with its precedential value than with the justice of the particular case. It cannot be forgotten that a function of the appellate court is also to make sure that

substantial justice has been done. Undue preoccupation with the precedential authority of the opinion may tend sometimes to distort judgment. In these cases, the opinion apologizes for what seems to be an unjust result. It attempts to justify the result by expressing the fear that a contrary holding would "open a Pandora's box" or cause a "flood of litigation." Undue concern for future cases, at the expense of the decision under present consideration, may violate the ideal of justice. I am reminded of Aristotle's Nichomachean Ethics, and his discussion of epikeia (epieikeia). Like the aequitas of the Romans, the notion implies a dispensation from the literal application of the general rule to do justice and equity in the particular case.

The length and thoroughness of the appellate judicial opinion will also depend upon whether it will affirm, reverse, or modify the decision on appeal. If you agree with the opinion on appeal, you may, of course, say so. Indeed, you may expressly adopt it. There is no need to retravel the identical path. If you find that no reversible error has been committed, a concise, simple statement is all that is required.

On the other hand, if the appellate opinion will reverse or modify the decision on appeal, the reasons for the reversal or modification should be set forth.

What error or errors were committed that warrant a reversal? Where did the court below go astray? Were its findings of fact clearly erroneous? Did it fail to consider or overlook important facts or points of law? Did it rely upon inapplicable authority, or did it misconstrue governing authority? The appellate opinion that reverses the decision on appeal should contain a persuasive statement of reasons.

The anatomy of the opinion pertains to its parts. What should the opinion consist of or contain?

In general terms, the appellate opinion should contain:

1. an introductory statement or paragraph setting forth the nature of the case and the appeal;
2. the question presented on the appeal;
3. the essential or salient facts;
4. the judicial discussion of the pertinent authority which resolves or decides the question or issues presented; and
5. the precise disposition of the appeal.

What do you think of the following opening paragraphs? Are they adequate, good, or excellent?

The question posed by this criminal prosecution is a recurring one: Is a defendant whose mental capability is maintained only through the use of a prescribed medication competent to stand trial? We hold that he is.

This statement is simple and easy to grasp. It introduces the case. You are immediately told the question presented on the appeal, and the holding of the court.

Often a case may be introduced by a succinct statement of the question presented. It states the precise issue before the court, and what it must decide.

Can the following statement of the question presented be improved?

The most important question presented by this appeal is the permissible extent or scope of a search incident to a lawful arrest based on probable cause, there being neither an arrest or search warrant, and the lengthening shadows cast upon such permissible scope by the decision in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034 (1969).

What do you think of the following statement?

Defendant appeals from an order of the district court quashing service of process on plaintiff for want of personal jurisdiction. We hold that the State's long-arm statute confers jurisdiction over a person who breaches a contract after the effective date of the statute, although the contract was made before that date. Accordingly, we reverse and remand.

The statement of the question presented should define the precise issue that the appellate court is called upon to decide. The statement quoted from the case dealing with the service of process not only states the issue, but also gives the holding of the case.

The question presented on the appeal may be followed by a recitation of the salient facts of the case. The facts are the foundation of the findings and legal conclusions. They facilitate an understanding of the dispute between the parties, and the issue or question that the court must decide. Excepting cases when the question pertains to evidentiary questions or sufficiency of the evidence, the appellate opinion need not contain a detailed statement of the facts. Only the key or operative facts need be set forth. Clearly, however, candor requires a statement of those facts stressed or relied upon by the losing party.

The salient facts are followed by a discussion or statement of the pertinent authorities. This discussion must contain the ratio decidendi of the case, that is, the reason or ground for the decision. This discussion will not only affirmatively set forth the

judicial reasoning or point which determined the judgment, but invariably will also answer the main or best point upon which the unsuccessful party relied.

The conclusion or decision of the court must be expressly set forth. Although it may seem obvious, the judge must make sure that he or she has answered the specific question presented. The author of the opinion must also be certain that the opinion states the precise relief that has been granted.

In summary, the following questions serve as a checklist:

Does the opinion state:

1. the question or issue that must be decided?
2. the salient facts that give rise to the legal question presented?
3. the specific findings and conclusion of the court?
4. the legal reasoning (based upon applicable or governing authority) that led to the stated legal conclusion or determination?
5. the nature of the relief granted and the actual disposition of the appeal?

Although time does not permit further extended discussion, I did, nevertheless, wish to make a few additional observations on certain peripheral matters:

1. Use direct language and avoid circumlocution, that is, wordy speech and indirect and roundabout expression.

2. Cite cases relied upon but avoid decorative or "string" citations.

3. Use footnotes sparingly. Footnotes are part of the opinion, and brevity is not attained by writing a concise text encumbered with lengthy footnotes. Footnotes are not places for matter that ought to be omitted from the opinion. Footnotes should contain pertinent material that, if placed in the body of the opinion, would affect the smooth reading of the text. They can be effectively used to set forth the text of a statute, or some historical or procedural matter that is pertinent to the case.

4. Avoid lengthy quotations. They are invariably printed in smaller type and are ineffective.

5. Quote only the key words, phrases, or sentences. Prior to quoting, evaluate the source or author of the quoted material. Is the quotation taken from binding authority? Its persuasiveness may also depend upon the status or respect enjoyed by its author.

6. Be generous in the use of quotation marks to acknowledge the contribution of others whose labors have greatly facilitated your writing of the opinion.

Throughout the conference, I was delighted to hear the several references that were made to "candor" in the judicial process. This encourages me to say a word about the contribution of the lawyer to the appellate judicial process, and to the judicial opinion which memorializes the law.

Were I to say, "The power to tax is the power to destroy," of whom would you think? Surely you would say, "Chief Justice John Marshall in McCulloch v. Maryland." Actually, the words were the inspired contribution of Daniel Webster, counsel for the plaintiff in error in that case.

Noting the relationship between the lawyer's brief and the judicial opinion, Justice Rossman of the Supreme Court of Oregon wrote, "If better briefs are written, the court will produce better decisions." The statement highlights the contribution of the lawyer to the judicial opinion. Rather than to decry the poor quality of appellate briefs and oral argument, a conscious effort must be made to inform lawyers of the importance that judges attribute to briefs and oral argument. Lawyers will devote additional valuable time and effort in the preparation of briefs and oral argument if they realize that their contribution is necessary, appreciated, and acknowledged.

Having completed the writing of your appellate judicial opinion, read and reread it to evaluate your work product. What portions may be improved and require rewriting? Is it repetitive or does it contain what must be stated? Whether a book or a judicial opinion is lengthy is determined not really by its size, but rather, by its merit and its inspiration--or lack of them.

I close by emphasizing the importance of the opening paragraph because it tends to forecast the quality of the entire product. Think, for example,

of the two-volume work by Sir Frederick Pollock and Professor Maitland entitled The History of English Law. It starts with the beautiful sentence: "Such is the unity of all history that any one who endeavours to tell a piece of it must feel that his first sentence tears a seamless web." After reading that sentence, you have reason to believe that the authors have something to say, and that they will say it well.