Judicial Writing Manual

Federal Judicial Center

THE FEDERAL JUDICIAL CENTER

Board

The Chief Justice of the United States
Chairman

Judge J. Clifford Wallace
United States Court of Appeals for the Ninth Circuit

Judge David D. Dowd, Jr.
United States District Court Northern District of Ohio

Judge Monroe G. McKay
United States Court of Appeals for the Tenth Circuit

Judge Diana E. Murphy
United States District Court District of Minnesota

Chief Judge William C. O'Kelley
United States District Court Northern District of Georgia

Judge Robert E. Ginsberg
United States Bankruptcy Court Northern District of Illinois

L. Ralph Mecham
Director of the Administrative Office of the United States Courts

Director
Judge William W Schwarzer

Deputy Director
Charles W. Nihan

Division Directors

William B. Eldridge
Research

Sylvan A. Sobel
Publications

Daniel L. Skoler
Continuing Education & Training

[Vacant]
Innovations & Systems Development

Russell R. Wheeler
Special Educational Services

Judicial Writing Manual

Board of Editors for the Judicial Writing Manual

Alvin B. Rubin, *Chair*
U.S. Circuit Judge

Patricia M. Wald
Chief U.S. Circuit Judge

Wilfred Feinberg
U.S. Circuit Judge

John C. Godbold
U.S. Circuit Judge
Director Emeritus, Federal Judicial Center

James Dickson Phillips, Jr.
U.S. Circuit Judge

J. Clifford Wallace
U.S. Circuit Judge

Louis H. Pollak
U.S. District Judge

A. Leo Levin
Professor, University of Pennsylvania
Director Emeritus, Federal Judicial Center

Paul J. Mishkin
Professor, University of California, Berkeley

Stephen J. Wermiel
The Wall Street Journal

William W Schwarzer
U.S. District Judge
Director, Federal Judicial Center

Sylvan A. Sobel, Editor
Director, Publications Division
Federal Judicial Center

Judicial Writing Manual

Federal Judicial Center

1991

This Judicial Writing Manual has been produced under the auspices of the Federal Judicial Center. The analyses and recommendations are those of the manual's board of editors. On matters of policy, the Center speaks only through its statutorily-created Board.

fourth printing

Contents

Foreword vii
Acknowledgments ix
Introduction 1
Determining the Scope of the Opinion 3
Factors to consider 4
Preparing to Write 9
Outlines 10
Using law clerks 10
Materials to review 11
Organizing and Writing the Opinion 13
Structure 13
Introduction 13
Statement of issues 14
Facts 15
Discussion of legal principles 16
Concluding paragraph 19
Summary disposition 19
Issuing opinions orally from the bench 20
Language, Style, and Self-Editing 21
Characteristics of bad writing 21
Guides for good writing 22
Footnotes and citations 24
Edit carefully 24
Dissents, Concurrences, and Writing with Other Judges 27
Joint opinion writing 27
Commenting on a draft prepared by another judge 28
Dissenting opinions 29
Concurrences 30
Reading About Writing 31
Books 32
Articles 32
Other 32
Appendix A: Sample Memorandum Opinion 33
Appendix B: Sample Summary Order 35
Appendix C: Sample Standards of Review 36
Appendix D: Sample Concluding Paragraphs 38
Appendix E: Sample Brief Dissenting Opinions 39
Appendix F: Sample Brief Concurring Opinions 41

Foreword

The link between courts and the public is the written word. With rare exceptions, it is through judicial opinions that courts communicate with litigants, lawyers, other courts, and the community. Whatever the court's statutory and constitutional status, the written word, in the end, is the source and the measure of the court's authority.

It is therefore not enough that a decision be correct — it must also be fair and reasonable and readily understood. The burden of the judicial opinion is to explain and to persuade and to satisfy the world that the decision is principled and sound. What the court says, and how it says it, is as important as what the court decides. It is important to the reader. But it is also important to the author because in the writing lies the test of the thinking that underlies it. "Good writing," Ambrose Bierce said, "essentially is clear thinking made visible." A. Bierce, Write It Right 6 (rev. ed. 1986).

To serve the cause of good opinion writing, the Federal Judicial Center has prepared this manual. It is not held out as an authoritative pronouncement on good writing, a subject on which the literature abounds. Rather it distills the experience and reflects the views of a group of experienced judges, vetted by a distinguished board of editors. No one of them would approach the task of writing an opinion, or describe the process, precisely as any of the others would. Yet, though this is a highly personal endeavor, some generally accepted principles of good opinion writing emerge and they are the subject of this manual.

We hope that judges and their law clerks will find this manual helpful and that it will advance the cause for which it has been prepared.

William W Schwarzer

Acknowledgments

The Center and the board of editors are grateful to the following judges who participated in telephone interviews to discuss their experience with and views on judicial writing. Their thoughtful responses contributed substantially to this manual.

Stephen Breyer, Chief U.S. Circuit Judge
Gerald B. Tjoflat, Chief U.S. Circuit Judge
Patricia M. Wald, Chief U.S. Circuit Judge
Ruggero J. Aldisert, U.S. Circuit Judge
Richard S. Arnold, U.S. Circuit Judge
Frank M. Coffin, U.S. Circuit Judge
Wilfred Feinberg, U.S. Circuit Judge
John J. Gibbons, U.S. Circuit Judge, ret.
Ruth Bader Ginsburg, U.S. Circuit Judge
Frank M. Johnson, Jr., U.S. Circuit Judge
James K. Logan, U.S. Circuit Judge
Monroe G. McKay, U.S. Circuit Judge
James Dickson Phillips, Jr., U.S. Circuit Judge
Richard A. Posner, U.S. Circuit Judge
Joseph T. Sneed, U.S. Circuit Judge
J. Clifford Wallace, U.S. Circuit Judge
John Minor Wisdom, U.S. Circuit Judge
Robert E. Keeton, U.S. District Judge
Prentice H. Marshall, U.S. District Judge
Louis H. Pollak, U.S. District Judge
William W Schwarzer, U.S. District Judge
Jack B. Weinstein, U.S. District Judge
Lloyd King, Chief U.S. Bankruptcy Judge
Robert E. Ginsberg, U.S. Bankruptcy Judge

We are also grateful to Carol Krafka of the Research Division staff, who conducted the interviews and edited the transcripts prepared by members of the Center's Research and General Administration staff, and to David Marshall and Scott Filderman for their thorough editing.

Introduction

Judicial opinions serve three functions. First, written opinions communicate a court's conclusions and the reasons for them to the parties and their lawyers. Second, when published, opinions announce the law to other lawyers, judges, academics, and the interested public. Finally, the preparation of a written opinion imposes intellectual discipline on the author, requiring the judge to clarify his or her reasoning and assess the sufficiency of precedential support.

The opinion should fairly, clearly, and accurately state the significant facts and relevant rules of law and demonstrate by its analysis the reasonableness of its conclusions. Misstating significant facts or authorities is a mark of carelessness or worse and undermines the opinion's authority and integrity. Unclear or ambiguous writing reflects the author's lack of clear thinking and defeats the opinion's purpose.

This manual is intended to encourage judges and law clerks to think critically about their writing — not only about what to include and what to exclude but also about how to write well. We expect that newly appointed judges and law clerks will be the principal users of this manual. It therefore takes a functional approach to opinion writing, describing the considerations that arise at each stage of the writing and editing process; recommending organizational, structural, and stylistic techniques; and explaining the reasons for its recommendations. In keeping with the principle that there is no single right way to write an opinion, the manual explores alternatives and the considerations for choosing among them.

This manual should also help experienced judges take a fresh look at their approaches to writing and their styles. Professor Robert Leflar has written:

> Pride of authorship is by no means an unmitigated evil. . . . [T]his pride can drive a man to hard work and with meticulous effort. The poorest opinions are apt to be written by judges who take no pride in them, who regard the preparation of them as mere chores. Pride in work well done is a proper

> incident of good craftsmanship in any field of work, including law. An opinion in which the author takes no pride is not likely to be much good.

Leflar, *Some Observations Concerning Judicial Opinions*, 61 Colum. L. Rev. 810, 813 (1961). The pride judges take in their written work should encourage self-evaluation.

This manual is not intended to proclaim *the* right way of writing an opinion. Anyone undertaking to announce authoritative rules of good writing invites debate and comparison. As one judge said: "I have one overarching rule. That is, don't have any such rules." Indeed, in a leading text on good writing, E. B. White acknowledged that "[s]tyle rules of this sort are, of course, somewhat a matter of individual preference, and even the established rules of grammar are open to challenge." W. Strunk & E. B. White, The Elements of Style xv (3d ed. 1979).

Instead, the purpose of the manual is to stimulate judges (whether they agree or disagree with what is said here — and there is room for disagreement) to think as systematically about writing their opinions as they do about deciding their cases. Judges should ask themselves: Am I writing this way because this is how I've always done it, or is there a better way? Is there a reason for organizing the opinion this way? For including these particular facts? For discussing this issue at length? For citing this case? Is this sentence clear? Are all the words in it necessary?

In the following chapters, the manual takes the reader through the opinion-writing process. Chapter 2 suggests some considerations to guide judges in deciding whether to write a "full-dress" opinion, a memorandum, or an unpublished opinion, and when to write briefly and when not. Chapter 3 discusses steps a judge should take before starting to write, including preparing an outline and how to use law clerks. Chapter 4 discusses the organization, structure, and content of an opinion. Chapter 5 offers suggestions on language, style, and editing for brevity. Chapter 6 presents considerations relevant to co-writing an opinion and commenting on the opinions of other members of the court and to dissenting and concurring opinions. Chapter 7 contains a bibliography of books and articles that may be useful to those who wish to read more about judicial writing. Appendices provide examples of some of the points discussed in the manual.

Determining the Scope of the Opinion

A judicial opinion informs parties of the outcome of their case and articulates the legal principles on which the opinion is based in order to guide the bench, the bar, academia, and the public. Because written decisions serve both case-deciding and law-making functions, they range in form from one-sentence, unpublished summary orders to formally structured, citation-laden full-dress opinions. An opinion that is intended only to inform the parties of the outcome of their dispute should not be as elaborate as one intended to serve as precedent. Before beginning to write, judges should decide what purpose the opinion will serve and how to write it to suit that purpose.

This manual will refer to three types of written decisions: full-dress opinions, memorandum opinions, and summary orders.

Full-dress opinions are those that require structured discussion of the facts, legal principles, and governing authorities. The significance or number of the issues presented, the novelty of the question, and the complexity of the facts are among the factors that determine whether an opinion requires full-dress treatment.

Memorandum opinions are appropriate where the decision does not require a comprehensive, structured explanation but still needs some explanation of the rationale. They are generally brief and informal and may or may not be published. Per curiam opinions are generally included in this category. Appendix A contains an example of a memorandum opinion.

Summary orders simply state the disposition of the case, sometimes with a brief statement of findings and conclusions, but often with little or no explanation. Summary orders are usually unpublished. Appendix B contains an example of a summary order.

The following sections discuss some of the factors a judge should consider in determining what kind of opinion to write.

Factors to consider

Three factors influence the scope and style of an opinion: the complexity of the facts and nature of the issues, the intended audience, and whether the opinion will be published. Although the manual treats these factors separately, they are interrelated.

Facts and issues

The complexity of the facts and the nature of the legal issues are the principal factors determining the kind of opinion required. If the precedents are clear and the material facts are not complicated, the scope of the opinion will be limited. As the controlling law becomes more uncertain or the material facts more complex, the need for exposition and analysis to explain the reasons for the court's decision increases. Some cases that present complex fact patterns may require lengthy discussion of the facts even though the applicable law may be simple. Others raising novel legal issues may require extended analysis of law and policy.

The scope of an opinion will be influenced by how well developed the law is in the area. Judges should consider whether the issue has previously been decided authoritatively and whether another opinion would aid in the development or explanation of the law. They should ask whether their opinion would say something that has not been said before. If the subject matter has been thoroughly aired in prior opinions, this one need not trace the origins of the rule and elaborate on its interpretation. In some cases, it is sufficient to affirm for the reasons stated by the court below. If the decision merely closes a gap in existing law, little more is needed than an explanation of the applicable principles and the reasons for the court's choice among them. Where such a decision contributes to the development of the law, a brief, published per curiam or memorandum opinion is appropriate. Summary orders may be sufficient where clear existing law is simply being applied to facts that are undisputed or that are made indisputable on appeal because, for example, they are jury findings supported by substantial evidence.

When, however, an opinion enters less developed areas of the law, laying down a new rule or modifying an old one, the writer must think not only about the rationale of the decision but also about the impact it will have as precedent. The writer should discuss and analyze the precedents in the area, the new direction the law is taking, and the effect of the decision

on existing law. Even if it appears that the litigants do not need a detailed statement of the facts, the opinion should present sufficient facts to define for other readers the precedent it creates and to delineate its boundaries. The relevant body of precedent — and the relevant policies — should be analyzed in sufficient detail to establish the rationale for the holding. A decision "... can be accepted as completely just and fair only if the reasoning that supports it has been adequate, and the main relevant considerations have in fact been impartially weighed in the balance." S. Hampshire, Innocence and Experience 53 (1989).

Audience

Because opinions decide cases, they are written primarily for the litigants and their lawyers—and for the lower courts or agencies whose decisions they review. To the extent an opinion is addressed to the parties, it should provide them with a fair and accurate statement of what was before the court for decision, what the court decided, and what the reasons for the decision were. This can generally be accomplished without writing a full-dress opinion. The parties will be familiar with the facts and will generally not be interested in an extensive exploration of the law, other than what is needed to give the losing party a clear explanation for the result.

The writer must also ask whether the opinion has something to say to others besides the parties. Opinions intended to inform other audiences may require additional factual development and legal analysis. How much analysis is required, and how detailed it must be, depends on the subject matter and the probable audience. Judges may assume a certain level of sophistication and familiarity with the law on the part of lawyers. But if the case involves an arcane area of law familiar primarily to specialists — tax, labor, or antitrust law, for example — more discussion of the factual and legal background will be needed and care should be taken to avoid the use of technical language and to define technical terms to aid comprehension by the uninitiated.

An opinion remanding a case must tell the lower court what is expected on remand (*see* p. 19). An opinion setting guidelines for trial courts to follow must state the factual basis, legal rationale, and policy foundation of the guidelines sufficiently to enable trial judges to apply them correctly.

The judge needs to consider whether a statement of facts and legal analysis adequate to explain the decision to the parties will suffice also for

a higher court to understand the basis for the decision. When the decision turns on complex facts, a more elaborate explanation than is necessary for the parties may be helpful to the appellate court. And when the decision involves novel issues or a developing area of law, it is appropriate to trace the prior development of the law and develop the legal and policy rationale at some length. Opinions should not, however, be turned into briefs or become a vehicle for advocacy.

Members of the general public will rarely read opinions. But reporters from the media will communicate what they believe to be the substance of an opinion that strikes them as being of public interest. When an opinion addresses an issue of general public interest or is likely to attract media attention, it should be written so as to ensure that it will be understood — and not misunderstood. The mark of a well-written opinion in any event is that it is comprehensible to an intelligent lay person.

Publication

All courts of appeals have adopted rules, internal operating procedures, or other policies concerning publication and non-publication of opinions. *See generally* Stienstra, *Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals* (Federal Judicial Center 1985). Some of the procedures specify criteria for determining whether or not an opinion should be published. For example, D.C. Circuit Rule 14(b) directs:

> An opinion, memorandum, or other statement explaining the basis for this Court's action in issuing an order or judgment shall be published if it meets one or more of the following criteria:
>
> (1) with regard to a substantial issue it resolves, it is a case of first impression or the first case to present the issue in this Court;
>
> (2) it alters, modifies, or significantly clarifies a rule of law previously announced by the Court;
>
> (3) it calls attention to an existing rule of law that appears to have been generally overlooked;
>
> (4) it criticizes or questions existing law;
>
> (5) it resolves an apparent conflict in decisions within the circuit or creates a conflict with another circuit;
>
> (6) it reverses a published agency or district court decision, or affirms a decision of the district court upon grounds different from those set forth in the district court's published opinion; or
>
> (7) it warrants publication in light of other factors that give it general public interest.

Similar criteria are included in 1st Cir. R. 36.2(a); 4th Cir. I.O.P. 36.3; 5th Cir. R. 47.5.1; 6th Cir. R. 24(a); 7th Cir. R. 53(c)(1); 8th Cir. Plan for Publication of Opinions ¶ 4; and 9th Cir. R. 36–2.

Other circuits have more general guidelines, giving judges latitude to decide whether to publish. The standard in the Third Circuit, for example, is that "[a]n opinion is published when it has precedential or institutional value." 3d Cir. I.O.P. chap. 5.5.1. *See also* 11th Cir. R. 36-1, I.O.P. 3 ("Opinions that the panel believes to have no precedential value are not published"); Fed. Cir. R. 47.8(c) ("Unpublished opinions . . . are those unanimously determined by the panel as not adding significantly or usefully to the body of law and not having precedential value"). The Second Circuit permits disposition "in open court or by summary order" of "cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion . . . ." 2d Cir. R. 0.23. Otherwise, written opinions, including per curiam opinions, are published. *See also* 10th Cir. R. 36.1 (permitting disposition without opinion where "the case involves application of no new points of law that would make the decision of value as a precedent").

In the district courts, the decision to publish in the West Reporter System is entirely in the judge's discretion. Because decisions of district judges are merely persuasive authority—i.e., they are not binding precedent even in their own districts—publication should be the exception. In addition, time constraints argue against writing formal opinions unless the decision involves a novel or complex issue or a matter of public importance and thus may be useful to attorneys and judges or be of interest to the public. Other reporters than West will sometimes print copies of "unpublished" opinions. The court has no control over this.

Because unpublished decisions are written primarily for the parties, they will require little or no elaboration of the facts and law. Often they will take the form of summary orders or memorandum opinions. The determination as to whether a disposition should be published or unpublished should be made as soon as possible, so that the judge who writes the opinion will not spend an undue amount of time on it if publication is not warranted.

Preparing to Write

Before beginning to write, judges should think through what they want their opinion to say and how they want to say it. They should consider the scope of the opinion, the prospective audience, and whether the opinion will be published. They should marshal the material facts, formulate the issues, identify the applicable rules of law, and determine the appropriate form of judicial relief. In short, they must break the case down into its components.

Professor Richard Wasserstrom characterizes the procedure by which a conclusion is reached as the "process of discovery" and the procedure by which a conclusion is justified as the "process of justification." R. A. Wasserstrom, The Judicial Decision: Toward a Theory of Legal Justification 27 (1961). The judicial writer must remember to separate these phases of decision making. A judge should have completed the process of discovery and reached a conclusion — if only a tentative one — before beginning to write. Setting down the reasons in writing then constitutes the process of justification.

This does not mean that judges will not change their minds after they have started to write. Sometimes judges may decide in advance where they want to go, but in the process of writing discover that they cannot get there. Justice Roger Traynor wrote that he

> found [no] better test for the solution of a case than its articulation in writing, which is thinking at its hardest. A judge, inevitably preoccupied with the far-reaching effect of an immediate solution as a precedent, often discovers that his tentative views will not jell in the writing. He wrestles with the devil more than once to set forth a sound opinion that will be sufficient unto more than the day.

Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. Chi. L. Rev. 211, 218 (1957). Nevertheless, the writing should reflect only the final decision and the reasons for it. Where the decision is a close one, the opinion should say so, but it should not record every step and misstep the writer took along the way.

The following sections discuss some of the techniques judges use to organize their thoughts and to prepare before starting to write.

Outlines

Outlines help to organize one's thinking. They may take a variety of forms: a formal, written outline prepared by the judge or law clerk; a rough sketch of important facts, issues, and points to discuss that the judge enlarges in the course of writing; a bench memorandum prepared by a law clerk in advance of oral argument, which the judge has marked up after the argument and conference; a brief checklist; or perhaps only a mental framework. Whatever the form, the point is that judges, like all other good writers, must organize their thoughts before starting to write.

A good time to prepare an outline is shortly after the conference at which the case is discussed and the opinion assigned, when the writer's own ideas and those of the other judges are fresh in mind. In addition to organizing the writer's thinking, the outline serves as an informal record of the discussion at the conference.

Using law clerks

Law clerks can provide substantial assistance to the judge faced with writing an opinion. Especially in a time of burgeoning dockets, their help is crucial. Discussions with law clerks are helpful in planning the opinion and developing the outline. The opportunity to test one's thoughts in vigorous exchanges with the clerks is invaluable. This will continue to be a useful exercise throughout the writing process as the judge and the law clerks discuss and criticize the opinion as it develops, ferreting out error and ambiguity, striving for precision, and polishing the final product.

In the writing process itself, judges use their law clerks in different ways. Some limit the clerks to performing research, preparing bench memos, and editing, cite-checking, and commenting on the judge's drafts. Some assign the writing of the first draft to a law clerk in routine cases only; others have clerks write drafts in even the most complex cases, having found that working from a draft, even a rough draft, makes the task of writing the opinion easier. A clerk assigned to write the first draft should use an outline developed by or with the judge, and should understand the scope, organization, and probable outcome of the opinion. Many judges, having found that it takes more time to work with a clerk's draft, write their own draft,

then polish it into the final product. Some judges invite the law clerk to rewrite the judge's first draft before the judge returns to it for preparation of the final version.

The process the judge uses depends on his or her own work habits and style and on the capabilities of the particular law clerk. The judge must always remember, however, that the law clerk usually is fresh out of law school, with little practical experience. Even a distinguished academic record does not qualify a law clerk to practice the craft of judging, to draw the fine line between reversible and harmless error, to make the sometimes delicate assessment of the effect of precedent, and to recognize subtle distinctions in the applicable law. It is the unusual law clerk who has perfected a writing style that makes for a satisfactory opinion. Law clerks' fact statements, analysis, and conclusions may require major revisions. Judges should not simply be editors — no matter how capable the clerk, the opinion must always be the judge's work.

Materials to review

Little need be said on this subject. The judge will, of course, have the briefs of the parties and the law clerk's bench memorandum. The full record is not always readily available. When an opinion turns on the specifics of testimony or on what occurred in the court room, there may be no substitute for reading the relevant portions of the transcript; rarely will excerpts or summaries in briefs convey the significance of these events fairly and fully. If an exhibit is crucial, it should be examined. Reference to the record may also be necessary to determine the precise procedural course by which the appeal has reached the court and the relevant proceedings below. The judge will therefore want to arrange for access to the record while preparing the opinion.

Some appellate courts tape-record the oral argument. Listening to the tape recording before beginning to draft an opinion can help refresh one's memory of the significant issues and the arguments made.

Organizing and Writing the Opinion

A judicial opinion should identify the issues presented, set out the relevant facts, and apply the governing law to produce a clear, well-reasoned decision on the issues that must be resolved to decide the case. The guidelines that follow are intended to help judges write opinions that will meet those tests.

Structure

A full-dress opinion should contain five elements: (1) an introductory statement of the nature and procedural posture of the case; (2) a statement of the issues to be decided; (3) a description of the material facts; (4) a discussion of the governing legal principles and the resolution of the issues; and (5) the disposition and necessary instructions. The organization and style of opinions will, of course, vary from case to case, but this is the framework on which to build.

Clear and logical organization of the opinion will help the reader understand it. The use of headings and subheadings, Roman numerals, or other means of disclosing the organization to the reader is always helpful, particularly where the opinion is long and the subject matter complex. These not only provide road signs for the reader, they also help to organize the writer's thoughts and test the logic of the opinion. They also enable a judge who wishes not to join some part of the opinion to identify it. And they assist in the indexing and classification of opinions and their retrieval by researchers.

The following sections discuss each of the elements of an opinion.

Introduction

The purpose of the introduction is to orient the reader to the case. It should state briefly what the case is about, the legal subject matter, and the result. It may also state some or all of the following:

(1) The parties: the parties should be identified, if not in the introduction then early in the opinion, preferably by name, and that identification should be used consistently throughout. The use of legal descriptions, such as "appellant" and "appellee," tends to confuse, especially in multi-party cases.

(2) The procedural and jurisdictional status: the basis for jurisdiction, relevant prior proceedings, and how the case got before the court.

(3) The issue: the issue or issues to be decided, unless they are so complex that they are better treated in a separate section.

Summarizing the holding at the outset can save time for readers, particularly researchers who will be able to determine immediately whether to read the rest of the opinion. Providing a terse summary of the holding at the start of the opinion also helps the writer to state it precisely and succinctly. The final version of the introduction may be best written after the opinion is completed, when the judge has refined the issues, the conclusions, and the supporting analysis.

Some judges prefer to place the holding and conclusion at the end, believing that an opinion will be more persuasive if the reader must work through it before learning the outcome.

Statement of issues

The statement of issues is the cornerstone of the opinion; how the issues are formulated determines which facts are material and what legal principles govern. Judges should not be prisoners of the attorneys' analysis; they should frame the issues as they see them, even if this differs from how the lawyers state them. That an issue has been raised by the parties does not mean that it must be addressed in the opinion if it is not material to the outcome.

The statement of issues should be brief. Although an issue or two can often be sufficiently identified in the introduction, the number or complexity of the issues in some cases may require separate statements.

The statement may come before or after the statement of facts. Stating the issues first will make the fact statement more meaningful to the reader and help focus on material facts. Judge Frederick G. Hamley of the Ninth Circuit has written: "A preliminary statement of the question, even in general terms, enables one to read the factual statement with discernment. It also aids the writer of the opinion in confining the factual statement to that which is essential." Section of Judicial Administration, American Bar

Association, Internal Operating Procedures of Appellate Courts 30 (1961). In some cases, however, it may be difficult to state the issues clearly unless the reader is familiar with the material facts. This may be true, for example, where the issue is procedural and requires an explanation of the setting.

The statement of issues should not be confused with recitals of the parties' contentions. Lengthy statements of the parties' contentions, occasionally found in opinions, are not a substitute for analysis and reasoning and should be avoided.

Facts

In a single-issue case, the facts can be set forth in one statement early in the opinion. But when a series of issues is raised, some facts may be relevant to fewer than all of the issues. This situation confronts the judge with the difficult task of presenting enough facts at the outset to make the opinion understandable without later repetition when discussing particular issues that require further elaboration of facts. In such a case, the initial statement of facts may be limited to necessary historical background, leaving the specific decisional facts to be incorporated in the analysis of the issues on which they bear.

Only the facts that are necessary to explain the decision should be included, but what is necessary to explain the decision is not always obvious and may also vary depending on the audience. An unpublished memorandum opinion intended only for the parties does not require background or historical facts; the opinion need only identify the facts that support the conclusion. Background facts, however, may sometimes be helpful in giving the context of a decision and explaining its rationale. And opinions that are likely to be read by audiences other than the parties may require lengthier fact statements to provide the context for the decision and delineate its scope.

Excessive factual detail can be distracting. Dates, for example, tend to confuse and should not be included unless material to the decision or helpful to its understanding. On the other hand, while brevity and simplicity are always desirable, they are secondary to the need for a full and fair statement. Facts significant to the losing side should not be ignored.

Some judges like to include facts that, while not material, add color. "We've got to have some fun," one judge said. Some feel that this is a mark of the author's flair and improves readability. There is an obvious danger,

however, that the reader may think the decision is based on these facts even though they are not material to the reasoning. Moreover, this style of writing — though appealing to the author — may be seen by the parties as trivializing the case. It must therefore be approached with caution.

Above all, the statement of facts must be accurate. The writer should not assume that the facts recited in the parties' briefs are stated correctly. There is no substitute for checking fact references against the record. No matter how good the lawyers, the judge may find that the record facts differ from the way they are stated in the briefs. If time does not permit the judge to read the entire record personally, a law clerk should be assigned that task with instructions to mark all the relevant parts for the judge to review.

Discussion of legal principles

The discussion of legal principles is the heart of the opinion. It must demonstrate that the court's conclusion is based on reason and logic. It should persuade the reader of the correctness of the result by the power of its reasoning, not by advocacy or argument. The judge must deal with arguably contrary authority and opposing argument, and must confront the issues squarely and deal with them forthrightly. Although the opinion need not address every case and contention, the discussion must be sufficient to demonstrate to the losing party that the essentials of its position have been fully considered.

The following guidelines apply to the discussion of legal principles.

Standard of review

The opinion should specify the controlling standard of review at the outset of the discussion of legal principles. Unless the reader is told whether review is under the de novo, the clearly erroneous, or the abuse of discretion standard, the meaning of the decision may be obscure. Specifying the standard of review, moreover, disciplines the writer's analysis.

Appendix C provides examples of different standards of review.

Order of discussion

Just as the court should not be wedded to counsel's formulation of the issues, it should not feel compelled to address the issues in the order in which counsel presented them. The order in which to address the issues will be dictated by the organization of the opinion. Generally, dispositive issues

should be discussed first. The order in which those issues are taken up will be governed by the opinion's reasoning. If non-dispositive issues are addressed at all — for educational reasons or to guide further proceedings — discuss them near the end of the opinion.

Which issues to address

As a general proposition, an opinion should not range beyond the issues presented; it should address only the issues that need to be resolved to decide the case. If the court determines that an issue not raised by the parties is dispositive and should be addressed — even though the parties have not properly preserved and presented it — the court should notify counsel and provide an opportunity to brief it.

Issues not necessary to the decision but seriously urged by the losing party should be discussed only to the extent necessary to show that they have been considered. The line between what is and is not necessary to the decision, however, is not always clear. Occasionally, a full explanation of the rationale for a decision may be enhanced by discussion of matters not strictly a part of the holding. Moreover, considerations of economy and efficiency may argue in favor of addressing issues not necessary to the decision if the court can thereby provide useful guidance for the lower court on remand. In doing so, however, judges must be careful not to prejudge issues that are not before them and to avoid advisory opinions and unnecessary expressions of views that may tie the court's hands in a future case.

Alternative holdings

Stating separate and independent grounds for a decision adds strength to the decision but diminishes its value as a precedent. Professor Bernard Witkin argues that judges should avoid such "even if" or "assuming arguendo that" rulings. *See* B. E. Witkin, Manual on Appellate Court Opinions § 81 (1977). Statements such as "even if the facts were otherwise" or "assuming arguendo that we had not concluded thus and so" undermine the authority of the holding. Witkin suggests either limiting the "even if" approach to situations where it is necessary to achieve a majority decision, or avoiding it completely by phrasing the opinion in such a manner that the alternative assumption is disposed of first and the substantial ground of the opinion stated last. But in opinions that are likely to have little impact as

precedent, there is no reason why the court should not base its decision on alternative grounds, without giving one precedence over the other.

Case citations

Most points of law are adequately supported by citation of the latest decision on point in the court's circuit or the watershed case, if there is one. String citations and dissertations on the history of the rule add nothing when the matter is settled in the circuit. Judges should resist the temptation of trying to impress people with their (or their law clerks') erudition. If there is no authority in the circuit, it is appropriate to cite authority on point from other circuits. If an opinion breaks new ground, however, the court should marshal existing authority and analyze the evolution of the law sufficiently to support the new rule.

Secondary sources

Because law review articles, treatises, texts, and non-legal sources are not primary authority, they should be cited sparingly and only to serve a purpose. That may be to refer to a sound analysis supporting the reasoning of the opinion. Some authors are so well respected in their fields that, in the absence of a case on point, their word is persuasive. Occasionally, public documents or other published works will shed light on relevant historical or policy considerations.

Quotations

If something important to the opinion has been said well before, quoting relevant language from a case on point can be more persuasive and informative than merely citing or paraphrasing it. The impact of a quote, however, is inversely proportional to its length. Quote briefly, and only when the language makes an important point.

While quotes should be short, they must also be fair. They must be in context and accurately reflect the tenor of their source.

Avoiding advocacy

Justifying a decision will sometimes require explaining why contrary arguments were rejected. In addressing the main contentions of the losing side, however, an opinion should not become an argument between the judge and the lawyers, or other judges on the court, or the court below. If

the losing side has raised substantial contentions, the opinion should explain why they were rejected. But it need not refute the losing party's arguments point by point or adopt a contentious or adversarial tone.

An opinion can — and properly should — carry conviction without becoming a tract. Put aside emotion and personal feelings, and avoid using adjectives and adverbs unless they convey information material to the decision.

Treatment of the court below

Appellate opinions can and should correct trial court errors and provide guidance on remand without embroidering on the circumstances or criticizing the court below. An appellate opinion need not attack a trial court's wisdom, judgment, or even its attitude in order to reverse its decision. And it should avoid unnecessary criticism, such as for having failed to consider authority or resting on improper motives.

Concluding paragraph

Disposition of a case — and the mandate to the lower court or agency, when that is a part of the disposition — is the most important part of the conclusion. Appellate courts should not speak in riddles. Simply to remand a case "for further proceedings consistent with the opinion" may leave the court below at sea. Opinions must spell out clearly what the lower courts or agencies are expected to do without, however, trespassing on what remains entrusted to their discretion. Thus, even where an abuse of discretion is found, the appellate court's decision is on the law, and the lower court or agency on remand retains the authority to exercise its discretion properly.

Appendix D contains examples of concluding paragraphs that provide clear instructions to the lower court or agency.

Summary disposition

Summary disposition may be appropriate in cases where only the parties and their lawyers are interested in the result, the facts are not complex, and the precedents are clear. It may take the form of a one-sentence order or a brief memorandum. *See* Appendix B.

The court should state its reason for making a summary disposition. Where a summary disposition is pursuant to circuit or local rule, that rule should be cited.

Issuing opinions orally from the bench

Appellate panels rarely rule from the bench. When they do, their decision may be memorialized simply in a one-line order, the reasons having been expressed orally.

Trial judges commonly deliver rulings from the bench. Even after a trial, Fed. R. Civ. P. 52(a) authorizes judges to state their findings of fact and conclusions of law orally from the bench. This practice saves much time and holds down the backlog of submissions. Having attorneys submit proposed findings and conclusions in advance of trial facilitates oral rulings, though the court must make its own, independent determination of fact and law. On occasion, a judge will orally announce a ruling, or proposed ruling, and state that an opinion will follow. This presents obvious hazards: with the case more or less decided, the pressure is off and the judge may have trouble getting around to writing the opinion. Moreover, the judge may later find it difficult to write an opinion in a way consistent with the earlier oral ruling and might even arrive at a different result.

Language, Style, and Self-Editing

Characteristics of bad writing

The judges who were interviewed for this manual identified the following as the major problems in judicial writing.

Wordiness

Wordiness means not just verbosity — using two words when one will do — but trying to convey too much information, covering too many issues, and simply writing too much. In trying to write authoritatively, some judicial writers belabor the obvious in lengthy discussion of uncontroversial propositions. Often wordiness reflects the writer's failure (or inability) to separate the material from the immaterial and do the grubby work of editing.

Lack of precision and clarity

Precision is the main concern of good writing. Some legal writers lack the ability to write simple, straightforward prose. Often this is the result of lawyers' tendency to find cover by over-generalizing: when the writer is not sure of a legal principle or of how to state it precisely, vague expression finesses the difficulty. To write with clarity and precision, the writer must know precisely what he or she wants to say and must say that and nothing else. The thought is the origin of the word, and the word is no better than the thought from which it springs.

Precision in judicial writing is important not simply as a matter of style but also because judges write for posterity. Once an opinion is filed, lawyers and others will read it with an eye to how they can use it to serve their particular purpose, no matter how remote that may be from what the writer had in mind. Thus, it is well for judicial writers to think how their words might be used, and write to forestall their misuse.

Painstaking and thoughtful editing is essential for precise writing. This

means going over the opinion, sentence by sentence, and asking: What do I mean to say here, and have I said it and no more?

Poor organization

A sound opinion is the reflection of a logical process of reasoning from premises through principles to conclusions. The framework in which that process takes place should be visible to the reader from the organization of the opinion. That organization will be a road map enabling the reader to follow from the beginning to the end without getting lost.

Cryptic analysis

While brevity is desirable, judges must elaborate their reasoning sufficiently so that the reader can follow. An opinion that omits steps in the reasoning essential to understanding will fail to serve its purposes.

Pomposity and humor

Judicial writing can be pompous. The judge must be vigilant for evidence of pomposity, such as arcane or florid expressions, use of the imperial "we" by a single district judge, or excursions into irrelevant erudition. Although humor is sometimes rationalized as an antidote to pomposity, it works better in after-dinner speeches than in judicial opinions. In the latter it may strike the litigants — who are not likely to see anything funny in the litigation — as a sign of judicial arrogance and lack of sensitivity. Though some judges seem to have succeeded with humor, it is a risk not to be taken lightly. Nor need it be taken, for writing can be made lively, forceful, and interesting by clarity and rhetoric.

Guides for good writing

The following guides are suggested to help writers recognize and avoid the problems listed above.

Eliminate unnecessary words

It is difficult to improve on Professor Strunk's injunction to omit needless words:

> Vigorous writing is concise. A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary

> parts. This requires not that the writer make all his sentences short, or that he avoid all detail and treat his subjects only in outline, but that every word tell.
>
> W. Strunk & E. B. White, The Elements of Style 23 (3d ed. 1979).

Be succinct and direct

Brevity promotes clarity. Writing that makes its point briefly is more likely to be understood than writing that is lengthy. Writing succinctly also forces the writer to think with precision by focusing on what he or she is trying to say.

Judicial writing should be direct. Use simple, declarative sentences and short paragraphs most of the time, but vary sentence length and structure where necessary for emphasis, contrast, and reader interest. Prefer the active voice and avoid constructions such as "it is said," "it is argued," and "it is well founded." Weed out adjectives and eliminate adverbs such as "clearly," "plainly," and "merely."

Write plain English

Even complex ideas can be expressed in simple language understandable by the general reader. To write in simple language requires that the writer understand the idea fully, enabling him or her to break it down into its essential components. For example, although electricity is a complex scientific phenomenon, it can be explained in terms lay persons understand. The same is true of tax, antitrust, and patent law, to take some examples. Avoid "legalese," cliches, hackneyed phrases ("as hereinabove set forth," for example), Latin expressions ("vel non," for example), and jargon. When using words of art, consider whether they are commonly understood among the likely audience or require plain English definition. There is a place for the elegant word, but it should not be necessary for the reader to have a dictionary at hand while reading the opinion.

Writing gender-neutral prose, though laudable, can lead to convoluted constructions when the writer tries to avoid the use of the personal pronoun; it should be practiced in moderation.

Footnotes and citations

Footnotes

The purpose of a footnote is to convey information that would disrupt the flow of the opinion if included in the text. The first question to ask about a prospective footnote is whether its content is appropriate for inclusion in the opinion. If it is not important enough to go into the text, the writer must have some justification for including it in the opinion at all. Footnotes can be appropriate to convey information, such as the text of a statute or material from the record, that supports the language of the opinion but is not immediately necessary to understand it. They can be used by the court to acknowledge and briefly dispose of tangential issues. Some judges place all citations in footnotes, leaving the text entirely for discussion. But footnotes should not be inserted for the writer's gratification or as a repository for information that the writer does not know what to do with. Some judges, conscious of the tendency to overuse footnotes, are striving to eliminate or at least reduce the number of footnotes in their opinions. *See, e.g.*, Mikva, *Goodbye to Footnotes*, 56 U. Colo. L. Rev. 647 (1985).

Citation formats

The two leading legal citation manuals are *A Uniform System of Citation* (the "Blue Book") and the *University of Chicago Manual of Legal Citation* (the "Maroon Book"). A judge may find it convenient to follow one or the other of these manuals in citing primary and secondary sources. Mastering the arcana of citation forms, however, is not a productive use of judges' or law clerks' time. The purpose of citations is to assist researchers in identifying and finding the sources; a form of citation that will serve that end is sufficient. In addition the form of citation should be consistent to avoid the appearance of lack of craftsmanship and care.

Some judges maintain personal citation forms or style manuals to reflect their preferences. Such forms and manuals promote consistency, help orient new clerks, and encourage careful preparation of opinions.

Edit carefully

Careful writers must edit their work critically to clarify the ambiguities, eliminate the superfluous, smooth the transitions, and tighten the structure. This is not an easy task because writers reading their own writing are prone to read what they meant to write rather than what they actually wrote.

Judges must strive to be objective about their writing, to read every paragraph carefully, and not to slide over text because it is familiar. A judge editing his or her own work must always ask such questions as: Have I said precisely what I intended to say? Is there a better way to say it? Does the thought flow clearly and logically? Will the reader understand it?

The following techniques should help judicial writers improve their self-critical faculties.

Reread and revise

Editing involves striking needless words and unnecessary facts, rewriting unclear and sloppy sentences, eliminating repetition, reorganizing, and making the opinion cleaner, sharper, and tighter. "I spend a lot of time editing, clearing away my own and the clerks' underbrush," one judge said. "The underbrush may be valuable some place or some time, but not here and now." This process may take the judge through many drafts before a polished opinion emerges.

Word processors have become a boon to writers and editors. They greatly speed up the writing process and facilitate editing and revising. But proofreading on a word processor is demanding, and without careful and repeated checking of a printed copy, typographical and other errors are easily missed.

Editing should not focus solely on language, grammar, and style. Judges must check for internal consistency. Go back to the introduction to see whether the opinion has addressed all of the issues and answered the questions as they were initially formulated. Reread the statement of facts to see whether it covers all the facts significant to the decision and no more. Review the legal discussion to see whether the opinion has addressed in logical order the issues that need to be addressed. Consider whether the conclusion follows from the discussion.

Put the draft aside and come back to it with a fresh mind

The editing process is improved if the judge will "let the draft sit for a while and simmer," as one judge said. Though time constraints and mounting caseloads may make it difficult to hold up the work, a delay of even a few days will serve to add a measure of objectivity to the review. It may help the judge see things not seen earlier, gain new insights, and think of new ideas.

Ask a fresh reader to criticize a draft

A law clerk who has not worked on the opinion can serve a useful function by reading the draft with a fresh eye and offering editorial and substantive criticism. But even the law clerk who has assisted the judge can provide an editorial perspective that will help produce a finished product.

Dissents, Concurrences, and Writing with Other Judges

Appellate opinions represent the collective decision of several judges. The judge who writes the opinion must take into account the thinking of the other judges of the panel or en banc court and incorporate the group's thinking into the opinion's rationale. Sometimes several judges participate in preparing an opinion, for example, when an opinion is written jointly or when judges comment on drafts prepared by the judge assigned to write the opinion. When the opinion does not represent the thinking of all of the members of the court, some judges may choose to prepare concurring or dissenting opinions. This chapter discusses some of the collegial considerations in opinion writing.

Joint opinion writing

In some circuits, the complexity and number of issues involved in a single case have resulted in jointly written opinions. Sometimes the opinion is designated a per curiam, at other times the authors of the different sections are identified. The review of long and technical administrative records in the D.C. Circuit, for example, frequently produces such opinions. *See, e.g., National Wildlife Federation v. Hodel*, 839 F.2d 694 (D.C. Cir. 1988), and *Ohio v. U.S. Department of Interior*, 880 F.2d 432 (D.C. Cir. 1989). *See also Chemical Manufacturers Association v. Environmental Protection Agency*, 870 F.2d 177 (5th Cir. 1989).

When a panel chooses to issue a joint opinion, considerable planning and coordination by both judges and law clerks are necessary to ensure a readable and coherent final opinion. A longer-than-usual post-argument conference is desirable to discuss the assignment of opinion parts, their interdependence, and joint assumptions or factual predicates. The sequence of sections may need to be determined to avoid confusion and repetition of basic facts or legal analyses.

Generally, one judge on the panel must assume coordinating authority and circulate an outline and summary of the proposed sections before writing begins. One judge, usually the coordinating judge, must also take responsibility for writing the introduction and conclusion, covering all sections. The introduction is usually brief and confined to a statement of the proceedings leading to the court challenge. The facts in detail are better presented as needed in the individual sections.

After the authors have drafted and approved the various sections, the coordinating judge should assume authority to make non-substantive changes to avoid duplication or gross stylistic differences. The law clerks usually meet to ensure a uniform citation and heading format.

As cases become more complex and time-consuming, courts can be expected to make increased use of jointly written opinions to avoid delay and tying up one judge for too long. With careful planning, it is possible to maintain high standards of writing for these opinions.

Commenting on a draft prepared by another judge

Judges circulate draft opinions to other judges on a panel or en banc court to ensure that the opinion reflects the rationale of the judges in the majority. When commenting on an opinion written by another judge, it is always appropriate to comment on the substance of an opinion, but inappropriate to comment on matters of style. When the distinction between substance and style is fuzzy, comments are appropriate if the matter in question seems to speak for the court and thus might send a message that does not represent the view of the other members.

If, for example, the discussion of a substantive issue is not written clearly, the other judges should bring this to the attention of the writing judge. When a citation to a case or law review article may represent a rationale that is not adopted by other judges, they should express their disagreement to the writing judge. When, however, a reviewing judge objects to stylistic, grammatical, or language choices simply on the basis of personal preference, such comments are best left unexpressed. Nevertheless, while judges are not grading the work of their colleagues, it is helpful to point out minor matters such as typographical errors or other "nits," either by a note to the author or by a telephone call between law clerks.

Dissenting opinions

Dissenting opinions serve several purposes. They may help to attract en banc or certiorari review and to isolate and refine the issues for further appeal. They may attract legislative action to correct possible shortcomings in the law. Dissenting opinions may also help to narrow the scope of a decision by pointing out the possible dangers of the position that the majority has taken or by sending signals to other judges and to the bar as to the limits of a particular decision and its effect on similar cases in the future. In these ways, dissenting opinions can serve useful functions in communicating important information to an opinion's audiences and aiding the growth of the law.

Dissenting opinions are written at a potential cost, however. A dissent that strikes a strident or preachy note may contribute to divisiveness and ill feelings on the court, may undermine the authority of the opinion and of the court as an institution, and may create confusion. Whether to dissent may depend on the nature of the case and the principle at issue. Dissents generally should not be written when the principle at issue is settled and the decision has little significance outside the specific case. Cases that involve emerging legal principles or statutory interpretation in areas that will affect future activities of the bar, the public, and the government are more likely to warrant dissenting opinions than cases of limited application. The issue should be significant enough that the judge's "fever is aroused," as one judge said, but the motivation should be to further the development of the law rather than to vent personal feelings. Judges considering whether to dissent should ask themselves whether the likely benefits outweigh the potential costs.

If a judge decides that writing a dissent will serve a useful purpose, it should be written as carefully and responsibly as the opinion of the court. Rarely should a judge dissent without opinion; doing so communicates no information to the opinion's readers. The argument should focus on the critical principles and distinguish the dissenter's rationale from that of the majority. But it is one thing to state the points of disagreement forcefully and effectively, and another to engage in argument or advocacy. A dissenting opinion should not simply slash at the majority opinion or its author. Personal attacks, offensive language, and condescending tone should not be used, although some judges believe that moral outrage and restrained indignation may sometimes be appropriate.

Appendix E contains examples of dissenting opinions that take a temperate, reasoned tone in reflecting sincere disagreement with the majority.

Concurrences

Most of the considerations applicable to dissenting opinions also apply to concurrences. Concurrences are appropriate where they are intended to define with greater precision the scope of an opinion or otherwise inform the parties and other audiences of what the writer believes are important points. Thus, judges may issue concurrences where there are two argued grounds for a decision, the majority justifies its decision on one of those grounds, and other judges believe the alternative grounds should be stated. Concurrences may also serve to indicate to parties in future cases how far the court is willing to go down a road, and where the road ends. A concurring opinion should not be written simply to add a point of view or personal statement that does not further either the decisional or educational value of the opinion. The question should be: Am I writing this for myself or for the good of the court?

Judges should include in their concurring opinions a statement of reasons why they are concurring specially. The point is not to present an alternative opinion of the court, but to indicate the point of departure from the majority and to further define the contours of the opinion. Concurrences should not rehash the facts and legal principles on which the majority based its decision, except to the extent that differences in the factual findings and legal conclusions are significant to the concurring point of view. The arguments should be principled and the tone should be instructive but not pedantic.

Appendix F contains examples of useful and narrowly written concurring opinions.

Reading About Writing

A dictionary, a thesaurus, a citation manual, and a reference manual are the basic writing aids judges should have at hand. Judges should also be familiar with manuals on style and grammar and refer to them when questions arise. Strunk & White's *The Elements of Style* is clear and concise. Fowler's *Modern English Usage* and Follett's *Modern American Usage* are comprehensive and authoritative. "I think judges should constantly read books on writing," one judge said.

Some judges find that reading old opinions helps them to improve the clarity of their writing. "Sometimes I'll remember an opinion that I think was particularly good in terms of teaching the legal principles," one judge said. "The old opinion will become sort of a textbook for how to skin that cat."

Beyond that, "I always tell my clerks to go back and read some good authors to see how they write and then try to think about that when they are writing law," one judge said. Another observed:

> I find the best tool for trying to keep your writing from being totally dull and hard to read is to read non-legal things. I think the more non-legal books you read, the more you pick up interesting popular terms having application to the law and the more you can stay away from legal jargon or the same tired old words. I find that reading outside of the law, sometimes a phrase will stick in your mind, sometimes a word, sometimes an image. Analogizing to non-legal situations can liven up your writing, as can introducing unexpected words and images.

This manual will not suggest what should be on a judge's non-legal reading list (although several judges suggested that Ernest Hemingway's lean style is an excellent model for legal writing). The following, however, are books, articles, and other materials that will assist judicial writers in preparing clear and concise opinions. In addition, there came to hand, as this manual went to press, Judge Ruggero Aldisert's latest work, Opinion Writing (1990), a book that should be on every judge's reading list.

Books

Advocacy and the King's English (Rossman ed. 1960)
R. Flesch, How to Write Plain English: A Book for Lawyers and Consumers (1979)
J. J. George, Judicial Opinion Writing Handbook (2d ed. 1986)
R. A. Leflar, Appellate Judicial Opinions (1974)
D. Mellinkoff, The Language of the Law (1963)
R. A. Wasserstrom, The Judicial Decision: Toward a Theory of Legal Justification (1961)
H. Weihofen, Legal Writing Style (1961)
R. H. Weisberg, When Lawyers Write (1987)
B. E. Witkin, Manual on Appellate Court Opinions (1977)

Articles

Aiken, *Let's Not Oversimplify Legal Language*, 32 Rocky Mtn. L. Rev. 358 (1960)
Bell, *Style in Judicial Writing*, 15 J. Pub. L. 214 (1966)
Benson, *The End of Legalese: The Game Is Over*, 13 Rev. L. & Soc. Change 519 (1984-85)
Douglas, *How to Write a Concise Opinion*, 22 Judges' J. 4 (Spring 1983)
Francis, *A Faster, Better Way to Write Opinions*, 27 Judges' J. 26 (Fall 1988).
Hager, *Let's Simplify Legal Language*, 32 Rocky Mtn. L. Rev. 74 (1959)
Hugg, *Judicial Style: An Exemplar*, 33 Loyola L. Rev. 865 (1987)
Leflar, *Quality in Judicial Opinions*, 3 Pace L. Rev. 579 (1983)
Leflar, *Some Observations Concerning Judicial Opinions*, 61 Colum. L. Rev. 810 (1961)
Mikva, *For Whom Judges Write*, 61 S. Cal. L. Rev. 1357 (1988)
Mikva, *Goodbye to Footnotes*, 56 U. Colo. L. Rev. 647 (1985)
Posner, *Goodbye to the Bluebook*, Appendix: University of Chicago Manual of Legal Citation, 53 U. Chi. L. Rev. 1343 (1986)
Re, *Appellate Opinion Writing* (Federal Judicial Center 1977)
Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 Calif. L. Rev. 731 (1981)
Stern, *The Writing of Judicial Opinions*, 18 Pa. Bar Ass'n Q. 40 (1946)
Wydick, *Plain English for Lawyers*, 66 Calif. L. Rev. 727 (1978)
Younger, *Bad Writing = Bad Thinking*, A.B.A. J. 90 (January 1, 1987)

Other

A.B.A. Section of Judicial Administration, Internal Operating Procedures of Appellate Courts (1961)
Institute of Judicial Administration, Appellate Courts: Internal Operating Procedures—Preliminary Report (1957)

APPENDIX A

The following excerpt from a per curiam opinion is an example of a memorandum opinion.

This is a consolidated appeal from two actions.... Defendants... appeal from final judgments of foreclosure and sale entered in the [district court] dated July 6, 1989 and May 17, 1989. We need not recite the facts of this case, since they are set forth in detail in the district court's two thorough opinions, reported at.... Familiarity with these facts is assumed. *See also* [related action].

The principal argument of [defendants] on appeal is that the district court erred in dismissing the "faithless agent" defense to foreclosure under [state] law. That defense is an attempt to avoid the established rule of agency law that a principal is liable to third parties for the acts of an agent operating within the scope of the agent's real or apparent authority. *See British American & Eastern Co. v. Wirth Ltd.*, 592 F.2d 75, 80 (2d Cir. 1979). Appellants . . . do not contest that appellee . . . , the mortgagee of the properties involved here, was a third party. Nor do they deny that [appellee] was dealing with their agent [land company] and that the latter was acting within the scope of its apparent authority. Nevertheless, they invoke the faithless agent defense, claiming that [appellee] should be barred from foreclosing because it was aware of the mismanagement of B_____, who was acting as president of [the land company]. To support this view, they point to evidence that [appellee] believed that B_____'s mismanagement was the root cause of the default.

We are not persuaded that the district court erred in rejecting the faithless agent defense. Assuming arguendo that this defense may be invoked under the right circumstances, we considered and rejected it in [citation]. Indeed, the party asserting the faithless agent defense in [citation] appears to have been essentially the same, in all but name, as [defendants]. [Citation.] Moreover, even if, as defendants contend, principles of collateral estoppel do not bar their claim, we find the reasoning of the [citation] panel dispositive on this record. "It cannot be that a mortgagee's

awareness of defaults under a mortgage constitutes awareness that a managing agent is engaged in self-dealing." [Citation.] On the record before us, "[f]aced with only conclusory allegations and unsupported factual assertions," we reject, as did the [citation] panel, the "'faithless agent' defense." [Citation.]

The judgments of the district court are affirmed.

APPENDIX B

The following is an example of a summary order.

This cause came on to be heard on the transcript of record from the United States District Court for the _____ District of _____ and was taken under submission.

1. Plaintiff . . . appeals pro se from an order dated December 21, 1989 of the United States District Court for the _____ District of _____ denying appellant's motion for reconsideration of the district court's order of October 12, 1989, which granted the crossmotion for summary judgment of defendants-appellees . . . . This civil rights case arises out of appellees' failure to hire appellant for a position at the Veterans Administration Medical Center in . . . .

2. Appellant's principal claims on appeal appear to be that the district court abused its discretion, misinterpreted the facts in this case, misapplied various laws and misinterpreted Congress's intent in enacting Title VII of the Civil Rights Act of 1964.

3. We have carefully examined all of appellant's claims, and they are without merit. We affirm substantially for the reasons stated in the thorough opinions of . . . dated October 12, 1989 and December 21, 1989.

4. The order of the district court is affirmed.

APPENDIX C

The following are examples of standards of review.

We review a district court's denial of a motion for a new trial for an abuse of discretion. *Robins v. Harum*, 773 F.2d 1004, 1006 (9th Cir. 1985). The reviewing court must consider whether the decision of the lower court "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971).

* * *

Section 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j) (1982), authorizes district courts to grant interim injunctive relief to restore and preserve the status quo pending the Board's decision on the merits of an underlying unfair labor practice complaint. E.g., *Asseo v. Pan American Grain Co., Inc.*, 805 F.2d 23, 25 (1st Cir. 1986); *Fuchs v. Hood Industries, Inc.*, 590 F.2d 395, 397 (1st Cir. 1979). Under this statutory scheme, the district court is limited to the determination of whether there is (1) reasonable cause to believe that a violation of the Act, as alleged, has been committed, and (2) whether injunctive relief is appropriate under the circumstances. *Asseo*, 805 F.2d at 25; *Maram v. Universidad Interamericana de Puerto Rico*, 722 F.2d 953, 959 (1st Cir. 1983).

As we have previously stated, on appeal, this Court's review is:

> limited to [determining] whether the district court was clearly erroneous in finding reasonable cause to believe that there were unfair labor practices and whether it abused its discretion in granting injunctive relief. *Union de Tronquistas de Puerto Rico v. Arlook*, 586 F.2d 872, 876 (1st Cir. 1978).

Asseo, 805 F.2d at 25. With these standards firmly in mind, we turn now to the merits of the appeal.

* * *

In reviewing findings by bankruptcy courts, we and the district courts may only reverse factual findings where we determine that they are clearly erroneous. *In re Killebrew*, 888 F.2d 1516, 1519 (5th Cir. 1989). Legal determinations, of course, we review de novo. *In re Compton*, 891 F.2d 1180, 1183 (5th Cir. 1990). As this appeal hinges upon whether [the debtor] intentionally deceived [the creditor]—a factual determination—we apply the clearly erroneous standard. *Cf. In re Rubin*, 875 F.2d 755, 758 (9th Cir. 1989).

APPENDIX D

The following are examples of concluding paragraphs:

For the foregoing reasons, the case is remanded to the district judge to clarify as expeditiously as feasible whether he would impose the same sentence if the lower Guidelines range of 10-16 months applied. In the event that Judge _____ indicates that he would not impose a 16 month sentence if criminal history category IV applied, [defendant], if he wishes to do so, may renew his appeal by filing a new notice of appeal within ten days of the judge's ruling on remand and need not file additional briefs. This panel retains jurisdiction in the event of such appeal.

* * *

We therefore grant the petition for review and order the [agency] not to initiate further prosecutions under the Penalty Rules until the agency has engaged in further rulemaking in accord with section 553. Nonetheless, pursuant to our remedial powers, we hold that the [agency] is free to hold pending cases in abeyance and resume prosecution upon the repromulgation of a scheme for adjudicating administrative civil penalty actions under section 1475.

* * *

For the reasons stated, we order the district court to do the following: 1) The court will reconsider its order in respect to VOC cleanup; it will amend that order to require [defendant] to clean up VOCs in the soil at the . . . site to a level that it determines "public health" and the "public interest" require. 2) The court will reconsider the matter of "indirect costs," explaining, as we have set forth above, any denial of those costs as a sanction. In all other respects the judgment of the district court is affirmed.

APPENDIX E

The following are examples of brief dissenting opinions:

The reasons why I am constrained to dissent may be briefly stated.

The question whether an anti-takeover provision provides a "special protection" to debentureholders cannot be answered in the negative merely because the "Independent Directors" decided to waive its provisions and approve a particular transaction. These directors were explicitly empowered to act in this fashion by virtue of the fully disclosed terms of the provision. A significant function of an anti-takeover provision is to serve as a deterrent to hostile takeovers, including takeovers which would be contrary to the interests of both shareholders and debentureholders. One cannot, I believe, fairly characterize such a provision as being "worthless" to the debentureholders, even though as a matter of Delaware law directors owe a fiduciary duty solely to shareholders. The anti-takeover provision was therefore a "special protection" to debentureholders, albeit a limited one.

Federal securities laws do not impose an obligation to advise investors of the fundamentals of corporate governance. The disclosure required by the federal securities laws is not a "rite of confession or exercise in common law pleading. What is required is the disclosure of material objective factual matters." *Data Probe Acquisition Corp. v. Data Lab, Inc.* 722 F.2d 1, 5-6 (2d Cir. 1983), *cert. denied*, 465 U.S. 1052, 104 S. Ct. 1326, 79 L. Ed. 2d 722 (1984). Especially is this so where, as here, the investor complainants are sophisticated financial institutions making major investments. The role of the federal securities laws is not to remedy all perceived injustices in securities transactions. Rather, as invoked in this case, it proscribes only the making of false and misleading statements or material omissions.

Whether the Independent Directors breached an implied duty of good faith or otherwise acted contrary to their fiduciary obligations are matters of state law. Here, the federal claims were asserted only conditionally, the express condition being the failure of the state law claims. These state claims were properly dismissed by the court below for lack of pendent jurisdiction.

Believing no valid federal claim to be present, I would affirm essentially for the reasons set forth in the Opinions of the Magistrate and District Court.

* * *

In many respects this case represents good police work. It is clear, however, that defendants were of abnormally low intelligence and that Miranda warnings were not given. Even though appellants had not been taken in custody, it is also true they had not been furnished counsel or waived same. As the district court held, the government agents should have taken further precautions to insure that [defendants] understood the situation and their rights. *See Henry v. Dees*, 658 F.2d 406, 411 (5th Cir. 1981).

APPENDIX F

The following are examples of brief, narrowly written concurring opinions:

I concur with most of Judge _____'s thoughtful discussion of the issues in this case. I am fully in accord with Part IIA and C and the rationale with respect to the claims against the [defendant] and the state law claims. I agree also with the statement in Part IIB that "[d]ue process concerns are clearly not implicated in [defendants'] actions with regard to the letter from . . . ." I agree further that there is "no support . . . for plaintiff's fanciful conspiracy theory."

I find no necessity, however, to adopt the statement quoted from *Rice v. Ohio Department of Transportation*, 887 F.2d 716, 719 (6th Cir. 1989), which may be interpreted to mean that the doctrine of *Will v. Michigan Department of State Police*, —U.S.—, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989), somehow bars suits under § 1983 against state officials when those officials are being sued in their individual capacities. I do not view *Will* as barring § 1983 suits against state officials whenever the suits concern actions taken in their official capacities. Instead, I believe that *Will* bars suits against state officials only when those officials are sued in their official capacities.

Accordingly, I would affirm the decision of the district court that under the facts of this case defendants . . . enjoy qualified immunity.

* * *

I concur with the results reached by Judge _____ and in his opinion except as to his analysis of the First Amendment issue. For the reasons stated in my concurring opinion in [citation], I believe the . . . regulations are permissible time, place, and manner restrictions on speech in the [plaintiff's] profession.

The Federal Judicial Center is the research, development, and training arm of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States is chairman of the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and six judges elected by the Judicial Conference.

The Center's Continuing Education & Training Division provides educational programs and services for all third branch personnel. These include orientation seminars, regional workshops, on-site training for support personnel, and tuition support.

The Innovations & Systems Development Division designs and tests new technologies, especially computer systems, that are useful for case management and court administration. The division also contributes to the training required for the successful implementation of technology in the courts.

The Publications Division edits and coordinates the production of all Center publications, including research reports and studies, educational and training publications, reference manuals, and periodicals. The Center's Information Services Office, which maintains a specialized collection of materials on judicial administration, is located within this division.

The Research Division undertakes empirical and exploratory research on federal judicial processes, court management, and sentencing and its consequences, usually at the request of the Judicial Conference and its committees, the courts themselves, or other groups in the federal court system.

The Special Educational Services Division is responsible for the production of educational audio and video media, educational publications, and special seminars and workshops. The Federal Judicial History Office, created in response to Congress's mandate that the Center conduct programs relating to judicial branch history, is located within this division.

Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.W., Washington, DC 20002-8003