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STYLE IN JUDICIAL WRITING

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In the common-law countries the courts play a fundamental role in applying and developing the law. This function is served largely by communication through written opinions. As a result, style in judicial writing is an important factor in the growth of the law. The style of an opinion may affect the manner in which it is interpreted by the reader. It may also govern the frequency with which the opinion will be cited in other cases and thus determine the influence the opinion will ultimately have. Style must be regarded as one of the principal tools of the judiciary and it thus deserves detailed attention and repeated emphasis. ...

One of the important elements [of style in judicial writing] is the need for suitable design. This design will take form through the thought process. The writer should always seek to answer a series of questions. What is the case? What are the issues? Who prevailed in the lower courts? Who is to prevail on appeal? To what extent? What direction as to disposition is to be given to the lower court?

The thought process provides the outline of the opinion. This is what Cardozo called the "architectonics" of an opinion. It is the bare bones, and we must proceed to fill out the structure.

One accepted opinion outline consists of five parts: (1) the nature of the action and how it reached the appellate court, (2) the questions to be decided, (3) the essential facts, (4) the discussion and determination of the questions, and (5) the disposition of the case. We may condense these to the statement of the case, issues presented, facts, the determination of the issues, and disposition.

At this point a caveat is proper. The particular case will govern the order of presenting these parts. In some cases the statement of the case should come first; in others the question presented may come first. Two examples will suffice. Judge Sibley began with a succinct statement in the case of *National Supply Co. v. American Mfg. Co.*: "The suit

* The following article, which first appeared in the *New York Law Journal* on March 9 and March 10, 1967, and is excerpted here by permission, is still cited as a masterful guide to the art of composing a written decision, administrative or judicial. Footnotes omitted.

is for infringement of claims 4, 5 and 6 of the Patent No. 1,823,163. ... The District Court held the claims invalid for want of invention. We agree."

What more is needed? There was no reason to refer to the specifics of the pleadings. The reader immediately understands what type of case is involved, who prevailed in the lower court and on what basis, and who will prevail on appeal. This is good style.

Under another approach, the opinion may begin with a statement of the question presented. Justice Brandels in *Erie RR v. Tompkins*, began his opinion in this manner: "The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved."

It will be the unusual case where the statement of the case or the question presented, in either order, will not form the first two parts of the opinion.

In either event there are three cautionary essentials. There should be no long statement of what is contained in the pleadings. The facts should be saved for a later portion of the opinion. The reader should be advised as to who will prevail on the appeal.

Good communication stems from clarity. A concise statement of the case, the issues, and what the result is to be on appeal, serve as a synopsis for the reader. It is the springboard for what is to follow.

The statement of the case and issues will be followed by a statement of the necessary facts — those general facts which background the issues. The statement of facts may also include the specific facts which illuminate the issues to be determined. In some case, however, greater clarity will be achieved by deferring the specific facts to the next section of the opinion — the discussion and determination of the issues.

There are two fundamentals in stating the facts: they must be correct, and they must be stated as favorably as possible to the losing party. No opinion is worthy of a court if the facts are misstated. The opinion lacks judicial advocacy absent the best view of the facts for the losing party. Moreover, *stare decisis* requires an adequate statement of the facts. There can be no precedential value in an opinion without a *ratio decidendi*. There can be no *ratio decidendi* in an opinion without the relevant facts. But it is to be emphasized that we need only those facts necessary to the ruling which is to be made, plus, of course, those for clarity.

Now having stated the case, the issues, and the facts, we come to the real mischief area of judicial writing. It

is usually in the discussion and determination of the issues that we find the gratis obiter dictum, the unnecessary citation, and the copious footnote. Clarity often ends and ambiguity begins in this section of the opinion. The careful writer — the stylist — has the desire and the capacity to gear the facts and the law — indeed, the whole opinion — to the issue or issues presented. His self-discipline is sufficient unto the day. He seeks not to display all of his legal knowledge, but is satisfied for posterity to judge his efforts case by case. Here is the place for the perfectionist. He is the polisher who goes the last mile to insure the accomplishment of his goal; brevity, clarity, and precedential preciseness.

This is not to say that there is not a place for discriminate use of obiter dictum in opinion writing. Policy considerations, where legal concepts are being changed, may dictate the need for guidance through dictum. This is an advisory opinion, no less, but the role of courts under our system of separation of powers and federalism may call such a practice into play in some situations.

Moreover, there are those instances where the determination of an issue has been based on one ground and buttressed by others. These subsidiary holdings are dicta in the strict sense, but a sense of advocacy, or sometimes a lack of confidence, impels the writer to this course.

Footnotes also may serve a good purpose. A footnote is a good place to quote a statute, or to list multiple citations where needed, or even for a caveat. A footnote should not be used for a catchall within which to store the irrelevant material which has come to the writer's attention in studying the case. Here again one must be careful not to overwrite. Self-discipline is required. That which is not strictly applicable must be put aside.

The last part or section of an opinion deals with the disposition of the case. Here absolute precision is required. If there is to be a new trial, what is to be its scope? Are the issues on retrial to be limited? Has every contention which may arise on the retrial been covered? Will the trial court understand the mandate of the appellate court on remand if the case is to be remanded? Have questions of cost been settled? This is the point where the whole opinion must be reviewed for coverage and clarity.

The disposition section is the summation. Thus we begin with a synopsis and end with a summation. Both are directed to the heart of the opinion: discussion and determination of the issues. ...

The opinion writer should be careful not to disparage counsel. If counsel is to be reprimanded, he is entitled to be heard.

There is no reason for the judge to apologize for his decision. It is the duty of the judge to decide, and the litigants understand that one or the other usually loses. An absence of apology will avoid such practices as pointing to an argument that was not made, or stating that the result might be different if this or that fact were present.

Also there is no need to apologize to the trial court by using such phrases as "the learned trial judge" where the judgment is being reversed. The trial courts understand that the function and duty of an appellate court is to correct errors.

The bizarre opinion is not acceptable. It does a disservice to the judicial system. The adversary process is serious: life, liberty, or property is at stake. The law as a workable institution is in the balance. The opinion must reflect sincerity.

While emphasis has been placed on form, it is well to keep in mind that there can be no substance without form. Form holds and preserves substance, and for that reason judges must pay close attention to form. Yet, mere form is not sufficient. An opinion should possess a high degree of readability. This is not to imply that only a drab or sullied opinion is proper. There is no rule without its exception. Much must be left to the "ear" of the writer. Abraham Lincoln could have started the Gettysburg address by saying "eighty-seven years ago," instead of "fourscore and seven years ago." This would have saved four words and would have avoided the necessity of multiplication by the listener, but Lincoln's ear must have told him to go ahead with fourscore and seven. His sense of rhetoric may have indicated a delay in getting into the body of the first sentence. ...

I close with this advice. Justice Holmes usually wrote short opinions. He attributed this virtue to the fact that he wrote his opinions in longhand while standing at a desk. He felt that standing contributed to brevity. Perhaps there should be a return to his practice.

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In the next issue: Recent Cases and Developments in State Administrative Law.