Res Ipsa Non Loquitur: The Writing of Opinions

Harold H. Kolb Jr.
The judge is a key member of society. He or she preserves the communal fabric that makes civilization possible by applying and interpreting the rules that we have agreed to live by. But judges are not just thinkers and talkers. They are also writers, for their knowledge of the law and their wisdom in making decisions are translated into persuasive resolutions, continuing guides for conduct, by the written word. A successful judge has to be a good writer. A great judge is almost always a distinguished writer. That is how we recognize his or her greatness, how we measure it, how we preserve it.

Like all complex human activities, good writing is both a skill and an art, and cannot be reduced to formulas. There are, however, principles which apply to most judicial writing that can be summarized in the following six suggestions:

1. **Write for an educated layman.** That does not mean, of course, that the audience for judgments is actually composed of laymen; few common citizens this side of senility while away an idle hour by perusing the latest releases from the bench. The audience for judgments is a mixed affair, composed of the litigants and their attorneys, courts of appeal, working lawyers, other judges, law professors and students, and occasionally the media. And it changes from judgment to judgment, depending on the type and the significance of the case. But whatever the case, the goal should be to communicate to an educated layman. This goal may not be achieved all of the time, for all judgments, or even for all sections of a single judgment, but it should be the goal.

There are two reasons to write for the educated layman. The first is that part of the audience for a specific judgment may well be composed of ordinary citizens whose lives are touched by the case at hand. It seems only right, in a democratic society, that a litigant ought to be able to read the order

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1 Professor of English, Director of American Studies, and Director of the Center for the Liberal Arts, University of Virginia. This paper was presented at a seminar for federally appointed Canadian judges at Mont Ste. Marie on 11 March 1982, and later used in part at the annual meeting of the NAALJ in Richmond, Virginia on 18 October 1991. The study of jury instructions cited was by Robert P. and Veda R. Charrow: "Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions," Columbia Law Review, 79 (1979), 1306-1360. Frank Smith's comments on proofreading are taken from his Understanding Reading (3rd ed., 1982). The quotations from judgments by Mr. Justice Dickson were from John Kenneth Park v. Her Majesty the Queen, Taylor v. Ankenman and Jaegli Enterprises, and McClelland and Steward v. Mutual Life, all decided by the Supreme Court of Canada on 22 June 1981. The quotation by Mr. Justice Hutcheon was taken from Regina v. Morris Davie, Court of Appeal of British Columbia, decided 10 September 1980. Other examples of less skilled writing come from American and Canadian judges who, gratefully no doubt, remain anonymous.
that dissolves his marriage, or restores his children, or dismembers his inheritance, or repairs his house, or sends him to prison. More than that, however, plain English is not only the best mode of communication for plain people, it is the best mode of communication even for legal specialists, who process language the same way everybody else does. How much confusion in law firms, how much agony in chambers, how much needless litigation has been caused by prolix and turgid prose created by specialists for specialists. In his Miscellanies-at-Law, Sir Robert Megarry, Vice-Chancellor of England, cites § 591 of the Municipal Act of Ontario, Chapter 284:

In all cases where land is sold for arrears of taxes whether such sale is or is not valid, then so far as regards rights of entry adverse to a bona fide claim or right, whether valid or invalid, derived mediatly or immediately under such sale, § 10 of The Conveyancing and Law of Property Act does not apply, to the end and intent that in such case the right or title of a person claiming adversely to such sale shall not be conveyed where any person is in occupation adversely to such right or title, and that in such cases the Common Law and §§ 2, 4 and 6 of the statute passed in the 32nd year of the reign of King Henry VIII, and Chaptered 9, be revived, and the same are and shall continue to be revived.

When Sir Robert asked an Ontario judge why this section had not been repealed, the judge replied: "Surely you realize how dangerous it is to repeal anything that you do not understand."

Some lawyers and judges have fooled themselves into believing that because they write for specialists, somehow those specialists will be able to machete their way through a jungle of tangled syntax and overgrown constructions. Your experience should have persuaded you that lawyers and judges, hard working and well motivated as they are, can still become bored and confused by the writing of other lawyers and judges. The common language, shared by literate members of the community-at-large, written with clarity and precision, and simplicity when that is possible, is the most effective means of communication in all professions.

2. Avoid legal language whenever possible. This point is a corollary of the first suggestion. Put positively, it means that a judge should use ordinary English prose when he or she is able to, which should be most of the
time. Legal writing is not a special language; it is a special instance of normal language. Admittedly, the law is composed of difficult concepts, abstruse terms, Latin phrases, and specific wordings that, rolling down the decades and the centuries, must be repeated verbatim. But these do not constitute the problem; technical legal phrases should be used when they are needed. "Habeas corpus," "burden of proof," and "contributory negligence" are useful and necessary expressions. But how about "the hereinbefore mentioned plaintiff," or "in futuro," or "pray for relief," or said judgment," or "infected with fatal error" or "the counsel reduced the motion to writing"? (What counsel ever reduced anything when writing a document?) The problem is that a judge often starts with necessary legal phrases, and then begins to legalize everything. Once he gets on this legalistic high horse a judge will write "prior to" for "before," "per annum" for "per year." All dates become "on or about." All sums become "in the amount of." Usages that were beginning to sound strange to Shakespeare’s contemporaries are resurrected: "sayeth," "doth," "deemed," "witnesseth." Plain "14 April 1981" balloons into "on or about the fourteenth day of April in the year of our Lord nineteen hundred and eighty-one." Once he is under way, there is no stopping such a judge until he comes to the end of his ride and triples his decision by having it "therefore ordered, adjudged, and decreed." And even after that he sometimes canters out over empty space: "If there are any other matters which cannot be stipulated, the Court will make a determination of same when they are presented for consideration."

The tendency to grind everything in a mill of legalisms stems partly from the pleasure of being an insider, of demonstrating one’s knowledge of the subtleties, the manners, the language of the profession. This pleasure is perhaps excusable in law students, but it ought to be resisted by judges, for it contributes to the distrust many citizens have of legal procedure and courtroom action. Partly, though, this tendency is simply one of habit, embedded everywhere in the linguistically conservative legal profession. A member of a jury sitting in Ontario is sworn to answer "to the best of [his] understanding," but that understanding can only be dimmed by the archaisms that swirl around him. He hears that the constable "shall not suffer any person to speak to the jury." He is told that he must "hearken to [the] charge" against the accused, who "hath been arraigned" and "hath pleaded not guilty" and "hath put himself upon his country, which country you are." The juror next hears that he must be "indifferent between the Queen and the accused," and that he must "present no person for envy, hate or malice, [nor] leave any person unrepresented for fear, favour, affection, gain, reward, or hope thereof." After our jury member hath hearkened, and hath done his best to "true presentment make," he may be surprised to
discover that the fine which resulted from his verdict is "made and levied against [the] goods and chattels, lands and tenements" of the accused. The accused himself, still puzzling about his chattels and tenements, may wonder if he faces prison when the clerk asks him if he is "content to be bound in the same terms in which you are now bound." The accused, according to the footnote in the Ontario manual of Courtroom Procedure, "must answer 'yes,'" just as, according to another footnote, he must answer yes to a second question that probably satisfies neither his content nor his understanding: "If you do appear as aforesaid and do not depart the said court without leave, the said recognizance is void. Otherwise it stands in full force and virtue. Are you content?" The footnotes contain some of the best reading in the Ontario manual. Here is the proclamation which opens a Supreme Court criminal trial:

OYEZ, OYEZ, OYEZ: ALL PERSONS HAVING ANYTHING TO DO BEFORE MY LORD THE QUEEN'S JUSTICE OF THE SUPREME COURT OF ONTARIO AT THIS SITTINGS OF ASSIZE AND NISI PRIUS, OYER AND TERMINER AND GENERAL GAOL DELIVERY FOR THE COUNTY (or DISTRICT) OF . . . . . . . . , DRAW NEAR AND GIVE YOUR ATTENDANCE AND YOU SHALL BE HEARD. GOD SAVE THE QUEEN.

NOTE: Because of its long-standing pronunciation in this manner, "OYEZ" shall be pronounced as "OWE-YAH" despite any different pronunciation shown in authoritative dictionaries. The last syllable shall be accented. "NISI" shall be pronounced as "nice-eye"; "PRIUS" as "pry-us"; "OYER" as "oi-urr" and "TERMINER" as "term-in-urr". The first syllable of each of these words shall be accented. The word "GAOL" shall, of course be pronounced "jail".

What is most interesting about this fifty-five word proclamation is the sixty-five word note appended for the enlightenment of a befuddled new clerk, who at this point probably wishes he sold shoes for a living. And, at that, the footnote stops short of explaining the meaning of these terms that puzzle clerks, jurymen, and defendants. The proclamation may be splendid ceremony, but it is doubtful communication. As a sympathetic Ausländer, who has noted the difficulties inherent in Canada's bilingualism, I wonder why lawyers and judges insist on compounding the problem by adding Latin and Old English to the
nation’s already heavy linguistic burden. Here is a brief checklist for avoiding unnecessary legal language:

a. **Use technical legal phrases only when you need them.** Many judges understand this point brilliantly when it is applied to other professions. They will question a doctor incisively, stripping away his jargon to get at the one or two crucial medical terms, and then they will make certain that these terms are used precisely and consistently. This understanding needs to be brought home to the law.

b. **Avoid gratuitous Latin words and phrases.** Some Latin is essential to the law. We would be handicapped without *caveat emptor*, *intestate*, *mandamus*, *nolle prosequi*, and *tort*. One of the advantages of Latin, a dead language, is that these terms remain stable. A living language, like a forest, has new shoots springing up chaotically, older growth constantly adapting to changing circumstances, and moss-covered relics of earlier centuries gradually disappearing from sight. We can be grateful to Latin for its fixed terminology, and also for contributing a number of phrases—no longer needing italics—that have been adopted into general English usage: *ad hoc*, *bona fides*, *ex officio*, *prima facie*, *quid pro quo*. Together these immutable foreigners and naturalized citizens perform useful work in English. But do we really need *ab initio*, *ad litem*, *de bene esse*, *duces tecum*, *inter alia*, *ipso facto*, *res gestae*, *ultra vires*, *sub silentio*, and *viva voce*?

And what are we to make of the Tennessee judge who wrote that “In the case *sub judice*, Thomas Brown et ux had driven to the *situs* in a 1974 Oldsmobile?”

c. **Don’t reach for a long word when a short one will do the job better,** just because your decision is important or you have been promoted to a higher court or you have received a thesaurus for Christmas. If the witness simply went home after the fire, there is no need to rear up and declaim that “subsequent to the conflagration, the witness proceeded to his domicile.”

d. **Don’t toss in weak qualifying phrases,** whether from temerity (“there is no question”, “we can say without doubt”) or timidity (“it would appear to be”, “speaking with all deference I would venture to suggest”), or simply from the pleasure of occupying the bench. Some judges litter their decisions with the written equivalents of “ahems” and inside winks and courtly nods. Here is the concluding page of a decision setting aside a judgment of the Exchequer Court, which had overruled the district court in a case concerning negligent stowage:
That Mr. Justice Thurlow considered this assumption to be of prime importance is evidenced by his saying:

Here, to my mind, the fact that no one has offered so much as an opinion, let alone proved facts, as to what it was that was wrong with the stowage and that caused the damage, becomes of prime importance.

It must, I think, follow from this that the learned Judges of the Exchequer Court who sat on this appeal gave no weight at all to the evidence of Captain Maley whose professional opinion, based on an examination of the damaged cargo in Hold No. 2 the day after the ship's return, was that "What it was that caused the damage" was that the cargo was "not adequately secured for normal conditions."

It is true that Captain Maley, having been engaged by the appellant or its insurers, was not an entirely disinterested witness, but as I have indicated, the decision of the learned trial judge appears to me to have been based in great measure on his evidence and with the greatest respect, I do not think it should be ignored.

With all respect for the learned Judges sitting on appeal in the Exchequer Court, I am of the opinion that the evidence in the present case discloses that the cargo was defectively stowed, that there was no other reason for it having shifted within less than 48 hours after the ship put to sea, and that such defective stowage was an act or omission which reasonably competent stevedores should have foreseen would be likely to injure the cargo and which did injure the cargo and thus caused the damage complained of.

For all these reasons I would allow this appeal and restore the judgment of the learned trial judge.
Here is the same page, with the cargo lightened:

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Avoid piling nouns on top of other nouns. Nominalization, as the linguists call it, slows a reader down. Since it is built into legal and business terminology—County Taxation Board, Real Property Appraisal Manual—the legal writer needs to be especially careful not to add to the problem with cumbersome combinations of his own invention: County Taxation Board equalization table, fact situation, nominal improvement assessment, influence factor, issue-oriented aspect, leadership-type decision, minimum average gross horticultural product sales requirement.

Avoid expressions, often associated with legal documents, that have no real legal function. These expressions simply call attention to themselves, like medical students at my university, who wear their white coats—stethoscopes sticking prominently out of pockets—in bookstores, restaurants, and barbershops. Legal writing is weakened, not strengthened, by "whereas," "as to whether," "said verdict," "witnesseth," "hereinafter," "further affiant sayeth naught," "be and the same is hereby," "learned trial judge," "thereof," "to wit." And the writer who claims that these are terms of art, with fixed and understood meanings, needs to spend an afternoon with his law books and his dictionary. There he will learn—if he consults Webster’s Second—that whereas means "considering that; it being the case that... implying a recognition of facts followed by inferences of something consequent"; and he will find that whereas also means "on the contrary... implying opposition or contrast to what precedes."

A special kind of functionless legalism derives from what seems to be the extraordinary fertility of the language of the law, its genius for reproduction. As soon as "null" appears, "void" follows, and then, tumbling out of the warren, come "cruel and inhuman," "allege and contend," "have and recover," "fitting and proper," "duly and sufficiently," "stipulated and agreed upon." Right behind these twins are triplets: "clear, cogent, and convincing," "arbitrary, unreasonable, and capricious," "bias, prejudice, and partiality," "rest, residue, and remainder." And from there it is a short step to a massive population explosion. While I am travelling, my wife has a document that empowers
her to "make, endorse, accept, receive, sign, seal, execute, acknowledge, and deliver deeds, assignments, agreements, certificates, hypothecations, checks, notes, bonds, vouchers, receipts, and other instruments in writing of whatever kind and nature as may be necessary, convenient, or proper." Mark Twain took a swing at this sort of language in Life on the Mississippi, where he described a prohibition bill that was pending in Burlington, Iowa:

A bill to forbid the manufacture, exportation, importation, purchase, sale, borrowing, lending, stealing, drinking, smelling, or possession, by conquest, inheritance, intent, accident or otherwise, in the state of Iowa, of each and every deleterious beverage known to the human race, except water.

g. Avoid expressions that concern the process of decision making:

"After listening to the lengthy testimony of the witnesses, I then researched the appropriate authorities."

"No citation of authority is needed."

"I have carefully considered all of the evidence."

"From an examination of all of the facts and circumstances in this case we must conclude . . . ."

"After a careful review of the entire record, including the lay witnesses and the medical testimony, and relying upon the previous decisions of our appellate courts, the Court finds that . . . ."

The reader should be given the fruit of judicial decision making, not a tour through the garden in which the fruit ripened.

3. Write concisely. Length, of course, cannot be dictated arbitrarily. The length of any discourse is a matter of appropriateness, but readers of the law consistently agree that although a few judgments are too short, most are too long. This tendency stems from good intentions, for judges are careful
and conscientious people. They wish to do their task thoroughly, to give fair
consideration to both parties, to cover all contingencies, to allay—perhaps smother—
possible objections to the decision, to prove that they were awake on the bench,
or, if not, that they at least read the transcript afterward. These are worthy goals.
But, as Virgil tells us in his native language, not ours, *facilius descensus Averno*
("easy is the descent to hell"). If these good intentions result in prose that is
bloated, difficult, incomprehensible, prose that forces a reader to skip to the last
page in order to find out what in fact was held, then no good cause has been
served.

There are several ways to control the length of an opinion. The
first is to organize—a subject I will touch on again—so that the materials are
presented once, in an orderly fashion, and do not wander all over the map. Too
many legal opinions, like the lower Mississippi River, require two thousand miles
of meandering to cover one thousand miles of distance. These extended judicial
travels are not merely an inconvenience to a reader and a waste of his time.
They may well disrupt his intellect. Studies of the psycholinguistics of language
indicate that some redundancy assists but excessive redundancy impedes
understanding, that a reader may carry a greater amount of information away
from ten pages than he does from twenty. In both written and oral discourse,
less is often more. A recent study of jury instructions came to the startling
conclusion that when a judge states and then restates a proposition to explain it
to a jury, he may well confuse rather than clarify the issue, and send the jurors
into their deliberations thinking that the statement and restatement are two
different, even conflicting, propositions. This study claims that the problems jurors
have understanding their instructions—apparently jurors comprehend about forty
per cent of what they are told—stem from language rather than law. Jurors were
derailed more by redundancies and nominalizations and misplaced modifiers than
they were by legal terms: "these [grammatical constructions and discourse
structures] rather than the legal complexity of the jury instructions, were
responsible for comprehension problems."

Often opinions can be easily trimmed by reducing the amount
of quotation. Judges have a tendency to quote entire paragraphs of law or
precedent, and then—because a reader doesn’t know in which direction to swim—
the judge will toss her or him a lifeline by italicizing the sentences that are crucial
to the development of the point. The solution is simply to quote the crucial
sentences and omit the rest. Since a reference is always given, the reader who
happens to be interested in the entire statute cited, or the whole case, can look
it up for himself.
A well-written, concise opinion is a selected summary of a proceeding, not a complete record. There is no need for a judge to compete with the court reporter. The judge's task is to convert the materials of the proceeding to the purpose at hand, decision making, rather than to review all of the documents, the statements of witnesses, the disputations of counsel. The essential arguments must be discussed; non-essential arguments may be summarized; trivial arguments may be abruptly dismissed. Counsel often hunt in court with shotguns; a judge should go armed with a rifle.

4. **Divide your opinion into sections.** This uncontroversial suggestion should corroborate your experience in reading well-crafted judicial prose. Organization into sections makes it unnecessary for the writer to repeat issues or facts, and makes it possible for the reader to know, at any particular moment, where he or she is, why certain information is being given, how it relates to what came before and to what follows. Normally, there are five parts to an opinion:

a. **Summary.** This brief statement, usually a paragraph is enough, sets out the type of case, the parties involved, and—if an appeal—how the case reached the appellate court.

b. **Issues.** Once the reader knows what the case is about in general terms, he or she needs to know what issues must be decided. If there are several, they should be given separate treatment, or grouped by categories, perhaps with an introduction that puts the various issues into a general perspective—a view of the woods before individual trees are identified.

c. **Facts.** With the issues established, the writer now has a guide to selecting the appropriate facts out of the welter of testimony and exhibits and documents. He or she should present only those facts that are pertinent to the determination of the issues or are necessary for a general understanding of the situation. Often the factual material is best presented in a brief chronological narrative, since that form is anticipated and thus quickly understood by the reader.

d. **Decision.** Having identified the issues raised by the action and having described the relevant facts, the writer is now in a
e. Conclusion. A judgment should end with a brief statement of the decision; or, if there are many parts, a brief summary of the several decisions.

This five-part organization may not be suitable all of the time, for every writer must be alert to create a structure appropriate to his or her content; form follows function in judicial opinions as well as architecture. In a short decision, these sections may be combined. The facts, if they are simple, might be covered in the opening summary. In a lengthy judgment more subdivision may be needed. If the issues can best be understood after the facts are presented, then sections b and c should be reversed. Nevertheless, this organization, or a version of it, will usually get you through. Here is a recent judgment by the Honorable Mr. Justice Brian Dickson, of the Supreme Court of Canada, in which the flesh has been removed from his fourteen-page decision so that only the organizational skeleton remains:

The appellant, John Kenneth Park, was charged with unlawfully breaking and entering a dwelling in Toronto and stealing jewelry and a sum of money. He pleaded not guilty and was tried in the County Court Judges Criminal Court of the Judicial District of York, by a judge without a jury. Convicted, he was sentenced to a term of imprisonment. An appeal to the Court of Appeals for Ontario was dismissed without written reasons and the matter has now reached this Court, by leave.

At issue is the admissibility of a statement made by Mr. Park, without which the conviction cannot stand. . . . Proof of the voluntary nature of the statement is generally, though not invariably, made on a voir dire, a trial within a trial. In this case, however, counsel for Mr. Park purported to waive the holding of a voir dire. The issue is whether in law an accused, or counsel on his behalf, may waive the holding of a voir dire and, if so, whether there was, in the circumstances of this case, a proper waiver.
I

The Facts

The dwelling house at which the break, entry and theft occurred was located at 57 York Downs Drive. Dr. Morris Herman resided next door. At about 7:15 p.m. on the evening in question, in early December, Dr. Herman ..............

In his notice of appeal to this Court, the appellant raises the following issues:

1. Did the trial judge err in failing to conduct a \textit{voir dire} to determine whether the statement was voluntary and admissible regardless of the fact that the appellant's counsel purported to waive the \textit{voir dire}?

2. Did the trial judge err in failing to conduct a \textit{voir dire} to determine whether the statement allegedly made by the appellant was in fact made?

3. Did the trial judge err in failing to conduct a \textit{voir dire}, notwithstanding the purported waiver, after the appellant testified that his conversation with the police was preceded by both a threat and an inducement?

II

The Right to Waive a \textit{Voir Dire}

Generally speaking, the only way that a trial judge, trying an accused with a jury, can determine whether any statement given by the accused is voluntary is by holding a \textit{voir dire} in the absence of the jury ........................................
Was the Statement in Fact Made

The second ground of appeal was framed in terms of error on the part of the trial judge in failing to conduct a voir dire to determine whether or not a statement allegedly made by Mr. Park was in fact made.

Inducement or Threat

I come now to the final point of appeal, pressed rather faintly, as it seemed to me, by counsel for the appellant. It is said that the trial judge erred in failing to conduct a voir dire when, notwithstanding the waiver of voir dire by counsel, the appellant later testified that his conversation with the police officers had been preceded by both a threat and an inducement. He said that at the outset of his conversation with . . . . . . . . . . . . . . . . . . . . . . . . . .

I would dismiss the appeal.

Here we have the five sections, with a slight variation that sets up a tripartite division of the issues:

a. An opening summary, which identifies the appellant, briefly describes the case, and sets out its history in the lower courts

b. The main issue to be decided—the admissibility of a statement by the appellant, given the waiver of a voir dire by his counsel

c. The facts, with a concluding section that divides the main issue into three specific questions concerning
1. the waiver
2. the existence of the statement
3. the conduct of the police officers
d. The decision, divided into three parts, each with a Roman numeral and a subtitle, each responding to a specific issue defined in c:
   part II decides issue 1
   part III decides issue 2
   part IV decides issue 3
e. The conclusion, pared down to only five words, which has the simple grace of the columns we use to build our halls of justice.

5. **Begin with your conclusion.** This advice, initially, may seem idiosyncratic, and it appears to violate the organization recommended above in part 4. It caused something of an uproar at the first Canadian Judicial Writing Program, if uproar is not too strong a word for a gentlemanly debate which took place inside the mellow elegance of Osgoode Hall. Many judges argued that a decision must preserve objectivity, that it must give a hearing to both sides. Stating the conclusion at the beginning, they maintained, appears to prejudge, to present a determination before the evidence has been considered. Others, using a different tack, claimed that opening with a conclusion spoils the suspense and thus lessens the reader’s interest. All of these points are important, though I would reply to the last that the novels of Agatha Christie are not an appropriate model for a judicial decision—a “who won it,” I suppose, rather than a “who done it.” There is enough mystery in the law as it is.

Let me rephrase the suggestion: begin either with your conclusion or by pointing toward it. A judge doesn’t have to nakedly blurt out the conclusion in the first paragraph. But—and this is the key point—whether the conclusion is stated at the beginning or not, the opinion ought to be headed for its destination from the very first word. The opening summary, the statement of issues, the selection of facts, the choice of authorities, what is included and what
is left out, should all be governed by the conclusion; and if they are, the opinion will move forward with the apparent inevitability that is the signature of a distinguished legal writer. The reason that lawyers turn to the last page first is not that they are interested only in the bottom line, but that reading the last page first tells them, in effect, how to read all the other pages. A reader needs to know what the destination is in order to understand the route of travel. Looking back at the five-part organization, we can see that the ends point toward one another. The opening summary and the conclusion do similar jobs—one looking forward, the other looking back. This circularity illustrates the essential point that all communication is simultaneously inductive and deductive: generalization must precede as well as follow specific details.

Thus, the conclusion to a judgment must be present in the beginning, either explicitly or implicitly. Putting an explicit conclusion at the end of the opening paragraph, though certainly not mandatory, is a technique that a judge ought to consider using on occasion. Here is an example of how firm and persuasive this technique can be—the first paragraph of a decision of the Court of Appeals of British Columbia written by Justice H.E. Hutcheon:

The question on this appeal is whether Lander, C.C.J., was right when, after a voir dire, he ruled inadmissible a statement made by the accused. The ground of the ruling was that the statement made by the accused was a "private communication" which had been intercepted without lawful authorization. Section 178.16 renders inadmissible any such statement. I think that the ruling was wrong.

We have been discussing, in essence, the end of beginnings—last sentences of first paragraphs. Let us look for a moment at the beginning of beginnings. Law, like mathematics, is full of general concepts and abstract precepts. Yet behind most proceedings beat the hearts of human beings, enmeshed in the daily realities that make the whole world kin. A brief summary of the human situation—what happened to whom—placed at the beginning of a judgment often assists a reader in understanding the legal technicalities that follow. It may be that the striking openings of Lord Denning—"It was bluebell time in Kent"; "Old Peter Beswick was a coal merchant"—are not appropriate for less gifted and less confident writers, but all judges would do well to consider beginning with a short explanation of the human drama that underlies most legal action. I turn again to Mr. Justice Dickson, and two of his characteristic opening paragraphs:
On April 8, 1976, Teresa Taylor and a friend were taking a ski lesson from Paul Ankenman on the slopes of Gibson Pass, in Manning Park, British Columbia when Larry LaCasse came over the crest of a knoll and accidentally collided with her, causing her grievous injuries. Through her parents she sued LaCasse for skiing out of control, Ankenman for negligence in conducting the ski lesson, Jaegli Enterprises as Ankenman’s employer, and other defendants as occupiers and operators of the ski hill for negligence in permitting a danger or trap to exist where Teresa was injured.

* * * * * *

Terence Robertson committed suicide in New York City on January 30, 1970. He was an author who had been commissioned by the publishers McClelland and Stewart Limited to prepare and write a biography. One of the terms of the agreement between Mr. Robertson and the publishers provided that Mr. Robertson would obtain a policy on his life in the amount of $100,000.

In each case we have immediately the essential fact on which everything else hangs—Taylor’s injury and Robertson’s suicide. Both are presented succinctly, yet graphically. In the Taylor case, the clause "came over the crest of a knoll" contains in a flash the speed and surprise of the accidental collision. In the Robertson case, the short first sentence—"Terence Robertson committed suicide in New York City on January 30, 1970"—evokes by its very brevity the shock of suicide and the fragility of human life.

6. **Follow the principles of good composition.** Good judicial writing is, in essence, simply good writing, and the judicial writer is bound by the same rules, conventions, possibilities, limitations, and agonies that govern all written communication. We have already seen several principles of good composition: considering the audience, avoiding jargon, writing concisely, organizing into sections, keeping the conclusion in sight from the beginning. Let me suggest several more:

a. Write for others, not for yourself. A legal opinion is not a diary entry, but an act of communication. Many problems in writing
are not problems for the writers; they know what they mean, and therefore can leap nimbly over the ellipses, jagged constructions, and mixed modifiers that trip readers, who are further from the case, who are not privy to material not stated, who may not understand a writer's assumptions, who are, finally, outside the writer's head. To be successful, a writer must fill in gaps that a reader cannot span, just as he or she should leave out statements that a reader will find obvious. The writer must consider how the message will be received in order to determine how it should be sent.

b. Keep to the main point, resisting the temptation—the siren call that drives legal prose upon the rocks—of adding every qualification, every nuance, every aspect of every point in each section. In both the opinion as a whole and in the individual sentence, there is, as Justice Cardozo warns, the danger of "an accuracy that defeats itself. . . . The sentence may be so overloaded with all its possible qualifications that it will tumble down of its own weight." The legal writer who tries to play it safe by including everything often communicates less than the writer with the skill and the courage to select only the right things, the necessary things.

c. Put your prose into chunks that the reader can digest. These chunks need to have internal coherence—subjects close to verbs, modifiers close to what they modify—and they need to be of manageable size. Since the average English sentence contains about seventeen words, sentences that consistently expand to fifty or one hundred words will
slow down any reader, layman or lawyer, especially if those long sentences do not have clear points of demarcation inside. Paragraphs, too, need to offer resting stations for the eye and for the mind. The paragraph that never ends makes a reader wish he had never begun.

d. **Emphasize nouns and verbs, the strong words in English, rather than relying on adjectives and adverbs.** If a witness didn't know the acts, say so, rather than "his actual knowledge of the case was extremely limited as far as the real facts were concerned."

e. **Don't overwork the verb to be.** This verb has spawned the most common and most important word family in English—*is, are, was, were*—but that distinction should not encourage you to use it continuously. The to be habit not only tires a reader, it gives less information in a sentence than other words might and less vigor and color as well, a point we can see by returning to the slopes of Gibson Pass:

> On April 8, 1976, Teresa Taylor and a friend were taking a ski lesson from Paul Ankenman on the slopes of Gibson Pass, in Manning Park, British Columbia when Larry LaCasse came over the crest of a knoll and accidentally collided with her, causing her grievous injuries.

A less skillful writer might have put it this way:
This is an action which resulted from an incident on April 8, 1976, when Teresa Taylor and a friend were at Gibson Pass, in Manning Park, British Columbia, where a ski lesson was being conducted by Paul Ankenman. Larry LaCasse, who is a defendant in this action, was involved in an accident with Ms. Taylor, and many injuries were suffered.

f. Use the active voice, most of the time. The passive voice takes longer to read than the active, and it often gives ambiguous or incomplete information. Thus, in most instances a writer should attempt to get the doer of the action in front of the verb, where we expect him or her to be. Rather than "many injuries were suffered," leaving us wondering just who was hurt, write that "Teresa Taylor suffered many injuries" or that "Larry LaCasse caused many injuries to Ms. Taylor." Rather than "it is alleged," or "it was decided," state who did the alleging, who did the deciding. Save the passive voice for occasional variety, and for the few times when it is more precise than the active voice. "Three bullets were fired" is an excellent sentence if you don't know who pulled the trigger. If you do, say so: "Patrolman Deegan fired three bullets."

g. Be specific, whenever possible. The legal writer faces all the normal difficulties that other writers face, and additional ones as
well. His or her material is often general, preceptual, abstract; yet a reader needs specific details, individual applications, concrete images to assist his understanding and keep his interest. Therefore, a legal writer should work for specificity whenever it is possible. In the citation of facts, one should normally refer to the litigants by their names, rather than by their legal designations: "Marlow crashed into Allen's car" rather than "the defendant-appellant crashed into the third-party tort-feasor's vehicle." Often precise details are more accurate, more informative, than general statements. Rather than saying that "Marlow made an improper response to the situation," say that he "failed to stop at the intersection." Rather than "Marlow's testimony was not impressive in the light of other testimony," give the reason: "Marlow's claim that his vision was impaired by grass six feet high was not consistent with photographs of the scene introduced into evidence." Here, as always, the reader must be kept in mind. The judge who wrote "in the light of other testimony" was undoubtedly thinking about the photographs, but if they have not been mentioned the reader has no way of knowing just what hard substructure underlies the spongy surface of generalization.

h. Use accepted conventions of grammar and typography. Our school teachers tend to make a fetish of correctness, forgetting that language is a set of conventions and that usage is relative. German writers are perfectly content with what we call the comma splice. French does not capitalize the first-person pronoun. Spanish begins an
interrogative sentence with a question mark. Americans put the final period inside quotation marks, Canadians put it outside. The school teachers are right, but for the wrong reason. Conventions of grammar and usage must be followed, not because they are linguistic absolutes or moral imperatives, but simply so that the reader will not be distracted from the writer's meaning.

Teach your secretary, your spouse, your clerk—whatever gets the last crack at your opinions—how to proofread, for the nation's law ought to be meticulously accurate in every aspect, large and small. The lesson, an easy one, is best explained by psycholinguist Frank Smith, of the Ontario Institute for Studies in Education: "The brain identifies letters, words, [and] meaning, but not at the same time; that is, the brain can perform these three distinct tasks on the same visual information, but it can do only one task at a time." Good readers make bad proofreaders because they have learned to read rapidly for meaning by looking only at parts of letters, halves of words—as little visual information as possible. To proofread one must slow down, and look at everything.

7. **Write and then rewrite.** The more we learn about composing, the more we discover that writing is largely revision, a fact that skilled authors have known all along. Justice Brandeis puts it this way: "There is no such thing as good writing. There is only good rewriting." Composing a good judgment is not a single, definitive act, but a process. The writer begins with notes, written or dictated, and perhaps with some form of outline. Then he or she usually proceeds in the following four stages:

**Rough Draft** Write a first draft—a rapid statement of main ideas—without worrying about order, redundancy, or final polish. In
the early stages writing is a process of exploration, and you should be open to all
the possibilities in the material that occur to you.

Revision  Let the first draft rest a day if possible, so you can chew over the ideas,
often subconsciously, and so you can come back to your draft as a critical stranger.

Now write a second draft—often a major reworking, and usually a major pruning, since
at this stage the focus shifts from discovery and inclusion to shaping and selection.
Examine the large units of structure, checking for logical connection of main ideas and the
best order of paragraphs and blocks of paragraphs.

Then write a third draft, concentrating on smaller points of style. Tune sentences for
best phrasing and rhythm. Check for effective beginnings and conclusions to sections and paragraphs.

Editing  Check facts, names, dates, quotations, citations, footnotes. Check
correctness, grammar, punctuation, spelling.

Proofreading  Read rapidly for meaning.
Then read again slowly, letter by letter, for typographical errors.

The idea of a genuine rough draft, written rapidly and without concern for wording or polish, may help judges who are frustrated in their attempts to produce finished judgments in a single act. Many legal writers, I would guess, write one-draft documents that are repaired rather than revised—a tendency too often encouraged by secretaries who wonder why you can’t get it right the first time. Considering writing as a series of rewritings takes the pressure off and allows for the continual reshaping of schemata that, according
to cognitive psychologists, lies at the center of the process of thinking. The revisions required by the second draft allow the writer to develop the potential of ideas that may be embedded inchoately in the rough draft. The second draft also provides an opportunity for what may be the most difficult of all the acts in the process of writing—throwing things away. If the writer is on track, the third draft allows him to shift his attention to particulars of style, to effective presentation of the ideas that have been blocked out and then refined in the rough and second drafts. The final steps of editing and proofreading assign to their proper place those details that should not be allowed to interfere earlier in the composing process.

This model, of course, is a general one, and like most models it both clarifies and oversimplifies its subject. Many writers proceed more or less in this fashion, though some skipping around is usual. Occasionally the writer will burst forth with a bit of final-draft rhetoric in the early stages. And some alterations in the late stages may require new sections of rough draft. For any given writer, on any given project, some stages may tend to merge, others may need to be extended.

At this point, two questions might be raised: "What about dictating?" and "Do I really need so many drafts?" My experience with dictating, and with reading dictated opinions, especially those dictated from the bench, persuades me that dictation can play a role in writing, most appropriately in the early stages, but an opinion that is merely dictated will rarely be a first-class act of communication. And, yes, a good written opinion will normally require at least three drafts. Fewer might be satisfactory in order to make a record for your personal use, but only through the process of revision can you shape your ideas effectively for readers who do not have your knowledge, your experience, your research, your observation of the witnesses, your hearing of the arguments. And many legal writers, often our best ones, don't stop at three drafts. Those sentences by Mr. Justice Dickson that we admired earlier did not simply spring, like Athena, fully armed from the forehead of Zeus. Their author stated last year that he writes "eight or nine drafts" of judgments.
Writing is hard work. The novelist Thomas Berger puts it this way:

At the beginning of my career I prepared myself for each session of writing by whimpering all afternoon, watching television all evening, and, after throwing up at midnight, fastening myself to the desk with shackles, to remain there till dawn.

No one ever promised you that being a judge would be an easy task. The rewards in your profession come not from primrose paths of dalliance, but from the satisfaction of knowing that a difficult and important job has been well done. I urge you to remember that writing is at the center of your job, and that a judgment is not well done until it is well written.