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# Writing Better Opinions: Communicating with Candor, Clarity, and Style

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## I. INTRODUCTION

Eighty years ago, Judge Benjamin N. Cardozo discussed the "nature of the judicial process" in a series of lectures he delivered at Yale University.[1] In his first lecture, Judge Cardozo considered how judges go about their work:

> The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth. Let some intelligent layman ask him to explain: he will not go very far before taking refuge in the excuse that the language of craftsmen is unintelligible to those untutored in the craft. Such an excuse may cover with a semblance of respectability an otherwise ignominious retreat.[2]

More recently, Judge Frank M. Coffin has reflected on the process of judging, attempting to get some perspective on some of the "stubborn problems," "the approaches that worked," and "the benchmarks of craftsmanship" in rendering appellate opinions.[3] Scribbling "on tickets, menus, court docket lists, [and] baggage checks," Judge Coffin found himself following Henry David Thoreau's advice to "[k]now your own bone; gnaw at it, bury it, unearth it, and gnaw it still."[4] In the end, Judge Coffin's search focused on the question being asked by citizens "[a]t all levels of sophistication . . . : Why must we entrust justice to the wisdom, mercy, and objectivity of this small and elite group, the judges?"[5] By identifying this central question, Judge Coffin acknowledges the judiciary's responsibility to communicate clearly with its various audiences as the essential ingredient in achieving the goals of our judicial system.

This article explores the purposes of appellate decisions and presents some ways appellate judges might improve their opinion writing by becoming more conscious of the needs of the audiences for whom they are writing. Part I discusses the philosophical underpinnings of our judicial system, contrasting them with those of other countries that do not rely on the "reasoned" decision making that is central to our approach. Part II looks at who the various audiences are for an appellate

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1. *See generally* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).
2. *Id.* at 9.
3. FRANK M. COFFIN, THE WAYS OF A JUDGE 3 (1980).
4. *Id.* (citation omitted in original).
5. *Id.* at 3-4.

opinion and what those various audiences need. Part III focuses on meeting those needs by writing clear, concise opinions. Part IV considers questions of style, including the use of humor and figurative language in opinions. The article concludes with an exhortation to judges to keep the needs of their audiences firmly in mind as they go about their work and to make every choice regarding tone or content of opinions with an eye to preserving respect and credibility for our judicial system.

## II. THE REASONED OPINION: A FOUNDATION OF AMERICAN JURISPRUDENCE

American lawyers, judges, and scholars expect an appellate opinion to be "a discursive narrative, consisting of a candid and reasoned explanation of the court's holding."[6] A radically different approach is taken in other countries like France where judges typically employ an opinion form that is terse and syllogistic.[7] Justice Ruth Bader Ginsburg has described opinions written in the French tradition as "tightly and precisely composed," and reported that commentators familiar with the French system believe that "the ideal judgment is 'considered all the more perfect for its concise and concentrated style, so that *only experienced jurists* are able to understand and admire it.'"[8] Whether the litigants or the general public understand the basis for the opinion is apparently not even a consideration.

Judicial scholars in the United States, however, emphasize the importance of writing a reasoned justification for the outcome in a case as a way of achieving the goals of our judicial system: (1) guiding the participants in the legal process, (2) persuading judges, officials, and citizens that the court has reached the proper resolution of a dispute, (3) limiting judicial arbitrariness, and (4) legitimizing any judicial departures from apparently established law.[9] Providing a "reasoned response to reasoned argument is an essential aspect of" our judicial process.[10] Requiring judges to give reasons for their decisions not only educates and persuades the readers of those opinions, it encourages judicial candor[11] and is designed to provide a "profound constraint on judicial discretion."[12] Candor has been viewed by one commentator as

> the sine qua non of all other restraints on abuse of judicial power, for the limitations imposed by constitutions, statutes, and precedents count for little if judges feel free to believe one thing about them and to say another. Moreover, lack of candor seldom goes undetected for long, and its detection only serves to increase the level of cynicism about the nature of judging and of judges.[13]

Judge Patricia M. Wald offers two slightly different reasons why judges do not "simply decree results in individual cases and, as necessary, announce broader

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6. Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT'L L. 81, 81 (1994).

7. *Id.* at 82.

8. Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 136 (1990) (quoting RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 129 (2d ed. 1978) (emphasis added).

9. Wells, *supra* note 6, at 82.

10. David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987).

11. *Id.*

12. Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 904 (1987).

13. Shapiro, *supra* note 10, at 737.

commandments about what the law requires"[14]: Judges must, first, "reinforce [their] oft-challenged and arguably shaky authority to tell others—including our duly elected political leaders—what to do" and, second, they must "demonstrate [their] recognition that under a government of laws, ordinary people have a right to expect that the law will apply to all citizens alike."[15] As Justice Oliver Wendell Holmes stated more than one hundred years ago, "the command of the public force [in our society] is intrusted to the judges . . . and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees."[16] Thus, observed Justice Holmes, people need to know what behavior is expected of them, based on the prior judgments of the courts.[17] Predictability—"the prediction of the incidence of the public force through the instrumentality of the courts"[18]—is one of the cornerstones of our legal system. Requiring judges to explain the outcome of each case reinforces the court's authority to regulate others and informs citizens about the rules of conduct that will apply to all. Furthermore, published reasoned opinions tend to ensure consistency within and among courts, leading to an even greater degree of predictability.

Underlying these principles is the fundamental American value, expressed in the Declaration of Independence, that our government derives its "just Powers from the Consent of the Governed."[19] Thus, the court's authority is grounded in public assent. To ensure that assent, a judicial opinion must seek to establish with its readers a conversation that invites them to use their minds and judgment in understanding and accepting the opinion of the court. Even the Supreme Court has recognized that its "power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."[20] Judge John Minor Wisdom taught his law clerks the importance of writing opinions "in a way that would teach basic principles of democracy, equal protection of the laws, and constitutional federalism to lawyers, government officials, and the general public, so that all would better understand the reasons behind the court's decisions."[21] Because of "the clarity and precision of his writing," Judge Wisdom was able to explain "firmly and clearly the court's reasoning in reaching what were often unpopular results."[22]

James Boyd White has challenged the court to ask whether its opinion represents "an authoritarian text, one that demands simple and total obedience of its

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14. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1371 (1995).

15. *Id.* at 1372.

16. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

17. *Id.*

18. *Id.*

19. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

20. Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992).

21. Allen D. Black, *Judge Wisdom, the Great Teacher and Careful Writer*, 109 YALE L.J. 1267, 1269 (2000).

22. *Id.* Judge Wisdom's opinion in *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), *adopted per curiam*, 380 F.2d 385 (5th Cir. 1967) (en banc), provides an excellent example of his ability to explain the court's holding in simple and practical terms. In instructing federal courts on how to desegregate hundreds of school districts, Judge Wisdom concluded, "The only school desegregation plan that meets constitutional standards is one that works." *Id.* at 847 (emphasis omitted).

reader," or defines "the reader as a person with a mind, with a heart-as a free agent-who in reading the text is encouraged to activate these capacities in certain ways?"[23] By showing respect for the people affected by their rulings and encouraging this form of participatory democracy, courts encourage respect for the judicial system and widespread acceptance of their opinions. When people do not feel committed to judicial pronouncements because they do not understand them or because they feel alienated from the judicial system itself, cynicism about legal institutions flourishes, potentially leading to outright disrespect for the law.[24]

One legal commentator has recognized "an emerging theory of judging [that] emphasizes . . . [the] sense of community or dialogue" described by Professor White.[25] Warning against deifying abstract law, one trial judge argues that the "kind of law that conforms to the ideals of democracy" is the only kind of law that will ultimately "contribute to the evolution of human personality, spirit and capacity" and, thus, the only "kind of law that wisely may be deified."[26] Each judge assumes the responsibility of ensuring "that individual justice is done, within the framework of the law."[27] This job must be done by a "human judge, not an abstract legal technician. This judge has an initial human concern that the litigants receive common-sense justice, but he also realizes that the discipline of legal doctrine governs his determination of the cause."[28] To do this job effectively, the judge must be able to recognize where justice lies and explain how the decision will be consistent, or at least not inconsistent, with existing legal authority.[29]

Our judicial system is, thus, thoroughly grounded on the concept that "the fairness and effectiveness of adjudication are promoted by reasoned opinions. Without such opinions the parties have to take it on faith that their participation in the decision has been real, that the arbiter has in fact understood and taken into account their proofs and arguments."[30] Furthermore, if a decision has consequences for an ongoing relationship, such as in a divorce case, and no reasons for the decision are provided by the court, the litigants will necessarily have to guess about the reasons for that decision and act accordingly.[31] In such circumstances, the effectiveness of the adjudication would be impaired for two reasons: First, the results achieved might not be those intended by the court, and, second, the court's "freedom of decision in future cases [might] be curtailed by the growth of practices based on a misinterpretation of decisions previously rendered."[32]

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23. JAMES BOYD WHITE, JUSTICE AS TRANSLATION 101 (1990).

24. Wells, *supra* note 6, at 88.

25. Martha L. Minow, *Judging Inside Out*, 61 U. COLO. L. REV. 795, 800 (1990) (pondering whether judging is a lonely experience or "an experience that confirms solidarity with others and that unlocks stored up memories and triggers imagined conversations with other people who could have a view on the issue").

26. William J. Palmer, *Appellate Jurisprudence as Seen by a Trial Judge*, 49 A.B.A. J. 882, 885 (1963).

27. Robert J. Martineau, *Craft and Technique, not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 33 (1993) (quoting Albert Tate, Jr., *The Art of Brief Writing: What Judge Wants to Read*, LITIG. 11 at 11 (Winter 1978)).

28. *Id.* (quoting Albert Tate, Jr., *The Art of Brief Writing*, LITIG. 11 (Winter 1978).

29. *See id.*

30. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 388 (1978).

31. *See id.*

32. *Id.*

In a talk given at the 1960 Conference of Chief Justices, Professor Robert A. Leflar challenged the judges to focus on the purposes of the appellate courts in our legal system and achieve those purposes by speaking clearly to their audiences, both by words and by action:

> Judicial opinions are the voices of our courts, and they serve the purposes that the courts serve. Stated most broadly, those are the purposes of government itself . . . . Opinions are the public voice of appellate courts, and so represent the judiciary to the public, but they are not voices merely. They are what courts do, not just what they say. They are the substance of judicial action, not just news releases about what the courts have done . . . .[33]

Professor Leflar challenged the judges to consider consciously their audience when writing opinions, asking "To whom is this bit of writing addressed?" and "What ideas should it convey *to that reader*?"[34] Judges who seriously consider these questions when writing their reasoned opinions are most likely to succeed in accomplishing the goals of our legal system. Regardless of the outcome of the cases, readers will have more faith in the judicial system and be more likely to abide by the court's decision when they understand how that decision was reached. In the end, the judges who are able to explain their decisions well to those who read them are the judges who will be revered. As Professor Lon L. Fuller said:

> The great judges of the past are not celebrated because they displayed in their judicial "votes" dispositions congenial to later generations. Rather their fame rests on their ability to devise apt, just, and understandable rules of law; they are held up as models because they were able to bring to clear expression thoughts that in lesser minds would have remained too vague and confused to serve as adequate guideposts for human conduct.[35]

## III. THE AUDIENCES FOR APPELLATE OPINIONS: WHO ARE THEY AND WHAT DO THEY NEED?

Poet and English Professor Walker Gibson has challenged appellate judges to consider the following four questions when sitting down to write an opinion:

> (1) To whom am I talking—who is my reader?
>
> (2) What do I want my reader to do?
>
> (3) Who am "I"—that is, what sort of speaking voice shall I project by the manner in which I compose my language?
>
> (4) What relation should I express between this "I" and my reader—should I be formal or informal, distant or intimate? To use the literary term, what is my *tone*?[36]

The first question, according to Professor Gibson, is simply a matter of fact: One must determine who actually reads a judicial opinion.[37] Professor Gibson

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33. Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 819 (1961).

34. *Id.*

35. Lon L. Fuller, *An Afterword: Science and the Judicial Process*, 79 HARV. L. REV. 1604, 1619 (1966).

36. Walker Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U. L. REV. 915, 921 (1961).

37. *Id.*

identified the immediate readers as the litigants and their lawyers; the writing judge's colleagues, including any dissenters; the lower court where the case originated, especially if the opinion is a reversal; perhaps a higher court; newspaper reporters; and the public at large.[38]

Professor Gibson had the opportunity to pose this question to appellate judges directly at the Appellate Judges Seminar held at New York University in 1960.[39] When asked to whom (or for whom) they wrote their opinions, the twenty-five judges present listed the following nine audiences: posterity, the bar, future judges, the legislature, law students (both today's and tomorrow's), readers of the *New York Times*, themselves (as the writing judges, to satisfy themselves that their decisions are correct), the losing lawyer, and their fellow judges.[40] Others have noted that appellate judges must address opinions to both lower and higher courts, "lawyers seeking understanding and guidance," other members of the judicial panel, "judges in other jurisdictions, legislative and executive officials, scholars, and the community at large," any of whom might plan future transactions based on the courts' opinions.[41]

The audiences for whom appellate judges write seem to revolve around the court like planets around the sun. Closest to the court are those most immediately concerned with the decision: the writing judge, other judges on the panel, the litigants and their lawyers. In the next orbit would be the court whose judgment was being affirmed or reversed and perhaps a higher court to whom the present opinion might be appealed. Next would come the newspaper reporters, the bar, other judges, scholars, law students, and public officials; and, finally, the public and posterity.

The answer to Professor Gibson's second question—"What do I want my readers to do?"—varies somewhat for different audiences. Generally, however, what the court is seeking is agreement.[42] "See it my way," the judge seems to be saying, while knowing that at least three members of the audience are sure to disagree: the losing party, that party's lawyer, and any dissenting judges.[43] The lower court, if its decision has been reversed, is also likely to be an unsympathetic reader.[44] To persuade its various audiences, including these most resistant ones, the court must convince them that it has considered all points of view, "that opposing evaluations of the case have been understood and seriously weighed."[45] To make the losing party even more accepting of the result, the judge might grant the losing side a point or two.[46] Regarding this approach, Professor Gibson comments, "When this suggestion is proposed to appellate judges, they nod in polite agreement. Is it not astonishing, then, how many opinions are written as if there were only one, very obvious, and utterly inescapable position, and that the position of the writer himself?"[47]

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38. *Id.* at 921-22.

39. Leflar, *supra* note 33, at 813 (citing Robert A. Leflar, *The Appellate Judges Seminar at New York University*, 9 J. LEGAL ED. 359 (1956)).

40. *Id.* at 813-14.

41. Wells, *supra* note 6, at 87.

42. Gibson, *supra* note 36, at 922.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

Professor Gibson's third question, which "concerns the quality of the 'I' or stylistic voice through which the judge speaks,"[48] was addressed in Judge Cardozo's essay, *Law and Literature*.[49] There, Judge Cardozo describes possible roles a judge may adopt through the use of language, including the "type magisterial or imperative" and, in the alternative, a writer who recognizes that the reader is a person "of sophistication and intelligence . . . who should not be patronized."[50] Discouraging the authoritarian approach of the former, Professor Gibson urges judges to adopt the latter tone, which reflects, in the words of Judge Cardozo, "'a changing philosophy of law'" that tends to use "other methods more conciliatory and modest."[51]

The fourth question regarding the writer's tone has probably already been answered. The reader must be treated as an equal, with respect. According to Professor Gibson, the reader should obviously

> not be slapped on the back with wisecracks and jocularity; neither should he be spoken to as if he were somehow intransigently stupid in the face of a "plain meaning." He should not be addressed at undue length, in paragraphs wordy and windy, for the tone should imply two busy [people], writer and reader, both perfectly capable of following an argument that is succinct, and efficiently composed. Most important of all, the writer must not assume that the reader is necessarily ready to adopt his position; the writer's own display of logic is not inevitably dazzling. It is in this sense that "good humor" is appropriate—a recognition of contrary yet reasonable conclusions.[52]

Communicating with such varied audiences may seem an impossible challenge. Yet, if the court is to satisfy the participants in the legal process; educate the bench, bar, and general public[53]; and leave an intelligible marker for posterity, this challenge must be met. Perhaps the best advice about how to meet the needs of the court's various audiences comes from an unlikely source: a legal reporter. In a 1949 article for the ABA Journal, Boyd F. Carroll of the *St. Louis Post-Dispatch* issued a "plea for simplification."[54] Carroll explains that when he talks about "simplification," he means "anything that will contribute to clear understanding of court decisions by laymen and the public in general; perhaps by lawyers, too."[55] Summing up centuries of complaints about legal writers, Carroll quotes "the gripe of an irate city editor who told a reporter, 'Don't be so damned profound. Write so city editors and street car motormen can understand.'"[56] His plea, as well as some specific suggestions that will be discussed in Part III, were "offered in the spirit that anything tending toward more knowledge and clearer understanding of the

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48. *Id.*

49. *Id.* (citing BENJAMIN N. CARDOZO, LAW AND LITERATURE 3-4 (1931)).

50. Gibson, *supra* note 36, at 923.

51. CARDOZO, *supra* note 1, at 14-15 *quoted in* Gibson, *supra* note 36, at 923. *See also* JOHN P. FRANK, MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE 295, 297 (1958) (*cited in* Gibson, *supra* note 36, at 922 n.16 (quoting Frank's terms for "the stuffier judicial styles" as "Legal Lumpy" and "Legal Massive")).

52. *Id.*, at 923.

53. *See generally* Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961 (1992).

54. Boyd F. Carroll, *The Problems of a Legal Reporter: Views on Simplifying Appellate Opinions*, 35 A.B.A. J. 280, 280 (April 1949).

55. *Id.* at 281.

56. *Id.*

courts and their decisions . . . is a contribution to a better evaluation and appreciation of the courts."[57] Judge Cardozo would, no doubt, have agreed.

## IV. WRITING CLEAR, CONCISE OPINIONS: ISSUES OF FORM, SUBSTANCE, AND STYLE

"Ask the public: The first thing they associate with professors is tweed; the first with doctors (a tie here) is lots of money or bad handwriting; and the first with lawyers, written language that is impossible to understand."[58] Judges probably feel the same way about lawyers themselves, having read countless briefs that are unnecessarily long, poorly organized, illogical, and, at times, even incomprehensible. To aid in eradicating such obfuscatory legal writing, judges should take the approach often advocated in sports: the best defense is a good offense. Judges should become models of clarity, conciseness, and logical organization through their opinions. They "need to be able to articulate clearly the steps and connections in a logical argument" and "maintain clarity of expression, even in the face of complexity of thought."[59] They must organize the necessary ingredients of their opinions in a logical, organized format that addresses the needs of their various audiences in as concise a way as possible. And they must write in plain English,[60] use correct grammar and punctuation, and adopt an engaging writing style.[61]

### *A. The Five Parts of an Opinion*

A well-written opinion consists of five essential parts: the nature of the action, the statement of the facts, the questions to be decided, the determination of the issues, and the disposition and mandate.[62]

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57. *Id.* at 282.

58. George D. Gopen, *The State of Legal Writing:* Res Ipsa Loquitur, 86 MICH. L. REV. 333, 333 (1987).

59. *Id.* at 335.

60. *Id.* at 348 (quoting the following elements of "'Plain English': (1) a clear, organized, easy-to-follow outline or table of contents, (2) appropriate captions or headings, (3) reasonably short sentences, (4) active voice, (5) positive form, (6) subject-verb-object sequence, (7) parallel construction, (8) concise words, (9) simple words, and (10) precise words.") (citation omitted).

61. 1999 Fall Judicial Conference of the Maine State Judiciary, "Better Opinion Writing," Augusta (Oct. 22, 1999) (notes on file with the author). At the Fall Judicial Conference of the Maine State District Court, Superior Court, and Supreme Judicial Court judges, trial court judges were asked to tell Maine Supreme Court Judges what they would like to see more of (or less of) in their opinions. The trial judges made the following suggestions to the Supreme Judicial Court:
"Don't misstate applicable facts."
"Be specific about what the trial court ruled, what the previous order or decision was."
"Give more instruction to the trial court (*e.g.*, particular language to use in instructing juries). Be clearer about what the court should do on remand."
"Be clearer in your use of language: Does 'property' mean real or personal property?"
"Be more specific in stating the rule you are adopting and your holding."
"Apply the law consistently; resist the urge to get a 'fairer' result. Don't overrule prior cases unless absolutely necessary."
"Be more instructional, less cryptic."
"Indicate explicitly which claims the court considers 'frivolous' or 'without merit.'"
"Be creative: Literary and well reasoned opinions are fun to read."
*Id.*

62. *See* JOYCE J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK 13 (3d ed. 1986); RUGGERO J. ALDISERT, OPINION WRITING § 10.2, at 153 (West Publishing Co. 1990).

### *1. The Opening Paragraph: The Nature of the Action*

The opening paragraph should set the stage by laying out the "who" and the "what" of the case.[63] That paragraph should begin by identifying the parties and establishing how the court will refer to them. Names are usually best, but functional designations, such as "the Contractor" also work well. Next, the paragraph should explain the nature of the case, how it came before the court, and what the court must decide. This paragraph may end with the actual ruling, informing the reader of the result of the case immediately. The following example, taken from an actual opinion, achieves the necessary results succinctly:

> Joseph H. Striefel appeals from the judgment entered in the Superior Court (Hancock County, *Mead, J.*) in favor of Donna Brignull, Donald W. MacLeod III, and Martha M. Sikkema (collectively, "the MacLeods") in Striefel's action seeking a declaration of his rights in a strip of land. Striefel contends that: (1) the trial court applied the wrong standard of proof; and (2) the evidence was insufficient to establish the elements of adverse possession. We disagree, and affirm the judgment.[64]

### *2. Statement of the Facts*

Following a hearing or bench trial, the trial judge should have considered all the evidence presented and made findings of fact based upon stipulations, uncontroverted relevant testimony, and admissions in the pleadings. Where the testimony, oral and documentary, was controverted, the judge should have made an explicit credibility determination, using such words as "The Court finds that . . . ," or "credits the testimony of . . . ," or "afforded great weight [or credibility] to . . . ." Some of these findings of fact will be relevant to the case on appeal. In writing the opinion, the reviewing judge must determine which of the testimony or findings of fact are the relevant ones. A mere recitation of the controverted testimony, with no indication of what the trial judge found to be credible is of little use to readers of the appellate decision. Specific findings of fact or credibility determinations are necessary to explain the factual basis for the court's decision.

The opinion should not include all the facts, but just those facts that are either legally significant or necessary to establish the context of the events described.[65] Although the facts should always be obtained directly from the record itself rather than from the briefs or other statements of counsel,[66] the statement of the facts should not reproduce the record or include long quotes from deposition or trial transcripts or the text of pleadings and motions. Diagrams and maps should be included when they will aid the reader's understanding of the case. This section may include any relevant procedural history not stated in the opening paragraph.

The facts should be stated as a narrative, in the past tense, usually in chronological order. They should be limited to those facts necessary to an understanding of the court's decision regarding questions of law; everything else should be omitted. Dates should be inserted only when they help readers understand the flow of

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63. ALDISERT, *supra* note 62, § 10.2, at 153.

64. Striefel v. Charles-Keyt-Leaman P'ship, 1999 ME 111, ¶ 1, 733 A.2d 984.

65. GEORGE, *supra* note 62, at 13.

66. George Rose Smith, *A Primer of Opinion Writing for Law Clerks*, 26 VAND. L. REV. 1203, 1204 (1973).

events or when they serve some other purpose, such as identifying the applicable law.

The following paragraph is an example of a well-written summary of the facts:

> Adams suffered a work-related back injury on November 8, 1990, while employed by Mt. Blue Health Center. Except for a brief, unsuccessful return to light-duty employment in 1991, Adams has received the equivalent of total incapacity benefits since the date of his injury. Adams filed a petition for award of an inflation adjustment in October 1996, contending that he has received total incapacity benefits pursuant to former section 54-B and is, therefore, entitled to an inflation adjustment. The Board denied the petition and we granted the employee's petition for appellate review pursuant to 39-A M.R.S.A. § 322 (Supp. 1998).[67]

The statement of the facts must be scrupulously accurate and stated "as favorably as possible to the losing side."[68] The court must be careful not to state as a "fact" something that was hotly contested and not explicitly resolved in the trial court.[69] It is a good practice to reread the statement of the facts after completing the opinion to ensure that all the facts relied upon are adequately stated.

### *a. Distinction between Facts and Legal Conclusions*

The statement of the facts should not include any legal conclusions. If the defendant punched the police officer, the statement of facts should say, "The defendant *punched* the police officer," not "The defendant *assaulted* the officer." A *punch* is a fact; an *assault* is a legal conclusion.

Although legal conclusions should not be included in the statement of the facts, logical factual conclusions—facts inferred from the evidence presented—are permissible. Such logical inferences must be based on "the reasonable probability that the conclusion reached flows from the evidentiary data."[70] In the following example, the court explains such a logical inference:

> Although the Hearing Officer did not make an explicit finding of unavailability, that finding must be inferred from the Hearing Officer's determination that Adams was entitled to benefits pursuant to subsection 55-B for 100% partial incapacity.[71]

### *b. Motion to Dismiss*

When reviewing the court's decision to grant or deny a motion to dismiss, the court must assume that all of the plaintiff's assertions are true.[72] When granting a motion to dismiss, "[t]he judge should set forth the facts as broadly as possible, in accordance with the pleadings, in favor of the" plaintiff.[73]

### *c. Motion for Summary Judgment*

When reviewing the court's decision to grant or deny a motion for summary judgment, the court must view the facts in the light most favorable to the nonmoving

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67. Adams v. Mt. Blue Health Ctr., 1999 ME 105, ¶ 2, 735 A.2d 478.

68. Richard B. Klein, *Opinion Writing Assistance Involving Law Clerks: What I Tell Them*, JUDGES' J. Summer 1995, at 33, 35.

69. *Id.*

70. ALDISERT, *supra* note 62, at 158.

71. Adams v. Mt. Blue Health Ctr., 1999 ME 105, ¶ 19 n.5, 735 A.2d 478.

72. *See, e.g.*, United States v. Gaubert, 499 U.S. 315, 327 (1991).

73. ALDISERT, *supra* note 62, § 10.4 at 155.

party.[74] When setting forth the reasons for affirming a grant or denial of summary judgment, the court should present the evidence supporting and contesting the motion to show whether a genuine issue of material fact exists.[75] The court may not "serve as a fact finder in summary judgment."[76] If the evidence on a material fact is controverted, summary judgment will not be warranted.[77]

### *3. Questions to be Decided*

Although the issues may be introduced in the opening paragraph, the specific legal questions to be decided should be laid out in the paragraph following the statement of the facts, before the determination of the issues. This approach is preferable to scattering the issues throughout the opinion, forcing the reader to seek them out as if participating in a treasure hunt.

To adequately identify the questions to be decided, the judge must state the issues concisely and specifically.[78] An issue statement is a question of law, which can often be recognized by the use of the word "whether."[79] The questions to be decided should be set forth as clearly and simply as possible. As in the three examples below, they should be easily distinguished from the contentions of the parties and the legal rules used to determine the outcome of the case.[80]

> Because the Superior Court acted in an appellate capacity, we review directly the record of the District Court to determine whether the District Court's denial of the Rule 60(b)(5) and 60(b)(6) motion for relief from judgment constituted an abuse of discretion.[81]

> The Crispins have raised several issues on appeal. We address only the following: (1) the separate responsibilities of the Planning Board and the Town Council when both contract zoning and subdivision approval are sought by an applicant; (2) the public's opportunity for notice and hearing when the Town is considering a proposal for contract zoning; and (3) the Crispins' individual claims regarding their property rights in an easement over the parcel to be owned by Maine Life Care.[82]

> We direct our attention to the elements of adverse possession, to determine whether the record contains sufficient credible evidence to support the trial court's determination that the MacLeods met their burden of establishing each of the elements.[83]

### *4. Determination of the Issues*

This section is the heart of the opinion, the legal discussion where competing cases, laws, or policies are analyzed and a reasoned decision is reached. In the trial court, "discussion of the law is justificatory only. It is not designed to be

74. *See, e.g.*, Matushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986).
75. *Id.*
76. *Id.*
77. ALDISERT, *supra* note 62, § 10.5, at 156.
78. GEORGE, *supra* note 62, at 48-49.
79. *Id.* at 49.
80. *Id.*
81. Beck v. Beck, 1999 ME 110, ¶ 6, 733 A.2d 981 (citations omitted).
82. Crispin v. Town of Scarborough, 1999 ME 112, ¶ 9, 736 A.2d 241.
83. Striefel v. Charles-Keyt-Leaman P'ship, 1999 ME 111, ¶ 8, 733 A.2d at 989.

error-correcting."[84] Appellate decisions, however, are intended to determine whether errors were committed in the trial court and, if so, whether those errors were prejudicial. If an error was great enough to be prejudicial, the reviewing court must grant a reversal or vacation of the judgment.[85]

Before determining whether an error was committed, the court must consider the extent of the review and the applicable standard of review.[86] To determine the extent of the review, the appeals court must first decide whether it has jurisdiction by establishing whether an appealable final order exists.[87] Next, the judge must determine the proper standard of review to be applied, noting first whether all the errors claimed were preserved in the record. "The analysis as to whether reversible error occurred is generally a function of the standard of review. This standard is established either by statute or by case law. It serves as a guide to measure the weight of the error. It determines [whether] the error is prejudicial."[88]

Because trial judges, litigants, and the general public will rely on appellate court opinions and the precedents they set, their meaning must be as clear as possible. A foggy, imprecise opinion is bound to lead to extensive future litigation as lawyers and litigants attempt to determine the meaning of that opinion. As Dean Wigmore warned, the judge should not "piece[] together a great many semi-irrelevant propositions of law" or "wander[] through numerous cited cases, sometimes mak[ing] as much as a law lecture out of them, and end[ing] with the impression that somewhere or other the opinion has told what the law is. But just what detail of the rule is newly decided remains unclear to the Bar."[89]

To avoid this outcome, the judge must explain the rules of law and their application to the facts at hand as clearly as possible. Unlike the facts, which occurred in the past, the rules of law being applied generally exist at the time the opinion is being written; in such cases, the law must be stated in the present tense. By stating the law in the present tense, the court helps the reader to grasp the current relevancy of the legal principles being applied.[90] If the law has changed since the incidents giving rise to the case at hand occurred, the court must determine whether the present law is retroactive and thus applies to the present case, or the law in force at the time of the incidents should be applied. If the court determines that the former law should be applied, it should be described in the past tense, just like the facts.

Because lengthy opinions are sometimes difficult to dissect, they should be divided into sections with section headings corresponding to each of the issues on appeal. This will satisfy the litigants that their contentions have been considered and assure any reviewing court that a question raised on appeal was, in fact, preserved. If an issue involves a novel question or if "the court's own decisions upon a particular point [are] somewhat out of harmony with one another,"[91] an extended discussion may be necessary. If the point is well settled, the issue can be adequately treated by reference to one or two citations. It is best to avoid long string

84. ALDISERT, *supra* note 62, § 10.9, at 160.
85. GEORGE, *supra* note 62, at 83.
86. *Id.* at 84.
87. *Id.*
88. *Id.*
89. 1 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 8b, at 254 (3d ed. 1940).
90. GEORGE, *supra* note 62, at 52.
91. Smith, *supra* note 66, at 1206.

cites and block quotes from cases or treatises; their potentially mind-numbing effect causes readers to skip over and disregard them. Little time should be devoted to minor, meritless claims. Just identifying them as such is usually sufficient. They should be grouped together and dispatched in a sentence or two. Similarly, dicta and footnotes should be used sparingly because of their tendency to break the flow and distract the reader.

In discussing each legal issue, it is helpful to the reader to organize the legal analysis as follows: first, identify the discrete issue, perhaps by a section heading; then present the statutory or common law rule that applies and show how that rule has been applied in other analogous cases; finally, apply that rule to the facts in the case at hand by presenting both parties' arguments and reach a conclusion indicating which argument is more persuasive. The final disposition of the case should reflect the sum of the individual conclusions of the separate issues on appeal.[92] If one of the individual conclusions is inconsistent with the final disposition, either that individual conclusion should be changed or the final disposition must be modified.[93] The final disposition must be consistent with all of the individual conclusions.[94] If this process is followed, the reader should have no trouble seeing the legal justification for the decision, as in the example below:

> In order to prove entitlement to total incapacity benefits for a 1990 injury, the employee must show: (1) a total or partial physical incapacity; (2) resulting in; (3) the inability to obtain any work, part-time or full-time, in the employee's local community; and (4) the inability to perform full-time work in the ordinary competitive labor market in the state, regardless of the availability of that work.
>
> In this case, the Board concluded that Adams has a partial physical incapacity and that work is unavailable to him in his local community as a result of his work-related injury. These findings satisfy the first three requirements for establishing total incapacity. The Board further found, at least implicitly, that Adams lacked the ability to perform full-time work in the state labor market. We conclude that Adams has met the four requirements. We must conclude, therefore, that Adams is entitled to total incapacity benefits pursuant to former section 54-B.[95]

### *5. Disposition and Mandate*

The last paragraph of the opinion, containing the disposition and mandate, should provide a clear, precise resolution of the case. The disposition and mandate should describe the decision reached and set forth the relief to be granted. If the case on appeal is to be remanded, the appeals court should provide clear directions about what the trial court should do on remand. In this way, subsequent appeals may be avoided. Each of the following final paragraphs is an example of a clear disposition and mandate:

The entry is:

> Judgment vacated and remanded to the Superior Court for remand to the Board of Environmental Protection for consideration consistent with this opinion with

92. GEORGE, *supra* note 62, at 94.

93. *Id.*

94. *Id.*

95. Adams v. Mt. Blue Health Ctr., 1999 ME 105, ¶¶ 18-19, 735 A.2d 478 (footnotes omitted).

regard to the ECF system; judgment affirmed with regard to the low NOx burner system.[96]

The entry is:

Judgment vacated. Remanded for a new trial on the remaining damages issues.[97]

The entry is:

Judgment amended to subtract $460.80 from the total award for unpaid wages plus treble damages. As modified, the judgment is affirmed.[98]

The entry is:

Judgment affirmed with sanctions against the plaintiffs and their counsel in the amount of $1,000.[99]

### *B. Writing with Conciseness and Clarity*

*"Justice is not there unless there is also understanding."*[100] If the function of opinions is to inform or to persuade, judges have failed unless their words actually convey their ideas to their readers.[101] After all, "the purpose of language is to *reveal* thought, not to conceal it."[102]

Commentators critiquing judicial opinion writing have been saying the same thing for decades: judges should write shorter, clearer opinions.[103] George Rose Smith, retired Associate Justice of the Arkansas Supreme Court, tells the following story to illustrate his view that most opinions would be improved if they were shorter, perhaps even cut in half:

> [A] woman . . . asked a florist for advice before entering a contest for the best arrangement of garden flowers. He put his instructions in three envelopes, to be opened in order. The first note told the contestant to gather her flowers, select a vase, and make the best arrangement she could. After she had done that, she opened the next envelope and was told to discard half the flowers and rearrange the rest. The last note was the same as the second one. It goes without saying that the lady won first prize, else the story would not be retold.[104]

Commentators also call for improvement in sentence structure, punctuation, and grammar,[105] and a vast reduction in the use of Latin phrases and dicta in

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96. Int'l Paper Co. v. Bd. of Env'l Prot., 1999 ME 135, ¶ 33, 737 A.2d 1047.

97. Withers v. Hackett, 1999 ME 117, ¶ 9, 734 A.2d 189.

98. Taylor v. Kennedy, 1999 ME 116, ¶ 6, 734 A.2d 682.

99. Johnson v. Amica Mutual Ins. Co., 1999 ME 106, ¶ 12, 733 A.2d 977.

100. Anon Y. Mous, *The Speech of Judges: A Dissenting Opinion*, 29 VA. L. REV. 625, 638 (1943) (quoting Justice Cardozo from an uncited opinion).

101. *See* Klein, *supra* note 68, at 36 ("Legal writing should be thought of as a transportation system, to convey an idea from your head to that of the reader. Plain writing does this best.").

102. Eugene C. Gerhart, *Improving our Legal Writing: Maxims from the Masters*, 40 A.B.A. J. 1057, 1057 (1954).

103. *See, e.g.*, Marshall F. McComb, *A Mandate from the Bar: Shorter and More Lucid Opinions*, 35 A.B.A. J. 382, 382-84 (1949) (quoting Justice John D. Martin's exhortation, "Let there be no unsolved mysteries in the Courts. Reasons for the decision of cases should be always unmistakably clear.") (citation omitted); Robert G. Simmons, *Better Opinions—How?*, 27 A.B.A. J. 109, 109 (1941) (reporting on a "recent survey made by a committee of the American Bar Association" indicating that "a great majority of lawyers prefer: One—Short written opinions; Two—Memorandum opinions in cases in which the law is already clear; Three—The omission of (pure dicta).") (citation omitted).

104. Smith, *supra* note 66, at 1205.

105. *See id.* at 1208.

opinions.[106] The following rules should help to guide a judge in writing clear, concise opinions, using effective sentence structure and proper punctuation.

### *1. Make the Opinion Readable*

Two major criticisms of legal writing have predominated across the centuries: "its style is strange, and it cannot be understood."[107] These were the complaints Thomas More was addressing when he wrote that the "Utopians' laws were few and simple because they thought that no one should have to obey a law [that] was 'too long for an ordinary person to read right through, or too difficult for him to understand.'"[108] To avoid this problem, judges should refrain from writing "long, complex sentences with many embedded clauses."[109] In addition, they should break each page into at least two or three paragraphs. When the page is broken into several blocks of text, it is far more readable. One-sentence paragraphs should also generally be avoided. Unless the sentence paragraph is intended for some special effect, it is better to incorporate it with the preceding or following paragraph.

Unduly formal or abstract words and expressions also make legal writing difficult to read. Judges should abstain from using long words, unnecessary Latin phrases, and other pompous communication, often referred to as "legalese."[110] Some Latin phrases like "stare decisis," "voir dire," and "habeas corpus" must be used, but many others like "vel non," "sub judice," and "inter alia," are not only unnecessary but often misunderstood. They should be avoided.

Judges should choose the simplest word that adequately expresses the idea. For example, judges should use "later" instead of "subsequently," "before" instead of "prior to," "stop" instead of "cease," "explain" instead of "elucidate," "place" instead of "locality," and "begin" instead of "initiate." As Justice Marshall F. McComb suggested:

> In selecting a word, think: First, do I know what it means? Second, how many of my readers know its meaning? Third, is there another word which expresses the same concept; if so, would more readers know its meaning? If you decide that a substituted word would be more readily understood by a larger audience use it . . .[111]

Opinion writers should also eliminate compound prepositions and use the simple form instead. For example, "because" is shorter and better than "for the reason that"; "by" expresses the same idea as "in accordance with"; and "if" means the same thing as "in the event that." By substituting the simple form in each of these sentences, two or three words can be eliminated without changing the meaning of the sentence.

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106. McComb, *supra* note 103, at 383-84.

107. Robert W. Benson, *The End of Legalese: The Game is Over*, 13 N.Y.U. REV. L & SOC. CHANGE 519, 520 (1984).

108. *Id.* at 520-21 (quoting THOMAS MORE, UTOPIA 106 (P. Turner trans. 1965) (1st ed. Louvain 1516)).

109. *Id.* at 524; *see also* Gopen, *supra* note 58, at 349 ("The problem is not how to make lawyers write shorter sentences, but rather how to get them to manage long sentences far better than they now are able. In the process, the redundancies, the loophole plugs, and other assorted fat will naturally be trimmed away").

110. Benson, *supra* note 107, at 523.

111. McComb, *supra* note 103, at 384.

Opinion writers should resist "elegant variation" and not be afraid to repeat the same word or phrase,[112] especially when it has a particular legal significance. For example, they should not refer to a list of "elements" in one sentence and later call them "factors."

### 2. *Prefer the Active Voice*

Opinion writers should use the active voice unless they have a reason not to.[113] In the active voice, the doer in the sentence is in the subject position. For example, "The judge pounded the gavel." In the passive voice, the doer is not the subject of the sentence. For example, "The gavel was pounded by the judge." Sentences in the active voice are generally leaner and more vivid. The passive voice should be used, however, when the doer is unknown or unimportant or the writer wants to downplay the doer's identity or emphasize some other part of the sentence.[114] For example, a criminal defendant's lawyer would probably say, "The old woman was strangled," not, "My client strangled the old woman."

### 3. *Create a Strong Subject-Verb Unit*

The best way to achieve "an energetic yet lean style is to make sure that the subject-verb unit carries the core of meaning in the sentence."[115] To create a strong subject-verb unit, opinion writers should choose concrete subjects for their sentences[116] and put the real action in the sentence in the verb,[117] not bury it in a noun. For example, the following sentence is weak because the verb is "are": "The facts in the case are an illustration of this point." Putting the core meaning of the sentence into the subject-verb unit creates a more energetic style: "The facts in the case illustrate this point."

Opinion writers should avoid using the words "there is," "there are," "there were," "it is," and "it was" as the opening words in a sentence "unless the point of the sentence is that something exists."[118] They should look for the doer in the sentence and make the doer the subject. For example, "She planned to file the motion," is a stronger sentence than "It was her plan to file the motion."

### 4. *Avoid Nominalizations and Abstractions*

Nominalizations—turning verbs into nouns—should be avoided. They dilute the impact of the sentence and convey an abstract impression, disconnected from common experience. For example, "reached an agreement" should be "agreed," "made a statement" should be "stated," and "performed a review" should be "reviewed."[119]

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112. John Minor Wisdom, *Wisdom's Idiosyncrasies*, 109 YALE L.J. 1273, 1274 (2000).

113. *See* LAUREL CURRIE OATES, ANNE ENQUIST & KELLY KUNSCH, THE LEGAL WRITING HANDBOOK § 23.1.2, § 23.1.3, at 588-90 (2d ed. 1998).

114. *Id.* § 23.1.3, at 590-93.

115. *Id.* § 24.2.4, at 643.

116. *Id.* § 23.2, at 593.

117. *Id.* § 24.2.4, at 643.

118. *Id.* § 24.2.4, at 644.

119. *Id.*

*5. Use the Proper Word to Express an Idea*

Judge Wisdom emphasized the need "to find precisely the right word to do the job at hand."[120] Noting that English has many more words than most other languages, Judge Wisdom observed that such a large number of English words can be "both a boon and a detriment to lawyers and judges. The unskilled writer can easily find a word that may seem good enough at first blush, but by critical standards is just not the right word."[121] Many writers, including judges, often confuse the following words. To maintain precision, judges should use the words as indicated below.[122]

*Affect* and *effect*: "Affect" is a verb meaning "to influence": "The testimony was intended to *affect* the jury." "Affect" can also mean "to pretend": "She *affected* surprise." "Effect" is usually used as a noun meaning "consequences": "She noted three major *effects* of the treatment." Sometimes "effect" may be used as a verb meaning "to bring about or accomplish": "The mediator *effected* an agreement."[123]

*Amount* and *number*: "Use 'amount' with nouns that cannot be counted and 'number' with nouns that can be counted . . . .": "That *amount* of pain can never be measured in any *number* of dollars."[124]

*Common law* and *case law*: Be careful to distinguish between "common law" and other case law. Although the term "case law" encompasses both common law and court decisions interpreting or applying enacted law, they are not one and the same.

*Compare to/compare with/contrast:* Use "compare to" in pointing out only similarities: "She *compared* Judge Smith *to* Moses when the judge applied the 'best interests of the child' standard." Use "compare with" when pointing out both similarities and differences: "In choosing a puppy, be sure to *compare* one breed *with* the other." Use "contrast" when pointing out only differences: "Today's rain certainly *contrasts* with yesterday's beautiful sunshine."[125]

*Continual* and *continuous*: "'Continual' means 'frequently repeated.'" "'Continuous' means 'unceasing'": "His *continual* complaint was that the *continuous* buzzing sound interrupted his sleep."[126]

*Farther* and *further:* "Use 'farther' for geographical distances and 'further' for . . . other additions": "The *farther* he walked the *further* discouraged he became."[127]

*Flout* and *flaunt:* "Flout" means "to treat with contemptuous disregard." "Flaunt" means "to display ostentatiously": "He *flouted* the nudity ordinance by *flaunting* his unclothed physique."

*Fewer* and *less:* "Use 'fewer' for objects that can be counted." Use "less" when referring to an amount: "He used *fewer* bottles of shampoo because he had *less* hair."[128]

*Held, ruled,* and *stated:* Be clear whether a court "held," "ruled," or "stated" something. When the court applies a legal rule to the facts, it "holds" something. A holding is the court's decision in a particular case. When the court announces a

120. Black, *supra* note 21, at 1270.

121. John Minor Wisdom, *How I Write*, 4 SCRIBES J. LEGAL WRITING 83, 84 (1993) *quoted in* Black, *supra* note 21, at 1270.

122. OATES ET AL., *supra* note 113, at 906-12 (Glossary of Usage).

123. *Id.*

124. *Id.*

125. *Id.* at 907.

126. *Id.* at 908.

127. *Id.* at 909.

128. *Id.* at 906.

legal standard to be used in deciding issues, it "rules" something. Rules are not case-specific; they are general standards to be applied in similar cases. When the court makes comments that are not directly related to the issue before it or necessary to its holding, the court "states" something. These statements are generally dicta. Do not use the imprecise word "indicated" when you mean "held," "ruled," or "stated."

*Lay* and *lie:* "Lay" means "to set down"; it must take a direct object: "*Lay* the book down." "Lie" means "'to recline or remain'"; it does not take a direct object: "The book *lies* open on the desk."[129]

*Oral* and *verbal:* "Oral" means "spoken out loud"; "verbal" means "in words." Something that is verbal may be oral or in writing. Do not make the mistake of saying, "Your answer may be verbal or in writing." To cover both spoken and written language say, "Your answer may be oral or in writing."

*Proved* and *proven:* Use "proved" as part of the verb "to prove" and "proven" as an adjective: "The lawyer *proved* her client was innocent even though everyone knew he was a *proven* liar."[130]

*Since* and *because:* Do not use "since" unless you are referring to the passage of time. Use "because" if you are indicating cause and effect: "*Since* Wednesday, I have had the flu." "*Because* she was only two years old, she couldn't sit still in church."[131]

*While* and *although:* Use "while" only as a time reference: "*While* you were sleeping, I ran three miles and cooked breakfast." Use "although" to indicate a relationship between ideas: "*Although* she was only two years old, she could read simple books."

*That/which/who:* "Use 'that' and 'which' for things; use 'who' for people. Use 'that' [to introduce] . . . restrictive clauses and 'which' for nonrestrictive clauses": "She was the teacher *who* gave me my first C." "I opened the thin, blue envelope with my name on it, *which* contained a $100 bill." "I would prefer to use the lawnmower *that* starts on the first pull."[132]

### *6. Strive for Conciseness*

Judges can succeed in writing shorter, more concise opinions in several ways. First, they can cut out superfluous facts, including only those necessary to the legal conclusions. They can also avoid cumulative citation of authority and eliminate most footnotes and dicta.

Judges can omit unnecessary words and phrases. For example, they can eliminate all the words in parentheses in the following sentence: (At this point in time), we are (in the process of) filing a motion to dismiss (with the court). They should avoid repeating themselves needlessly by eliminating redundant words like the following words in parentheses: (point in) time, (advance) warning, (past) history, consensus (of opinion). They can remove qualifiers like "very," "quite," "rather," and "somewhat," and avoid "throat-clearing expressions" that add little or nothing to the meaning of the sentence[133] like the following: "It is significant that," "It is generally recognized that," and "It should be noted that."

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129. *Id.* at 910.
130. *Id.* at 911.
131. *Id.* at 907.
132. *Id.* at 912.
133. *Id.* at 654.

Judges can use variety in sentence openers. Although most sentences should begin with the subject, sentence variety may be achieved by preceding the subject with a phrase or clause that establishes a context or picks up a previously established theme. The previous sentence is an example of beginning the sentence with a clause.

### *7. Keep a Reference Book Handy to Resolve Questions of Punctuation, Usage, and Style*

No one can remember all the rules of effective writing. Thus, it is essential to keep a reference book nearby as a guide to grammar, punctuation, and usage. *The Elements of Style*,[134] by William Strunk, Jr. and E.B. White, is perhaps the clearest, and certainly the most concise, authority on the rules of usage, principles of composition, and matters of form and style. *A Writer's Reference*,[135] by Diana Hacker, provides a more expansive guide to better writing. It is fully indexed and provides helpful examples to illustrate each point.

In the end, all judges must set their own standards for their opinions. They must then "govern and discipline the writing process to comply with those standards."[136] The bottom line in judicial writing, however, must be whether opinion writers have communicated effectively with their audiences by organizing and writing their opinions "efficiently, understandably and forcefully."[137] "The purpose of the writing is to identify and articulate the questions presented and to render a decision."[138] In doing so with dignity, clarity, and profound respect for the litigants, a judge has fulfilled the promise of our judicial system.

## V. USE OF HUMOR AND FIGURATIVE LANGUAGE IN OPINIONS

Sometimes judges are tempted to "spice up" their opinions with a dash of humor or figurative language. Most commentators, however, agree that judicial humor is "neither judicial nor humorous."[139] According to William Prosser,

> Judicial humor is a dreadful thing. In the first place, the jokes are usually bad; I have seldom heard a judge utter a good one. There seems to be something about the judicial ermine which puts its wearer in the same general class with the ordinary radio comedian. He just is not funny. In the second place, the bench is not an appropriate place for unseemly levity. The litigant has vital interests at stake. His entire future, or even his life, may be trembling in the balance, and the robed buffoon who makes merry at his expense should be choked with his own wig.[140]

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134. WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE (4th ed. 2000).

135. DIANA HACKER, A WRITER'S REFERENCE (4th ed. 1999).

136. GEORGE, *supra* note 62, at 144.

137. *Id.* at 143.

138. *Id.* at 144.

139. George Rose Smith, *A Primer of Opinion Writing, For Four New Judges*, 21 ARK. L. REV. 197, 210 (1967); *see also* Marshall Rudolph, *Judicial Humor: A Laughing Matter?*, 41 HASTINGS L.J. 175, 176 (1989); GEORGE, *supra* note 62, at 7 ("Never use sarcasm and avoid humor."); *but see* George Rose Smith, *A Critique of Judicial Humor*, 43 ARK. L. REV. 1, 25 n.60 (1990) (retracting his view of humor in *A Primer of Opinion Writing, For Four New Judges* as follows: "In judicial language, that part of the Primer disapproving judicial humor is hereby overruled, set aside, held for naught, and stomped on!") (hereinafter "*Critique*").

140. THE JUDICIAL HUMORIST: A COLLECTION OF JUDICIAL OPINIONS AND OTHER FRIVOLITIES vii (William Prosser ed., 1952), *quoted in* Adalberto Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. MIAMI L. REV. 693, 693 (1987).

Thus, humor is almost always inappropriate in opinions. Humor at a party's expense is never appropriate, no matter how clever or witty it is. Litigation is a serious matter, the outcome of which has great significance for the parties. They are seeking justice and a level of sensitivity and concern on the part of the court. "Amusing" verse, puns, innuendos and gratuitous commentary, excessive brevity, spoofs, sarcasm, and ridicule are not appreciated by the parties or their attorneys and should be avoided.

Some commentators, however, believe that humor may be appropriate if it enlivens opinions and serves an educative function.[141] Even Judge Cardozo seemed ambivalent on the propriety of adding a bit of humor or figurative language to opinion when he wrote:

> Flashes of humor are not unknown, yet the form of opinion which aims at humor from beginning to end is a perilous adventure, which can be justified only by success, and even then is likely to find its critics as many as its eulogists. . . . I would not convey the thought that an opinion is the worse for being lightened by a smile. I am merely preaching caution. . . . In days not far remote, judges were not unwilling to embellish their deliverances with quotations from the poets. I shall observe towards such a practice the tone of decent civility that is due to those departed.[142]

The use of humor and figurative language may help to "demystify law," or "crystallize a point, put it in context, and breathe life into the set of facts that the law has formalized."[143]

In 1855, for example, the Supreme Court of California wrote the following short opinion in which the humor injected may actually have clarified the opinion's legal significance without being offensive to the parties:

> If the defendants were at fault in leaving an uncovered hole in the sidewalk of a public street, the intoxication of the plaintiff cannot excuse such gross negligence. A drunken man is as much entitled to a safe street as a sober one, and much more in need of it.[144]

In another short opinion, the court seems to have said all that is needed in just a few words:

> The appellant has attempted to distinguish the factual situation in this case from that in *Renfroe v. Higgins Rack Coating and Manufacturing Co., Inc.* He didn't. We couldn't. Affirmed. Costs to appellee."[145]

The best examples of judicial humor seem to be characterized by two requirements: brevity and a genuine relevance to the case at hand.[146]

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141. *See, e.g.*, Adalberto Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. MIAMI L. REV. 693, 700-02, 705 (1987) (providing a "small sampling of some of the best judicial opinions employing colorful language").

142. BENJAMIN N. CARDOZO, LAW AND LITERATURE 26-27, 29 (1931), *quoted in* Jordan, *supra* note 141, at 700.

143. Jordan, *supra* note 141, at 700.

144. Marshall Rudolf, *Judicial Humor: A Laughing Matter?*, 41 HASTINGS L.J. 175, 180 (1989) (quoting Robinson v. Pinoche, Bayerque & Co., 5 Cal. 460, 461 (1855)).

145. Denny v. Radar Industries, Inc., 184 N.W.2d 289, 290 (Mich. Ct. App. 1971) (citation omitted).

146. *Critique*, *supra* note 139, at 5, 8.

William Domnarski, in a 1986 law review article, provided some examples of the effective use of humor and metaphor by Connecticut Supreme Court Justice Leo Parskey.[147] Parskey apparently made frequent use of colorful figurative language: allusions, similes, maxims, and especially epigrams loaded with metaphors.[148]

An epigram is defined as "a concise [writing] dealing pointedly and often satirically with a single thought or event and often ending with an ingenious turn of thought"; it is also "a terse, sage, or witty and often paradoxical saying."[149] The use of epigrams is particularly effective in judicial opinions because "the antithesis at its center declares meaning through contrasts and gives the defined idea depth and texture."[150] For example, in the following portion of an opinion, Justice Parskey used two epigrams to aid in the reader's understanding of a confusing legal doctrine:

> [The] *Evans* rule is designed to protect fundamental constitutional rights. It deals with substance, not labels. Putting a constitutional tag on a nonconstitutional claim will no more change its essential character than calling a bull a cow will change its gender. If a word to the wise will do it, then suffice it to observe that the *Evans* trial court bypass to this court is a narrow constitutional path and not the appellate Champs-Elysees.[151]

In another opinion, Justice Parskey used an epigram involving a vacuum cleaner to explain the error of thinking that a claim involving due process should warrant automatic appellate review: "Due process is not to be regarded as a giant constitutional vacuum cleaner which sucks up any claims of error which may occur to a party upon microscopic examination of the trial record."[152] According to Domnarski, "[o]nce the reader's attention has been captured by the apparently incongruous images, he realizes that the distinction between bulls and cows analogizes potently to claims that cannot be disguised by labels. In this manner, Parskey's imagery reflects a deliberate use of hyperbole that intensifies meaning by helping to isolate the principle at issue."[153] Domnarski points out that the gift of metaphor has been highly prized since Aristotle who stated, "By far, the greatest thing is to be a master of metaphor. It is one thing that cannot be learned from others. It is a sign of genius, for a good metaphor implies an intuitive perception of similarity among dissimilars."[154]

Ultimately, in deciding whether to include imagery or humor in an opinion, a judge must consider his or her own audience and purpose. Will the interjection of witty or figurative language help to demystify the law and explain the rationale more clearly to the reader? Dealing with legal principles can, at times, overly formalize a dispute; perhaps the use of imagery and humor can help bring the

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147. *See generally* William Domnarski, *The Tale of the Text: The Figurative Prose Style of Connecticut Supreme Court Justice Leo Parskey*, 18 CONN. L. REV. 459 (1986).

148. *Id.* at 459.

149. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 390 (10th ed. 1993).

150. Domnarski, *supra* note 147, at 460.

151. *Id.* (quoting State v. Gooch, 438 A.2d 867, 869 (Conn. 1982)).

152. *Id.* (quoting State v. Kurvin, 442 A.2d 1327, 1331 (Conn. 1982)).

153. *Id.* at 462-63.

154. *Id.* at 465 (quoting Aristotle from J. WILLIAMS, TEN LESSONS IN CLARITY AND GRACE 156 (1981)).

dispute down to earth. Or will its use demean or ridicule the parties and actually prevent them from understanding that justice has been served? If so, it should be eliminated.

Judge Smith concluded his examination of humorous opinions in verse with the following limerick, which appeared in *United States v. Irving*,[155] an unpublished opinion.[156] Mr. Irving had been charged with "having created a physically offensive condition" by briefly being nude while changing out of some wet clothes in a mostly deserted parking lot at the Lava Beds National Monument."[157] Although Irving was convicted of this petty offense, no record of the proceeding was made and the conviction was set aside.[158] In setting aside the conviction, United States District Judge Thomas J. McBride quoted from counsel's brief this limerick, which Judge Smith believed, had genuine relevance, considering the facts in the case:

> There was a defendant named Rex
> With a minuscule organ of sex.
> When jailed for exposure
> He said with composure,
> De minimis non curat lex.[159]

Although this limerick clearly meets the criterion of brevity, its genuine relevance to the case at hand is surely in doubt. Furthermore, Mr. Irving might find the humor in the limerick demeaning and potentially embarrassing. So, despite the limerick's origin in Irving's counsel's brief, the judge would have done well to leave it out of his opinion. Because it does nothing to enhance the reader's understanding of the law or explain the court's opinion, the limerick fails to serve the interests of justice and should have been eliminated.

## VI. CONCLUSION

Ultimately, the goal of opinion writing is clear communication. If opinion writers make every choice regarding the tone or content of opinions with an eye toward communicating with the audiences for those opinions, the purposes of our judicial system will be met. Such opinion writers will have succeeded in the noble goal of "devis[ing] apt, just, and understandable rules of law," which will serve as "guideposts for human conduct."[160] There can be no higher calling.

The following checklist may be helpful in critiquing an opinion. Opinion writers who can answer "yes" to all of the questions on the list can be fairly confident that their opinions will provide reasoned explanations of their courts' holdings, explanations that their readers can understand and ultimately should be able to accept.

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155. No. 76-151 (E.D. Cal. 1977).
156. CRITIQUE, *supra* note 147, at 14.
157. *Id.*
158. *Id.*
159. *Id.*
160. *See* Fuller, *supra* note 35, at 1619.

**CHECKLIST FOR CRITIQUING AN OPINION**

Does the court have jurisdiction?

Are all the factual statements in a trial court opinion supported by references to the original depositions, transcripts, and exhibits?

Are the questions to be decided laid out clearly?

Are all the legally significant facts included in the statement of the facts?

Are all direct quotations from an exhibit, a witness's testimony, or legal authority perfectly accurate?

Have the facts supporting the losing party been stated?

Have all issues been addressed?

Have the arguments of the losing party been stated and adequately addressed?

Do the cases cited stand for the propositions for which they are asserted?

Are the conclusions in the opinion supported by clear reasoning and legal authorities?

Is the court's ruling stated clearly and succinctly?

Have all omissions from quotations been indicated by ellipses?

Are all dates, numbers, and citations accurate?

Is the opinion readable, grammatical, and correctly punctuated?

Is any use of figurative language or humor in the opinion likely to help the reader to understand the court's resolution of the legal issues in the case?

Have all the parties been treated with respect?