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A Primer of Opinion Writing for Law-Clerks

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Not all appellate judges make the drafting of tentative opinions a part of their law clerks' duties. The practice, however, is increasing, perhaps as a result of the mounting case loads that now occupy the time of most appellate courts. Opinion writing by law clerks is certainly so widespread today that no symposium devoted to the duties of law clerks would be complete without some discussion of the subject.

Except for the matter of final responsibility for the opinion, the problems that confront a law clerk in the preparation of an opinion include those that confront the judge himself in the same task. In addition, the clerk encounters difficulties that understandably attend any attempt to turn out a literary product that someone else can be expected to adopt as his own, with or without revision. This article will treat the subject of opinion writing primarily from the law clerk's point of view, using a step-by-step chronological approach.

The Conference With the Judge

This conference should invariably be the basis for any opinion that a law clerk is expected to prepare. There are judges who simply hand their law clerks an appellate record and a set of briefs, with the direction that the clerk submit a proposed opinion affirming [or reversing] the trial court's decision. This summary procedure is unfair to the clerk. It saddles him with decision-making burdens that are not properly his. Moreover, it is not nearly such a shortcut for the judges as it might seem to be. Not even a clerk who has worked with his judge for several years can be sure just how the judge wants an opinion to be written. Consequently, for the clerk to work without detailed instructions usually results in wasted time and lost motion on his part in drafting the opinion and on the judge's part in revising it to his satisfaction.

Thus a comprehensive conference between judge and clerk is essential. The discussion should cover every aspect of the case. The

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facts should be examined in appropriate detail. The judge should emphasize salient points that he thinks especially important. Every question of law to be decided must be fully discussed. At the end of the conference the clerk ought to know exactly where he is going, although the problem of just how to get there is one that he must work out largely on his own.

One note of warning. Even though the judge may have been firmly convinced of the existence of certain facts in the case, the clerk is never justified in relying blindly upon the judge's belief. It is always the clerk's job to verify every statement of fact that goes into the opinion. If the clerk discovers any reason to think that the judge was mistaken in his understanding of a factual issue, it is imperative that the clerk bring the matter to the judge's attention. Of course the same observation applies to an issue of law, but there is generally more room for differences of opinion about questions of law than there is about questions of fact.

Planning the Opinion

There is much spadework to be done before any attempt is made to write even the first sentence in an opinion. A good starting place is to write down a clear statement of the issues to be decided. Karl N. Llewellyn suggested that judicial opinions would be shortened and improved if the author first wrote his own headnotes, even though they were not to be published with the opinion.[1] His advice is especially valuable to law clerks, who, inexperienced in the matter of opinion writing, will find that the discipline required in writing down a precise statement of the issues sharpens their thinking and eliminates cords of dead wood not actually necessary to the opinion.

A clear grasp of the issues also simplifies the task of going through the record to gather together the vital and controlling facts. One must always obtain the facts from the record itself rather than from abstracts, briefs, or statements of counsel. Not infrequently partisanship affects an advocate's narrative of the facts. No trace of the partisan should be discoverable in the court's opinion. A losing lawyer will usually forgive a judge for making an apparent error of law, but an error of fact supplies ammunition for withering salvos of artillery in the petition for rehearing. Nor does it matter that the error had no real bearing upon how the case was decided.

1. K. LLEWELLYN, THE COMMON LAW TRADITION 296-97 (1960).

The lawyer is apt to feel that the mere existence of error shows beyond doubt that the case was hastily considered and wrongly decided.

After the essential facts have been sifted from the record, then and only then should any additional legal research be undertaken. One of the ablest lawyers I ever practiced with steadfastly refused to discuss the legal issues in a client's problem until the facts had been ascertained as precisely as possible. "Let's get the facts first," he would say. No better rule could be given to young lawyers, whether they are clerking or practicing. The law must be applied to the facts, not the other way around. It is basic that the facts must be gathered with exactness before legal research can be undertaken with profit.

Writing the Opinion

At this point the spadework has been done. The issues and their resolution are known. The facts have been taken from the record. The authorities to be cited are at hand. Even so, we are not yet quite ready to begin putting pen or typewriter to paper. It is important to think a bit about how the nature of the case affects the *appropriate* length of the opinion that is to be drafted. Students of opinion writing agree that judicial dissertations are not merely too long, but much too long. Most opinions would actually be improved if they were cut in half, although this process entails additional labor. There is a story about a woman who 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.

Brevity in opinion writing cannot be achieved by a similar process of discarding half of what has already been written. It is a regrettable truth that once the written word gets itself on paper, it is as tenacious of life as a cat with its nine lives. There are judges—I have served with two or three—who really believe that it is a waste of manpower, if not an act of immorality, for them to scrap any sentence they have written. With such writers an opinion may grow after the first draft, but it is almost never destined to shrink.

The opinion writer, be he judge or clerk, should consider at the

outset whether the particular case justifies a disquisition of substantial length. By far the majority of appellate cases—probably more than 90 percent—are routine. If the principal issues are questions of law, the decision usually calls for nothing more than the correct application of familiar rules to facts not really in dispute. If the main issue is that of reviewing the trial court's findings of fact, nothing is ordinarily gained by an elaborate review of all the testimony in the case. As a general rule, opinions in routine cases should not exceed five or six typewritten pages, running to 2,000 words or so in all. In most instances even greater brevity is possible and desirable.

Some cases deserve fuller treatment. Two types, though not of frequent occurrence, come to mind. First, the court's own decisions upon a particular point may be somewhat out of harmony with one another, so that a certain amount of tidying up is called for. In that situation an extended discussion is recommended.[2] Even so, in the long run the goal of brevity is achieved, for the explanatory opinion may be cited without repetition when the point arises again. Secondly, a significant case may pass upon a new issue or re-examine an old one. Note the word "significant." Almost every case presents what might be regarded as a novel question, in the sense that no precedent exactly like it can be found. Yet it does not follow that every new point, such as the interpretation of a phrase in an obscure statute, demands a learned discourse by the opinion writer. Truly significant cases are rare, but when they are encountered a thorough discussion of the issues should be undertaken.[3]

We come now to the writing of the opinion. In most cases several points of law must be decided. The writer must adopt some sequence of discussion, which need not adhere to the order followed by counsel in their briefs. If there is one point of outstanding importance, it should usually be discussed first. At times, however, a different sequence is preferable. For example, if there is a preliminary procedural question that might be decisive of the whole case, it should be disposed of first to avoid an anticlimax. If the case turns upon a standard of proof, such as a requirement that the evidence be clear and convincing, that standard should be stated before the

2. For 2 such opinions see Burbridge v. Bradley Lumber Co., 218 Ark. 897, 239 S.W.2d 285 (1951), and Umberger v. Westmoreland, 218 Ark. 632, 238 S.W.2d 495 (1951).

3. Typical cases of first impression include Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970), and Reasor-Hill Corp. v. Harrison, 220 Ark. 521, 249 S.W.2d 994 (1952). Prior cases were re-examined and overruled in Hare v. General Contract Purchase Corp., 220 Ark. 601, 249 S.W.2d 973 (1952).

facts are narrated, so that the reader may read the narration with the standard in mind. In criminal cases containing many points for reversal, the readability of the opinion is often enhanced if the points are treated in their chronological order at the trial, beginning, for instance, with a pretrial motion to suppress evidence and ending with the asserted excessiveness of the punishment. No matter what order of discussion is selected, the opinion should move smoothly from one point to the next, without repetition of facts already stated.

It is hardly possible to overstress the importance of the first paragraph in the opinion. Ordinarily, it should answer three questions: What kind of case—child custody, foreclosure, and so forth—does this appeal present? What roles—plaintiff or defendant—did the appellant and the appellee play in the court below? What was the trial court's decision? The issues on appeal should also be stated if they can be readily summarized.

A well-written initial paragraph—occasionally two are needed—serves two worthwhile purposes. It provides the reader with enough preliminary information to enable him to read the opinion with understanding and without backtracking. It also helps the opinion writer, because a properly constructed opening paragraph greatly simplifies the drafting of the rest of the opinion. For the latter reason the first paragraph should be written and rewritten and rewritten until perfection is attained; then only should the writer proceed with his draft of the rest of the opinion.

One aspect of opinion writing that should be consciously considered is the matter of giving the practical or equitable reasons for particular rules of law. Of course that sort of justification should not be undertaken in every instance. More often than not the reason for a rule will be apparent to any person who is likely to be reading an appellate court's opinion. We do write for a specialized audience. On the other hand, if a judge never goes beyond a dry recitation of rules of law with supporting citations, even his best efforts will never "sing," to use Llewellyn's word.[4] Not infrequently a simple statement of the reasons underlying a rule of law will impart to the opinion that touch of wisdom that demonstrates beyond question the rightness and justice of the decision.

Literary Style

The ability to write simply and clearly cannot be taught over-

4. K. LLEWELLYN, *supra* note 1, at 183-84.

night or learned overnight. It comes from long study and much practice. There are many books on the subject of good writing, among which two are especially valuable. *The Elements of Style,* by William Strunk, Jr., is a little book of only 71 pages, but it is a *must* for the inexperienced writer. H. W. Fowler's *Modern English Usage,* though to some extent a reference book, is delightful reading; it covers every aspect of good writing, with particular emphasis upon clarity, usage, grammar, and punctuation.

In preparing a proposed opinion the law clerk should always begin with a rough draft and revise it pitilessly before the work is considered to be in final form. There are many defects to be sought in the process of revision, but the greatest improvement will come from attention to sentence structure. There is no doubt that the greatest fault to be found with most judicial opinions stems from the length and complexity of the sentences that are used.

Punctuation often provides a clue to imperfect sentence structure. Punctuation marks should be inserted for the sole purpose of assisting the reader to understand what is meant. Excessive use of punctuation has just the opposite effect. The chances are always good that a sentence containing several commas and one or two semicolons can be improved by revision. Improvement is often a matter of merely changing the position of clauses and phrases so that the sentence reads smoothly and needs little or no punctuation in addition to the final period.

The principle of parallelism must be singled out here, because its violation is the one sentence defect which even experienced writers are apt to be wholly unaware of and therefore wholly incapable of avoiding. In his Rule 15, Strunk states the basic principle: "Express co-ordinate ideas in similar form."[5] He goes on to say that expressions similar in content and function should be outwardly similar, "the likeness of form [enabling] the reader to recognize more readily the likeness of content and function."[6] An aspect of the principle is that an article or preposition applying to all members of a series must either be used only before the first term or be repeated before each term.[7]

5. W. STRUNK & E. WHITE, THE ELEMENTS OF STYLE 20 (1959).

6. *Id.*

7. Strunk gives several examples of the bad and the good:

Formerly, science was taught by the textbook method, while now the laboratory method is employed.	Formerly, science was taught by the textbook method; now it is taught by the laboratory method.

The advantages of correct parallelism can easily be demonstrated by taking familiar examples that are correctly written and changing them so that they are no longer parallel. Note the jerkiness of saying that Washington was first in war, peace, and in the hearts of his countrymen. Or what if Lincoln had said that government of the people, by the people, and government for the people shall not perish from the earth?

Closely related to parallelism—indeed, an aspect of it—is what Fowler calls bastard enumeration.[8] Here there are really two enumerations, but the author thinks there is only one and falls into the error of omitting a necessary "and." Fowler's example is: "He plays good cricket, likes golf and a rubber of whist." The sentence should read: "He plays good cricket and likes golf and a rubber of whist." Countless violations of this kind are to be found not only in judicial opinions but also in much other writing. While working on this paragraph I saw a good example, in which I have inserted the omitted "and": "The Trial Court concluded that the Commission order was arbitrary, capricious, [and] characterized by abuse of discretion and that the participation of Commissioner Guy Newcomb constituted an error of law."

There are many other suggestions for improving one's style. Short sentences are best. An effort to be flowery is almost always a mistake. The use of adjectives and adverbs often weakens a statement instead of strengthening it. Active verbs are preferable to passive ones. All such matters, however, are clearly discussed by Strunk and Fowler. I can close with no better advice than recommending the study of their works.

[A postscript. Lest my 25 former law clerks rise up in indigna-

The French, the Italians, Spanish, and Portuguese	The French, the Italians, the Spanish, and the Portuguese
In spring, summer, or in winter	In spring, summer, or winter (In spring, in summer, or in winter)
It was both a long ceremony and very tedious.	The ceremony was both long and tedious.
A time not for words but action.	A time not for words but for action.
Either you must grant his request or incur his ill will.	You must either grant his request or incur his ill will.

Id. at 21-22.

8. *See* H. FOWLER, MODERN ENGLISH USAGE 28-29 (2d ed. 1965).

tion in the thought that this article might lead someone to think that they wrote my opinions, I should explain that I have never followed the practice of having law clerks draft opinions. Hence some of the points made in this article are based not upon personal experience but upon conversations with other judges and with law clerks who have been assigned the duty of opinion writing.]