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OPINION WRITING ASSISTANCE INVOLVING LAW CLERKS: WHAT I TELL THEM

WESTLAW LAWPRAC INDEX

JUD -- Judicial Management, Process & Selection

Everyone has their own style of opinion writing. Mine comes from my background as a high school and college newspaper editor, teaching legal writing at Temple Law School, and serving as a member of the American Bar Association's "Legal Writing" Committee until it dissolved through lack of funding and interest.

I also have had many discussions with appellate judges on this topic.

Judge Vincent Cirillo of the **Pennsylvania** **Superior** **Court** repeatedly made the point not to write a tome but just to tell the court what the case was about. The late Justice Samuel Roberts of the Pennsylvania Supreme Court, a former chair of the ABA's Legal Education Committee, said that an opinion is "the visible reflection of the trial."

The purpose and style of opinion writing is very different from writing a law school paper. People with law review experience often have to *unlearn* some of the techniques they have learned about. (Yes, you can end a phrase with a preposition like "about".) What follows is my suggestion for style, getting to the substance of the opinion, melding with the judge's style, using clear writing techniques, and tailoring an opinion to the audience.

My recommended guidelines are as follows:

A. THE STYLE OF THE OPINION

1. In a paragraph or two, explain the procedural history of the case.

In a criminal case, start by saying something like:

> Frank Lewis was convicted of aggravated assault by a jury and was sentenced to two and one half to five years in prison.

(Note that in a criminal case, you explain what he/she was convicted of, what the sentence was, and whether it was a jury or nonjury trial.)

In a civil case, you start by saying something like:

> Alex Blake sued Bradley machine Company under a strict liability theory for a crushed hand he suffered when his arm was dragged into a cement mixer. The jury found for Blake and awarded him $900,000.

Note that it is usually better to refer to the parties by name rather than "plaintiff" and "defendant." It is particularly confusing when there are appellants, respondents, petitioners, defendants on the counter-claim, etc. If there are a lot of parties, than you can say "Defendant Bradley Machine."

2. Next, give a *brief* outline of the facts--only a paragraph or two. Detailed facts can come later, if ***34** necessary. Remember, appellate judges, just like trial judges, like to see that justice is done. Try and make it appear that there was a fair trial and the result was reasonable, assuming you are not writing an opinion to reverse the verdict.

A criminal example:

> Lewis stabbed his brother-in-law, Frank Davis, in the arm, sending him to the hospital emergency room where the cut was closed with butterfly bandages. Davis and Lewis lived together in the same house with Lewis's wife, who was Davis's sister. Lewis's wife threw Lewis out of the house because she thought Lewis was running around with other women. Lewis thought Davis had put Mrs. Lewis up to changing the locks.

A civil example:

> Blake, a laborer who ran his company's cement mixer, was knocking old cement out of the mixer when he claims the mixer shifted out of neutral into gear. He testified that his coat was caught by the mixer, his hand was pulled in and crushed.

3. Briefly state the legal argument.

Lewis claims the Court erred:

> (a) in admitting his confession, because he was too drunk to waive his Miranda rights; and
>
> (b) because there was no intent to inflict serious bodily injury and no bodily injury was inflicted.
>
> or
>
> Bradley Machine claims that a directed verdict for the defense should have been granted because:
>
> (a) The machine, as shipped, was safe. A manufacturer is not required to take every imaginable precaution. Since there were several other safety devices, the mixer was not "defective" because the machine would not go into gear if there were a malfunction. It was not necessary to have the machine "fail safe" (go into neutral if there is a malfunction).
>
> (b) The machine was safe when manufactured, but later damage and modifications made it unsafe (the gear lever bent and would not reach the catch; and an extra hitching hook made it impossible for the gear level to reach the catch).

Note in "(a)" in the civil example that the argument does not have to be made all in the same sentence. A common fault of legal writing is that lawyers write overlong sentences. They think that if every modification of the main point is not in the same sentence, somehow it is ineffective. That is not true, even for contracts.

Also note that the arguments are "tabulated"--(a) (b) (c) (or (1) (2) (3). Tabulation makes it easier for the reader to follow along. It may not be important in the summary, but it is critical in long, detailed arguments.

4. Summarize the legal thinking upon which the opinion is based. Do it quickly and succinctly. Remember that appellate court judges (or their clerks) are overwhelmed with appeals and have a limited "reading time" for each appeal. Your whole story should be contained in the first page or so. Unlike oral argument, you do not have the opportunity to use "primacy" and "recency." You cannot use body language and tone of voice for the big ending. If you lose a reader in the first couple of paragraphs, you never recover the full attention of that reader.

Examples:

> Defendant Lewis' arguments fail for the following reasons:
>
> (a) Although Lewis' blood alcohol level was .12, the testimony of the officer provided the basis to conclude that he still was aware of his surroundings, answered all questions coherently, and was in sufficient control of his faculties to intelligently waive his rights; and
>
> (b) Although the victim, Frank Davis, was only in the emergency room for a few hours while he received butterfly stitches, a stab wound in the arm could have gone into a more vital organ of the body, or could have cut an artery, tendon, or nerve. Therefore, there is enough evidence to conclude that Lewis intended to inflict serious bodily injury.
>
> or
>
> There was sufficient evidence to find for plaintiff Blake, and Bradley machine's arguments fail for the following reasons:
>
> (a) Plaintiff Blake's expert testified that it would not be difficult to make the mixer "fail safe," and in fact the Bradley Machine expert testified that there were other mixers that did "fail safe."
>
> (b) Plaintiff Blake's expert testified that, in his experience, a manufacturer should have anticipated that gear levers would bend, and users would fail to repair them. Further, manufacturers should ***35** also anticipate modifications that would interfere with the safety catch. That is why the machine should "fail safe."

After you have finished, you may want to say, “the arguments will be discussed in this order.” You could say “the arguments will be discussed in more detail below.” I don't like saying, “the arguments will be discussed seriatim.”

5. If necessary, start a section labeled “FACTS” and discuss the facts in more detail. In a typical burglary, robbery, drug case, slip and fall, or auto accident, hopefully this will not be necessary.

It is critical to make sure the statement of facts is accurate. State them as favorably as possible to the losing side. A major sin of new lawyers is stating as a “fact” something that was hotly contested by the parties. This is a sure way to lose credibility.

6. Then move to the arguments, using headings and subheadings, and probably mirroring the order of the summary. Start this section by paraphrasing (or copying) the summary you did above.

Avoid the common mistake in dealing with the case law, just writing what the Court *said* rather than what it *held.* A trial court opinion is the same as an appellee's brief. Most intermediate appellate court opinions are also like appellees' briefs. They are designed to marshall every argument possible to support the outcome. Often the gratuitous language goes far, far beyond the holding, *never* cite a case without putting a line or two saying what it was about.

For example:

> The Supreme Court held that a plaintiff can establish a product defect through circumstantial evidence, saying, the plaintiff must proffer “evidence of the occurrence of a malfunction…with evidence eliminating abnormal use of reasonable, secondary causes for the malfunction.” *Rogers v. Johnson & Johnson Products*, 523 Pa. 176, 182, 565 A.2d 751, 754 (1989). In *Rogers*, the plaintiff was burned after heated insulation was placed on his leg, and the Court held that there was enough evidence to refute malpractice and to find that there was a chemical reaction causing heat.

7. Finish with a brief conclusion. For example:

> Therefore, there was sufficient evidence from the police officer to find that despite his drinking [Note: not “consumption of alcoholic beverages”] Lewis knowingly waived his right to counsel and to remain silent. There also was sufficient evidence from the stab

wound in the arm to infer an intent to commit serious bodily injury. The post-verdict motions were properly denied.

or

Therefore, there was enough evidence for the jury to find that the mixer was defective because it did not "fail safe" back into neutral. The jury also could find that the manufacturer should have anticipated damage to the gear lever that would not be repaired and other modifications made by the user. The post-verdict motions were properly denied.

B. THE SUBSTANCE OF THE OPINION

1. Normally, the place to start is the formal postverdict motions, together with any supplemental motions filed after the notes of testimony are transcribed.

2. Next, I suggest reviewing the notes of testimony of the oral argument on the post-verdict motions. Frequently, judges will state their ideas during the interchange with counsel. Make sure the stenographer does not put notes of testimony of post-verdict motions on the back burner, since I recommend using these as a primary source for writing opinions.

3. Look at the counsels' briefs. After all, at least in civil cases, lawyers are charging their clients huge sums of money for preparing them. Sometimes (but not always) they can be of major help in opinion drafting.

Make sure you carefully review the brief of the losing side. Has the opinion addressed all of their arguments?

C. HOW TO USE YOUR TIME EFFECTIVELY

In today's world, all courts are being overwhelmed by the volume of the caseload. Even in the less busy jurisdictions, the volume has increased dramatically and the judges *think* they are overwhelmed. You no longer have the luxury of time you had for law school papers. It is necessary to "move the business."

Some techniques you learned in grade school still work and can help solve writer's block.

(a) Discuss the case with your judge or with fellow clerks so that you understand exactly what it is you want to say before you start writing.

(b) Outline the opinion--put the outline down on paper.

(c) Start writing where you feel comfortable to get the juices flowing-- there is no rule requiring you to start at I.A.I.(a).

(d) Start writing before you have researched everything to death. You should have a general idea of where you are going before doing all the research. Do a quick first draft early. "The research trap" occurs when you look at one case that has a point, that case ***36** refers you to another case with a somwhat related point, which refers you to still another case with a point even more remote. By the time you are finished, your research can lead you to issues that, while interesting, have nothing to do with the case. If you have an outline and a draft, that will keep your research focused.

D. MAKE SURE YOUR STYLE FITS YOUR JUDGE

These recommendations fit my personal style. Different judges have different approaches, and your judge is the boss.

Ask your judge for copies of a few of his or her opinions he or she thinks were particularly well written. Use them as a guide. However, make suggestions to make the writing clearer. Do not be afraid to say, "judge, this looks like it will be a fairly long opinion. Do you have any objections if I put in headings and subheadings?"

E. MAKE SURE THE STYLE DOES NOT INTERFERE WITH CLARITY

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. Perhaps you will even educate your judge to have your office produce clearer opinions. There are a number of sources of instructions on clear legal writing, and most experts agree on the basics. I recommend a book that not only conveys the points well but is fun to read. It is *Writing for Lawyers* by Pittsburgh attorney Hollis T. Hurd, available

for less than $10 from Journal Broadcasting & Communications, P.O. Box 3084, Pittsburgh, PA 15230.

While this is not the place for a full “plain writing” course, some of the pitfalls to avoid are:

(a) Using excessive legalese.

(b) Spending too much time reiterating general principles of law that everyone knows, such as citing all the cases that hold that in a motion for summary judgment, all the plaintiff's well pleaded facts are deemed to be true.

(c) Using fancy words when plain words will do (“transaction” instead of “sale,” “vehicle” instead of “car”).

(d) Sentences that are too long.

(e) Paragraphs that are too long.

(f) Saying “it is clear” or “clearly”. Whenever a lawyer does that, the odds are 5-1 it either isn't clear or is clear the opposite way.

(g) Stringing citations without saying what the case held.

F. THE STYLE FITS THE AUDIENCE.

Most opinions will be designed to be read by an appellate court judge, or his or her clerk. However, sometimes the opinion has other audiences. It may be designed for the parties to see the legal arguments and perhaps settle the case prior to a full appeal. It may be an opinion that is on a novel point of law and may set the stage for other judges at the trial court level and for the bar. There will be differences in style depending on the audience.

G. PROOFREAD, PROOFREAD, *POOFREAD.*

A good opinion is not finished when the last word is written. No opinion, or any other writing comes out perfectly in first draft. The key is going over the document again. It is best to put it aside for a couple of days and then go back over it, perhaps pretending someone else wrote it.

You might even do a "post-mortem outline," looking at the opinion and putting an outline down on paper. You then can easily see whether or not your organization works. I think I write clearly, but every time I go over a document again, I find dozens of changes I would like to make. The quality of an opinion varies directly with the number of times it is reviewed.

Footnotes

Note

1. *Editor's Note: This article is a memorandum that Judge Klein gives to his new law clerks.*

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