How to Write a Concise Opinion

By Charles G. Douglas, III

Why should a judge even want to write a short opinion? I discovered a shocking answer to this question when I received the following information from West Publishing Company:

CASES RECEIVED BY
WEST PUBLISHING COMPANY
1895–1981

Year	*Number of Cases*
1895	19,476
1929	27,527
1942	23,283
1950	21,450
1964	27,336
1970	36,892
1977	46,983
1981	54,104

The number of opinions received by West in 1929 was the same number it received in 1964—some 35 years later. Yet the number has doubled to 54,104 in 1981 in just half that time! If this trend continues we will soon be at 100,000 cases a year.

Who, pray tell, will ever read this flood of paper, or ever care? Are we all deluding ourselves that we are a Cardozo, Marshall, or Holmes? Or are we writing pages of unique fact-oriented opinions that will never even be referred to again by our own courts? Worse still, are we, through neglect, allowing our law clerks to develop lengthy writing samples for the next job interview?

In this article, I will not attempt to change judges' writing styles, but rather I will show how we can reduce the length of our opinions. Judges will always have to crank out the paper, but it need not be as voluminous or convoluted as many of our opinions are.

I. THE FIVE PARTS OF AN OPINION

Let us review the five constituent parts of an opinion to pick up tips on writing a shorter one.

1. **The nature of the action and how it**

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got to the appellate court. We do not read new books by starting at page 150, yet many of us write opinions as if to encourage such practices. Many opinions from the federal judiciary seem to have mastered the art of beginning with a massively detailed factual exposition that tells the reader nothing about where he or she is going. Is it a case involving a tax fraud or a drug bust? You never know until several pages into the opinion. Don't start opinions with pages of facts out of a clear blue sky!

We should *set the stage* and tell the reader the nature of the case and how it got to our court. Such a statement should be a sentence or two or at most a paragraph. It should tell the reader whether to begin thinking about contract law, tort law, criminal law, etc. It also establishes who the appellant is, whether there was a jury, and similar procedural matters. An example:

> The issue in this declaratory judgment action is whether the Town of Nowhere may constitutionally enact a ban on the distribution of political leaflets. Judgment was entered for the defendant town and plaintiff appeals.

2. **The questions to be decided.** Some writers would put such a statement in a one or two issue case in step one above. The worst thing is to scatter questions treasure-hunt style throughout the opinion. It is best to lay them out on the front end for the ease of attorneys and fellow judges who must research the hundreds of thousands of printed decisions. With the advent of Westlaw and other computer case research systems, the first paragraph or two that rolls up on the CRT screen will set the tone quickly for the searcher.

By doing this we aid ourselves in clarifying the issues so that we can cut down on the facts needed to reach a decision. An example of handling multiple questions is:

> In this action by a buyer to rescind a real estate contract for fraud, the questions on appeal relate to the sufficiency of the evidence as to fraud, the defenses of laches and estoppel, and the admissibility of certain evidence challenged as being hearsay.

We should also keep in mind that we frequently advise lawyers to begin oral arguments by telling us at the start, and in a few words, what the case is about. Just as we don't like a long factual dissertation to begin an oral argument, readers don't like the same at the beginning of an opinion.

3. **The essential facts.** Usually a chronological statement of the essential facts is helpful. Exquisite detail is to be avoided as to exact dates and times, car make and model, etc., unless necessary. One writer observed that the French say that the "art of being a bore is to tell every detail." [Gerhart, *Improving our Legal Writing: Maxims from the Masters,* 40 A.B.A.J. 1057, 1058 (1954).]

A more detailed factual discussion is sometimes fruitful in connection with a specific question to be decided—if saved for that part of the opinion. We must remember that the facts cannot be twisted or altered to suit our own view. The lawyers know their facts better than we do. They will forgive us for legal mistakes, but never take away their facts!

4. **Determination of the issues.** The meat of an opinion is the legal discussion where the competing cases, laws, or policies are analyzed and a reasoned decision is made. Dean Wigmore cogently observed that this is often where the rambling opinion emerges, as it

> pieces together a great many semi-irrelevant propositions of law, wanders through numerous cited cases, sometimes makes as much as a law lecture out of them, and ends 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. [*Wigmore on Evidences* § 8 b, at 254 (3d ed. 1940).]

5. **Disposition and mandate.** The end of the opinion should avoid an open-ended word like "remanded" or a phrase like "so ordered." The very imprecision of the words can lead to motions for clarification, rehearing, etc. Be clear and direct at this point. In most cases "affirmed" or "reversed" will do just fine.

II. THE RENO TEST

The above popular judicial acronym, which refers to the location of the National Judicial College, is the key to four readability tips.

R. Readable first time. The best way to determine if a consumer of one of your opinions will be able to understand it is to read it through nonstop. If you have to stop and reread a sentence, thought, or paragraph, it is not well written! If a draft is done by a law clerk and you can't keep your eyes moving and your brain waves flowing, then the offending section must be rewritten. This simple test, better than any I know, will eliminate long phrases, sentences, and words.

This article is based upon a lecture given by the author and retired Chief Justice William A. Grimes of the New Hampshire Supreme Court at Appellate Judges' Conference Educational Programs.

"The lesson is that good legal writing is the same as good writing—clear, direct, and easy to read."

E. Ease of reading. Tied closely to our first test is the simple truth that in good writing we find the going easy. Ease of reading was discussed at length by Dr. Rudolph Flesch in his 1949 book *The Art of Readable Writing*. Long words are notoriously hard to read and therefore must be avoided. As Sir Winston Churchill noted, "Short words read best and the old words when short are best of all." Our eye flows more quickly over short words.

Sentences should be an average of 17 words long. At least two or three paragraphs should appear on a double-spaced letter-size piece of paper. We all know how psychologically tedious a full page of type is to read. Break up the page and it will be more "readable."

N. Names not abstractions. To create more interest in your writing, avoid using abstractions. Cut down on those elements in your opinions that delay or block the reader. Letters like A or B are not an aid to communication any more than the "party of the first part" is in a lease. The description "plaintiff-appellee" or "respondent below" forces us to keep looking at the title block on the opinion's first page to keep track of who is whom.

Make the writing more interesting by using the name of a criminal defendant or the proper names of two parties. If names would not be as helpful as "buyer" or "seller" then use the latter. Avoid use of "appellant" and "appellee." For corporations or government agencies, you don't even need the phrase "hereinafter referred to as _____." An example:

> In this appeal Public Service Company of New Hampshire (PSNH) challenges the denial of a rate increase by the New Hampshire Public Utilities Commission (PUC). The issues raised by PSNH are that. . . .

O. Only clear expression. Daniel Webster observed that "the power of clear statement is the great power at the bar." We must avoid the temptation to impress our friends, neighbors, and pets with the use of obscure Latin phrases that we can't properly pronounce but can copy out of a book. The use of such phrases is pompous behavior that does not aid in communicating our thoughts, which is the purpose of writing.

Of course, there are some phrases like "res judicata" that we must use if we *are* going to properly communicate, but I doubt that in a given year we even need to use more than 20 different Latin words.

Another aid to clear expression is the elimination of compound prepositions. Use the simple form instead. Some examples:

Compound	*Simple*
for the reason that	because
in accordance with	by
in favor of	for
in the event that	if
subsequent to	after

The lesson is that *good* legal writing is the same as *good* writing—clear, direct, and easy to read. In case you think the legal giants of our time wrote in brilliant but arcane legalese, I offer the following sample from an opinion:

> Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. [*Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 340–41, 162 N.E. 99 (1928) (Cardozo, J.).]

III. SEVEN RULES FOR SLIM OPINIONS

Assuming you now *want* to write a short opinion, here are seven "weight watching" tips.

1. **Cut down facts.** All too often opinion writers quote verbatim blocks of questions and answers, the text of pleadings and motions, or the facts found below. In nine out of ten cases these could be summarized or eliminated entirely. In an excess of caution, we load up our cases with useless detail.

Judge John Gillis provides the extreme example of short facts in the following opinion:

> J.H. Gillis, J. The appellant has attempted to distinguish the factual situation in this case from that in *Renfroe v. Higgins Rack Coating and Manufacturing Co., Inc.* (1969), 17 Mich. App. 259. He didn't. We couldn't. Affirmed. Costs to appellee. All concurred. [*Denny v. Radar Industries, Inc.*, 28 Mich. App. 294, 294, 184, N.W. 2d 289, 290 (1970).]

2. **Don't reproduce the record.** Pages out of a record are not likely to be read and in most instances can be boiled down to a few quotes. The record was paid

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the public interest. But the judge is not to impose a sentence thinking, 'I want to be harsh.' The judge should not impose a sentence to gain favorable public opinion or favorable press. The judge must be accountable, yet independent. The judge strives to impose sentences that are wise and just. As judges, you must do the best you can, knowing that although you must sentence, you cannot predict with certainty the offender's future conduct. You use your best judgment to protect the public.

"I enjoyed serving with you 'judges' today. I can tell by your sentencing decisions and your discussion that you were not influenced by improper considerations. I do not think you sentenced by applying labels to your decision—liberal or conservative; tough or lenient; popular or unpopular. You were guided by principles and policies set forth in the laws, not personal predilections or ambitions. Your tried to be sensible and fair, considering the offender, the victim, and the community. That is what we can and should expect from all our judges. You lived up to these expectations, and I enjoyed serving with you.

"Although you are good judges, unfortunately your term must end." I wave my hand and say, "Poof—you are no longer judges."

I am prepared to sit down, but they want to talk about a variety of topics—including capital punishment, plea bargaining, percentage of crimes reported to the police, percentage of crimes "solved," police discretion, prosecutorial discretion, prison conditions, juvenile offenders, and on and on. I discuss as many of these topics as time permits and suggest that the group schedule a series of programs on the criminal justice system—and they generally do.

1. When citizens talk about crime, they are not talking about corporate crime. Although many think corporate crime constitutes a significant threat to the integrity of our society and the moral base of the law, citizens are talking about "street crime"—crimes that threaten their person and their property in their homes and on the streets, predatory crimes that destroy their freedom and sense of community.

2. Abrahamson, *How Tootsie the Goldfish Is Teaching People To Think Like a Judge*, 21 THE JUDGES' J. 12 (Spring 1982).

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for once; don't reproduce it in West Publishing Company's regional reporters.

3. **Authorities only cited.** All too often we cut and paste into our opinions huge block quotes from cases or treatises, or we string together well-known citations, which are purely tangential to our issue. Our opinions thus look like an effort to reprint what the bar and libraries have already purchased.

An example of what *not* to do is the case of *United States v. DiFrancesco*, 449 U.S. 117 (1980), which is used by retired Chief Justice William A. Grimes of the New Hampshire Supreme Court as a classic in Appellate Judges' Seminars. In that double jeopardy case the United States Court had to decide the narrow legal question whether a sentence could be increased on appeal by the government. In section III of the opinion, the court remarks that it has had frequent occasion to consider double jeopardy claims in a variety of contexts. It then cites 21 cases from the last decade and 8 more earlier decisions. The court then lapses into a rambling series of pages in sections III and IV, summarizing what all of those unrelated cases hold.

In addition to the fact that such cumulative citation of authority is totally unnecessary, there is a great risk that in restating settled and extraneous propositions of law a court might err or unintentionally reword a maxim. These ticking time bombs can come back to haunt a court in later cases. All of the basic principles of law do not need to be discussed at length if only one narrow issue is implicated. Law clerks tend to restate the obvious because they either aren't yet certain about it or didn't take a course in the substantive law at issue and therefore use the opinion as a tool to educate themselves. Let them save their treatises on offer and acceptance or why we have the First Amendment for writing samples.

4. **Meritless points merit no time.** All too often a brief will have several one paragraph "throw away" issues. The theory is that if you throw enough up on the ceiling something will stick. Don't fall for it. A good example of how to handle this situation is as follows:

> We have considered the defendant's remaining arguments: that testimony concerning the victim's identification of him in a photographic array should have been excluded; that the trial court, pursuant to RSA 632-A:6 (Supp. 1981), improperly restricted his cross-examination of the victim; that the trial court should have granted him a new trial; and that the trial court improperly denied his request to instruct the jury on simple assault. We hold that these arguments have no merit and do not warrant further consideration. [*State v. Dukette*, 122 N.H. 334, 339, 444 A.2d 547, 549 (1982) (Brock, J.).]

5. **Eliminate footnotes.** If you haven't been shocked so far, this point usually succeeds in doing so. There is no need at all, *ever*, to use footnotes in an opinion!

By eliminating footnotes you can instantly strip an opinion of irrelevant points, string cites, block quotes from treatises, lengthy quotations from the record, full text of statutes printed elsewhere, fascinating little asides, restatements of legal principles, and useless statistics, to name but a few examples. No one is sure of the importance ascribed to a footnote, but all doubt is removed if you refrain from using them. An opinion is not a law review article!

Readability is greatly aided if footnotes are not used; otherwise, the thought flow is broken up by having one's eye glance up and down the page every time a little number appears. For a book like *Corpus Juris Secundum* (C.J.S.), the use of footnotes makes sense but for

a tighter clear opinion avoid them at all cost.

My court, the New Hampshire Supreme Court, last year handed down 237 printed opinions for publication. Not a single one contained a footnote! We never use them and never will. All of the 16 footnotes in the majority opinion in *DiFrancesco* case mentioned above could have been eliminated—especially the pages that reprinted 18 U.S.C. sections 3575 and 3576.

If you do nothing else as a result of reading this far, at least plan to use only one or two footnotes if your nervous system can't do without them.

6. **Summarize statutes.** By eliminating footnotes and long block quotations you are now down to the harsh reality that statutes can be summarized or quoted only in *relevant* part. Nothing is lost and readability is dramatically increased.

7. **Avoid string citations.** A good opinion selects the key cases on both sides of a point and perhaps refers the reader to a source like *Administrative Law Review* for the rest. Remember, *Administrative Law Review* and *American Jurisprudence* are updated with pocket parts—your opinion won't be. Don't forget you are not writing for *C.J.S.*

IV. FOUR WRITING AIDS

1. **Use Topical Headings.** Just as this long article has been broken up into topic headings so should your opinion if it is more than five or six typewritten pages. However, do *not* use topic headings that will confuse people reading your opinions. For example, instead of taking the names of multiple defendants and clustering all the issues relating to a given name under a heading like "*3. John Jones,*" use a heading like "3. *Prior Inconsistent Statements.*"

Properly used, a set of topic headings prevents run-on thoughts, helps interest and readability, and forces the writer to encapsulate an issue and then go on to the next one. It also aids in "headnoting" and key-word searches through Westlaw or Lexis.

2. **Use diagrams and maps.** In your opinion, consider attaching photo copies of exhibit material, such as maps, sketches, even photocopies or photographs of "hard" exhibits. For much exhibit material, photo copier reduction machines are necessary. If you do not have such equipment then consider drawing your own sketch or map, leaving out the irrelevant details or markings. Keep in mind the ultimate book size and margin requirements and be sure it ties into your fact-pattern discussion. Such devices can lead to a shortened set of facts, because as we all know a picture is worth.... For examples see *Richard v. Broussard,* 378 So. 2d 959, 962 (La. App. 1979) and *Waller v. Farmland Industries, Inc.,* 392 So. 2d 1099, 1103 (La. App. 1981).

3. **Write, don't dictate.** On this point reasonable people can differ. A short one- or two-page opinion might be dictated as easily as it could be written. Generally, however, we tend to ramble more when speaking than when writing. By writing, we can more easily retrace our steps to shorten or cut down thoughts, quotes, etc. Always write double-spaced so that changes can be easily made.

In this age of microcomputers and word processors with video display terminals (VDTs), we can edit, move paragraphs around, and delete or add words without having to retype an entire opinion. The sections that have not been changed can then be skipped over without the need to reread them. All appellate courts should have word processors.

At conference time, my court has its working drafts typed on paper with 30 numbers down the left-hand margin (line numbers), so that changes can be targeted by fellow judges. A memo or comment directed to "page 5, line 17" is clear and easy to follow.

4. **Published versus unpublished opinions.** Because unpublished opinions tend to be very factually oriented rather than to pronounce legal principles, they can be quite short. The parties know the facts, and it may be easier to get to the rationale of the holding if the writer knows the case will have limited applicability. If published, a one or two sentence fact pattern may be too cryptic for the reader.

V. THE LAW CLERK PROBLEM

It never fails to amaze me how little guidance we give to 23-year-old law clerks who have never tried a case, sat as a judge, or practiced law. They tend to worry too much about problems, over-research, explain the obvious, and write far too long.

We need to tightly control their product. There is no reason why an experienced judge can't say, "This is a simple two-issue case that should take about three days to write and should be about four or five pages tops." You *can* tell them when to get it back to you and how long it should be. You have the experience—they don't.

From the beginning tell them the things you *don't* want done, such as the items that have been discussed in this article. Have them read it as your standard operating procedure. *Tell them also what issue is likely to be dispositive and what the holding is likely to be.*

Most clerks have law review experience, which presents you with a mixed package. The good news is that they know the signals, cite forms, etc. The bad news is that they still think they are writing notes or preparing a lead article. This problem is acute at the federal level where an excess of law clerks have turned the *Federal Supplement* into a veritable cornucopia of writing samples for their next job interviews.

I had one law clerk applicant show me a 100-page "writing sample" in the form of an opinion for a federal district judge on the sole question of whether in a given case a jury trial should be held. In the six years I have sat on my court, it has never produced an opinion longer than 30 letter-sized, double-spaced, typewritten pages. Most of our cases average five or six such pages. What is the secret? Control of law clerks by discouraging "writing samples" and "law review articles" in opinion form!

Finally, I would point out the need to avoid the use of a clerk's distinctive writing style. It may be great for the year he or she is with you, but once the clerk

departs, you are back to the same old you. Keep a certain style and have the clerk write to it. For guidance, you should provide the clerk with some prior opinions as samples. Even if you bear down on them, the clerks will survive the year.

It may be harder to write a short opinion, but they certainly read better. Most of us are merely deciding cases and not "making law." Even when we do the latter, we can tighten up the product dramatically if we reign in the staff attorneys and law clerks. Unlike Dickens, we aren't paid by the word nor can we turn a phrase that will live on in history.

We can, however, improve our work product if we really think about it.

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support was the college able to expand its curriculum in the face of heavy inflation and a rapid growth in attendance that we experience over our 20-year history.

Many alumni have provided specific gifts to bring life and memories to the Judicial College building: a clock for the library, a podium, trees, a sprinkler system, carpets for classrooms, audio-visual equipment, and a flagpole. The plaques recognizing these contributions appear on the Judicial College building's walls.

We'll have our own brand of fireworks in July as we celebrate our anniversary. On July 6, the 20th anniversary of that first judicial conference in Boulder, we'll have a commemorative 20th anniversary dinner, followed the next day with a special 20th anniversary program. The summer semester will then open July 10.

Our alumni have created our past and are actively participating in our current activities to build our future. We're in the process of establishing an alumni association, and the first issue of an alumni association newsletter will be published later this year. Our alumni also act as "ambassadors" in the development effort, encouraging their colleagues to share in the career rewards to be derived from active participation in the college. Their continued enthusiasm will play a large part in the establishment of an endowment fund that will perpetuate the college and national career judicial education and training forever.

We owe our success of the last 20 years to those to whom are dedicated: the judges of the world who seek professional self-development through continuing education. Without their support, we'd be just another school or merely a series of seminars.

Practicum

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pointed to the first level. The tendency is to appoint lawyers, laymen, and judges who have very little experience at the high volume criminal, traffic, or rural courts.

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The judge has no due process in Illinois before the Inquiry Board.

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Judges have no input into the Inquiry Board investigations.

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No due process is available at the first level; no copy of the charges are provided unless filed with Courts Commission (second level); and there is no right to discovery.

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Individual Inquiry Board members discuss matters in the press.

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Judges should have the right of discovery in Judicial Inquiry Board proceedings.

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Trial courts and lower special courts have little or no input into the Inquiry Board and the Courts Commission.

Another concern was that the Judicial Inquiry Board of Illinois views a mistake of law which is considered a gross abuse of discretion to be a disciplinary matter. The judges urge that the standard should require actual knowledge by the judge of the law and a willful refusal to follow it.

Other judges in Illinois suggest that complaints against judges be granted an absolute privilege of immunity from suit, but not from disclosure.

In addition, Illinois judges suggest that even though the disciplinary board may decide whether or not to notify a judge that a complaint has been made, the commentary of Standard 4.5 of "Standards Relating to Judicial Discipline and Disability Retirement" states that notice should be given in the majority of cases. The Illinois judges contend that this principle is not followed by the Judicial Disciplinary Board of Illinois. Some Illinois judges argue further that judges should be entitled to the same discovery of information as the Judicial Inquiry Board and that no such policy exists.

Still other Illinois judges suggest that there be a statute of limitations on the use of closed files in subsequent proceedings. Currently, the complaint is filed and never closed, and judges must recall details of events that happened years before the present complaint.

There is a movement in Michigan to adopt procedural changes to guarantee judges due process in disciplinary matters. An effort is being made to clarify what conduct is in fact "misconduct." Some Michigan