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From the Selected Works of Hon. Gerald Lebovits

March, 2013

The Goals of a Judicial Opinion

Gerald Lebovits



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Lex and Verum

The National Association of Workers' Compensation Judiciary



Number XL, March 2013

Thoughts on Adoption of Proposed Findings and Order



By: Hon. David Torrey*

The practice of a judge adopting the prevailing party's proposed findings and/or order has been a topic long-discussed by appellate courts and commentators. In the Pennsylvania system in which I work, the workers' compensation judge (WCJ) must produce a detailed decision consisting of findings of fact and conclusions of law, and the adjudication must set forth reasons explaining the basis of the same. Our decisions are thus scrutinized carefully as matters of both employee performance and appellate review. Still, Pennsylvania courts have expressly stated that adoption of proposed findings is a legitimate practice, as long as the decision itself is based on substantial evidence and satisfies our "reasoned decision" requirement.¹ The U.S Supreme Court in a 1964 case has communicated the same sentiment.²

Many Pennsylvania WCJ's – and, I sense, those of other jurisdictions – in the present day nevertheless believe that the practice is questionable. Such judges have a concern that adoption of findings suggests that the judge did not undertake his own, independent, judicious study of the record, sufficient for the judge to come up with his own findings and legal conclusions. Others view adoption of findings as suggesting that the judge is lazy or unskillful, unable or unwilling to fashion a well-reasoned, well-structured final decision that will have staying power through the appeal process.

In 2003, an expert on judicial conduct addressed the issue of verbatim adoption in the periodical *Legal Affairs*. The article was prompted by a charge that a Florida appeals court judge had committed plagiarism by adopting, in his opinion, "almost verbatim replication of [one of the briefs] without a single attribution."³

The author, Professor Charles Geyh, submitted that it is *not*, in fact, unlawful or unethical for a judge to incorporate the inclusions of a brief in his or her own opinion. Geyh argued that it would only be unlawful or unethical were we to "elevate judicial originality to the status of a constitutional responsibility." Still, adoption "without attribution" in an appellate court opinion, particularly one that is to be a reported precedent, is troublesome: "Even if a judge believes that a brief offers a perfect expression of the law, copying it creates the perception that the jurist is sloppy, lazy, or intellectually moribund. That perception may be unfair But the perception will remain, to the detriment of the public's confidence in the judicial system."

Geyh did not, however, extend this critique to the trial court level where the WCJ dwells: "In an adversarial system of justice . . . , judges are expected to crib from the arguments, ideas, and research of the adversaries. They mislead no one into thinking they've done otherwise if they don't festoon their opinions with citations to the briefs. The point is for judges to get it right, not for them to get there on their own intellectual steam. In an age of crowded dockets and overworked courts, lawyers routinely draft proposed orders, findings of fact, conclusions of law, and briefs on behalf of their clients in the hopes that judges will borrow from them freely."

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The Goals of a Judicial Opinion

By Gerry Lebovits*



1. Why Should Trial Judges Write?

Under CPLR 2219 (a), all orders that determine motions must be in writing. But the writing may be brief and conclusory, for record-keeping only. The question is, when should a trial judge write a full opinion? The answers are given in John B. Nesbitt, View from the Bench, *The Role of Trial Court Opinions in the Judicial Process*, 75 NY St. BJ. 39 (Sept. 2003).

Trial judges write to communicate to the litigants and their counsel the court's conclusions and the reasons for them when

- (1) an issue is novel;
- (2) the matter is complex;
- (3) the facts are in dispute;
- (4) an issue or a case is important to the litigants or the public;
- (5) the scope of future litigation must be narrowed;
- (6) the decision and its reasoning must be maintained for record keeping;
- (7) the decision is likely to be appealed and the court wants the appellate court to appreciate its reasoning;
- (8) the litigants and their lawyers cannot be present for an oral opinion;
- (9) writing will focus the court's mind; or
- (10) a written opinion will enhance confidence in the judiciary.

If none of these factors is present, the trial judge should rule from the bench and follow up with a brief order to memorialize the decision. According to CPLR 2219 (a), a court must reduce to writing or otherwise record all orders and rulings "upon the request of a party." (For an excellent text on how to formulate orders and judgments in civil cases, see Supreme Court, Civil Branch, New York County, *Guide to the Form of Orders and Judgments* 8-9 [2d ed. 1998].) Ruling from the bench speeds resolution, which aids litigants and reduces backlogs. Ruling from the bench also promotes compliance with CPLR 2219 (a), which requires that motions relating to provisional remedies be decided within 20 days and that orders determining all other motions be decided within 60 days.

It is risky, however, to announce that a written opinion will follow an oral ruling. The judge might not get around to it, and if the judge does write, the written opinion might conflict with the bench ruling.

Writing is commendable. But writing a full opinion is not always important for a trial judge. In the trial courts, writing quickly, fairly, and accurately, with a record for appellate review, is vastly more important than writing an erudite opinion. An oral opinion can accomplish a trial judge's goals better than a full written opinion except when one or more of the above 10 factors are present.

Trial judges publish their opinions to guide lawyers, academics, students, other judges, and the public on substantial and novel legal issues. Publication ought not be the vanity press. Publication should not be directed only to the litigants or appellate courts.

2. The Purposes of a Reasoned Opinion

Judgments are primary. Opinions merely explain judgments: "judicial opinions are simply explanations for judgments—essays written by judges explaining why they recorded the judgment they did." (Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 *Cardozo L. Rev.* 43, 62 [1993].) What immediately counts for the litigants is what a court does, not its reason for doing so.

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But for other lawyers and judges, who rely on the precedent, setting function of reasoned opinions, and for the litigants in the event of an appeal, what counts is the basis for the judgment.

Often judges should decide issues and even render judgment without giving an opinion, either oral or written. To speed things along and for other reasons, trial judges, for example, frequently judges decline to give their grounds for a decision when they rule on objections. Lord Mansfield, in particular, advised "new judges to state their judgments and withhold their reasons, since their judgments were probably right and their reasons probably wrong." (Philip B. Kurland, *Politics, the Constitution, and the Warren Court* 94 [1970].)

Arbitrators rarely and jurors never justify their decision making. Continental Europeans of the civil-law tradition believe that judges, too, need not justify for the litigants and the public. Justification is unimportant in the civilian tradition, in which "only experienced jurists are able to understand and admire" a judicial opinion. (Rene David and John E.C. Brierley, *Major Legal Systems in the World Today* 129 [2d ed. 1978]; accord Michael Wells, *French and American Judicial Opinions*, 19 *Yale Intl. LJ.* 81 *passim* [1994].) Judicial opinions in civil-law jurisdictions are terse, opaque, and conclusory not only because they have no precedential value. They are written as syllogistic, authoritarian assertions without candor, argument, and policy justification because continental judges, given historical, cultural, and political influences, see themselves as "technician[s] who mechanically appl[y] existing law to a factual situation, rather than as . . . social engineer[s] who exercise judgment and lay down general rules of conduct." (Wells, *supra*, at 98.) Opinions in common-law jurisdictions, whose history of judging has always included winning battles for judicial independence, carry precedential force. Since the 1800s, the American way has been to justify and thus engage readers of judicial opinions in participatory democracy - for judges to give a candid, persuasive, accessible response to a litigant's reasoned argument. Indeed, many have argued that the American way of writing reasoned opinions that stress law as something other than a naked exercise of power is a response to European positivism and authoritarianism. (See e.g. G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 *Va. L. Rev.* 279,282-283, 285-286 [1973], cited in Wells, *supra*, at 83 n 6.)

All remember one sentence from *Marbury*, but the Court's next sentence sheds light on the first: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." (*Marbury v. Madison*, 5 U.S. [1 Cranch] 137, 177 [1803] [Marshall, Ch. J.].) Most understand *Marbury* to mean that under the separation-of powers doctrine, the judicial branch interprets laws the legislative branch enacts and the executive branch enforces. *Marbury* means more than that. *Marbury* requires judges to give reasoned opinions, not merely judgments, in cases that call for explanation.

Reasoned judicial opinions that explain judgment are unnecessary in the world of the legal positivists. Positivists believe that the law is the state's authoritative command backed by the state's might. To render law in that sense, a court need only rule. It need not explain its reasoning. Its role is limited to resolving cases and controversies, not to pronouncing, expounding, and interpreting the law. It need not render an opinion that justifies its conclusion. (See e.g. Gary Lawson and Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 *Iowa L. Rev.* 1267, 1328 [1996] ["[T]he issuance of opinions is not an essential aspect of judicial power . . .".])

A democratic society and the rule of law are disserved, however, by naked assertions of law as power. As Justice Douglas explained, "confidence based on understanding is more enduring than confidence based on awe." (William O. Douglas, *Stare Decisis*, 4 *Record of Assn. of Bar of City of NY* 152, 175 [1949]; accord William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 *J Am. Jud. Soc.*104 [1948].) Moreover, "that the public believe that justice is done is no less important than that it be done with the greatest possible precision." (Roscoe Pound, *Justice According to Law*, 13 *Colum. L. Rev.* 696, 701 [1913].) Judicial decision making has many goals, chief among them interpreting the will the people expressed through the Legislature, imposing constitutional safeguards, and promoting efficiency, equal justice, stability, and fairness in reaching decisions and in adhering to moral values. These goals are best achieved-indeed, they are achieved only-when a court explains how and why it decided a case.

Justice Smith asked and answered the question, "Why an opinion at all." He gave two of the ten reasons:

"Above all else to expose the court's decision to public scrutiny, to nail it up on the wall for all to see. In no other way can it be known whether the law needs revision, whether the court is doing its job, whether a particular judge is competent. A second reason . . . is that there is no test of a decision equal to the discipline of having to compose an opinion."

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(George Rose Smith, *A Primer of Opinion Writing, for Four New Judges*, 21 Ark. L. Rev. 197, 200-201 [1967].) These two reasons keep opinion writers in line-accountable to others and to themselves - because reasoned opinions limit judicial discretion and expand judicial candor and because "[w]here a judge need write no opinion, his judgment may be faulty." (Moses Lasky, *Observing Appellate Opinions from Below the Bench*, 49 Cal. L. Rev. 831, 838 [1961].) A third reason for an opinion is that "[w]ithout . . . opinions the parties have to take it on faith that their participation in the decision has been real, that the arbitrator has in fact understood and taken into account their proofs and arguments." (Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 388 [1978].) Fourth, opinions enable litigants "to know what impressed the judge, and why." (David Mellinkoff, *Legal Writing: Sense & Nonsense* 68 [1982].) Fifth, opinions tell the litigants whether "it [is] worthwhile to challenge the result by further appeal." (*Id.*) Sixth, opinions help higher courts resolve appeals. Seventh, opinions impose consistency within and among the courts. Eighth, opinions explain the law so that people can predict the law in analogous cases and govern themselves by it. (Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 26 [1960] ["[T]he opinion has as one if not its major office to show how like cases are properly to be decided in the future."].) Ninth, opinions allow students to study the law, advocates to argue it, and other judges to be persuaded by it. Tenth, the public has the right to know who creates and interprets the law: "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified . . ." (*Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 [1917, Holmes,], dissenting[.]) Opinion writing identifies those who write and interpret the law.

Some judges write for personal reasons:

"Transplants from academia [write] to communicate their intellectual processes to the world. Refugees from the world of politics . . . write to persuade their colleagues and the public that they are moving the law in the right direction. Some judges write for the personal gratification that comes from being quoted, cited, and republished . . . Ambitious judges write in hopes of promotion to higher office . . ." (Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1372 [1995].)

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"Second Fridays" Free Educational Programs from the NAWCJ

March, 2013 - On "Spring Break" Hiatus.

April, 2013 - Robert J. Barth, Ph.D. Medical evidence, Objectivity, and medical opinion evidence in judicial proceedings. Medicine is inextricably intertwined in most workers' compensation adjudications. When is a medical opinion appropriate, and what factual foundation should underpin such opinions. Alternatively, when are medical facts and objective evidence more appropriate?

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All Second Fridays presentations are free. To join at 12:00 Eastern time, email judgelangham@yahoo.com for details.

3. The Goals of a Reasoned Opinion

Written opinions, as opposed to oral opinions, have many purposes, but the writer "should concentrate on a single goal - to write an opinion supported by adequate authority that expresses the decision and rationale of the court in language and style that generate confidence in the reader that justice has been fairly and effectively administered." (American Bar Association-Appellate Judges Conference, *Judicial Opinion Writing Manual* 1 [1991].)

The most important thing the opinion must do is "state plainly the rule upon which the decision proceeds. This is required, in theory, because the court's function is to declare the law and in practice because the bar is entitled to know exactly what rule they can follow in advising clients and in trying cases." (1 John H. Wigmore, *Evidence in Trials at Common Law* § 8b, at 624 [Peter Tellers rev. ed. 1983].) To write a good opinion, though, the writer must do more than state the rule plainly. The opinion writer must also persuade: "[I]t is not enough that an opinion produce a just result and provide a clear precedent. The opinion must also persuade its audience that its rationale is sound" (Ron Moss, *Rhetorical Stratagems in Judicial Opinions*, 2 *Scribes J. Legal Writing* 103, 104 [1991].)

The goal of a trial-court opinion: To decide cases by weighing and resolving issues of fact and law thoughtfully and with a disinterested approach for the litigants and to freeze the record below for appellate review. (*See generally* Dwight W. Stevenson and James P. Zappen, *An Approach to Writing Trial Court Opinions*, 67 *Judicature* 336, 337-339 [1984].)

The goal of an appellate opinion: The lower the appellate court, the greater the need to review for correctness, to flesh out high-court doctrine, and to sharpen issues for higher appellate consideration. The higher the appellate court, the greater the need to "expound, declare, and expand the law rather than to decide the issues in particular cases." (Id. at 338.) A trial court may, and should, make oral rulings quickly to move cases along. On the other hand, the New York Court of Appeals and the United States Supreme Court would lose legitimacy if they rendered bench rulings right after oral argument and issued unpublished opinions. For appellate opinions of courts of last resort,

"the test of the quality of an opinion is the light it casts, outside the four corners of the particular lawsuit, in guiding the judgment of the hundreds of thousands of lawyers and government officials who have to deal at first hand with the problems of everyday life and of the thousands of judges who have to handle the great mass of the litigation which ultimately develops." (Henry M. Hart, Jr., *The Supreme Court* 1958 Term, 73 *Harv. L. Rev.* 84, 96 [1959].)

Temple Law Professor Cappalli agreed: When all is said and done, "The mark of greatness becomes how well the opinion's inchoate rule is understood by generations of future lawyers." (Richard B. Cappalli, *Viewpoint, Improving Appellate Opinions*, 83 *Judicature* 286, 320 [2000].)

For an excellent discussion of what an opinion is for, see James Boyd White, *What's an Opinion For?*, 62 *U. Chi. L. Rev.* 1363 (1995).

4. Should Intermediate Appellate Judges Always Write?

Much has been written, pro and con, about whether judges of intermediate appellate jurisdiction, who hear appeals mostly as of right rather than not by leave, should always write and publish.

Some argue that with the proliferation of published appellate opinions, cases that involve no novel issues should be summarily affirmed without opinion. The advantage to doing so is that many cases are so cut-and-dried that it is wasteful to devote limited appellate resources to them and, conversely, that it is smart to devote attention to important cases and novel issues. Moreover, a proliferation of published opinions diffuses precedent, allows lawyers to identify a case for almost any proposition, and adds great expense for practitioners who buy law books. (*See e.g.* Charles M. Merrill, *Could Judges Deliver More Justice if They Wrote Fewer Opinions?*, 64 *Judicature* 435, 471 [1981].)

Others argue that litigants who may appeal of right are entitled to know why they lose, that not writing or publishing opinions results in an underground body of conflicting law, that limited writing or publishing diminishes judicial responsibility, and that confidence in the judiciary is enhanced when the public believes that the court gave due consideration to all cases. (*See e.g.* David Greenwald and Frederick A. O. Schwarz, Jr., *The Censorial Judiciary*, 35 *UC Davis L. Rev.* 1133 *passim* [2002]; Ruth Bader Ginsburg, *The Obligation to Reason Why*, 37 *U. Fla. L. Rev.* 205, 221 [1985].) Those who argue that all appellate opinions should be written and published note that no-opinion cases are rendered in cases that sometimes are not clear-cut. In short, some believe, unwritten decisions or unpublished opinions lead to secret, sloppy, and unequal justice.

For better or worse, all the judicial departments of the Appellate Division currently issue written, published opinions in most appeals they hear of right, although many opinions are brief memorandum opinions so conclusory on the facts

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and the law that someone who has not read the briefs will not fully understand the facts and issues.

The federal courts of appeals have resolved the debate by writing in nearly every case. The courts of appeals write, but they often affirm, reverse, or modify in unpublished, or really uncitable, opinions. These opinions do not constitute precedent. (*See Hart v. Massanari*, 266 F.2d 1155 [9th Cir. 2001, Kozinski, J.]) Unpublishable opinions constituted precedent only in the Eighth Circuit, and only briefly. (*See Anastasoff v. United States*, 223 F.3d 898 [8th Cir. 2000, Arnold, J.] *vacated en banc as moot* 235 F.3d 1054 [8th Cir. 2000, Arnold, J.]) In 1999 the Federal courts of appeals decided nearly 25,000 appeals. More than 17,000 went unpublished. (William Glaberson, *Unprecedented: Legal Shortcuts Run into Some Dead Ends*, NY Times, Oct. 8, 2000, at 4, col. I [noting also that in some states, more than 90 percent of appellate opinions go unpublished].) Unpublished Federal opinions are available in full in West's Federal Appendix and on Westlaw and LEXIS, but they appear in the Federal Reporter Series only in the Table of Cases. Under the circuits' non-citation rules, it is contempt of court to cite, other than for *res judicata* or collateral estoppel purposes, an unpublished opinion.

For an excellent article about unpublished opinions, see Joseph L. Gerken, *a Librarian's Guide to Unpublished Judicial Opinions*, 96 Law Libr. J. 475 [2004].)

5. For Whom Do Judges Write?

Appellate judges devote a great deal of their time writing. According to one source, nearly half of an appellate judge's time involves opinion preparation. (*See Charles R. Haworth, Circuit Splitting and the "New" National Court of Appeals: Can the Mouse Roar?*, 30 SW LJ 839, 855 n 12 [1976].)

Judges write for their own benefit to clarify their reasoning, to assess arguments and law objectively, and to decide what to include. California Chief justice Traynor explained the process of justification: "A judge must do more than decree. He must reason every inch of the way." (Roger J. Traynor, *The Limits of Judicial Creativity*, 29 Hastings L] 1025, 1037 [1978].)

Judges write for others, too: to enable litigants to comply with their rulings and to understand why they won or lost; to help lawyers and judges research opinions for legal principles; to teach law students and the public the law; and to enhance confidence in the judiciary. Appellate judges also write for their colleagues by circulating drafts. For trial judges who write brief opinions and for appellate judges who write memorandum opinions, the primary audience is the litigants and their lawyers.

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In all other cases, "the primary audience for the judicial communication comprising an opinion must be the world of future lawyers and judges who, as part of their daily professional work, have to know what rights and duties are imposed by law." (Richard B. Cappalli, Viewpoint, *Improving Appellate Opinions*, 83 *Judicature* 286, 286 [2000].)

For an excellent discussion of whom judges write for, see Abner Mikva, *For Whom Judges Write*, 61 *S. Cal. L. Rev.* 1357 (1988).

6. Why Write Well?

Whether judges write for others or primarily for themselves, a poorly written opinion is ineffective. Poor opinion writing brings disrespect to the court and to the opinion. A poorly written opinion reflects and exacerbates the author's poor clarity of thought. Poor clarity of thought leads to incorrect decisions, misunderstood decisions, and embarrassing decisions.

In response to a poorly written opinion, litigants and others might also fail to comply with the ruling or misapply the law, innocently or not. When that happens, it is the opinion writer's fault, not the lawyer's, because "one of the most important skills of effective lawyering is the ability to find room for interpretive maneuver and to exploit it to advantage." (Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* § 3.2, at 38 [4th ed. 2001].) Every opinion, therefore, "must be crafted in a way that blocks misreadings and distortions . . ." (Richard B. Cappalli, Viewpoint, *Improving Appellate Opinions*, 83 *Judicature* 286, 287 [2000].) An opinion writer who drafts poorly fails to view the "lawyer-with-cause as an enemy bent on dismantling the logic and sense and structure of the judicial precedent to serve his client's interests." (*Id.* at 318.)

Poor opinion writing even produces additional litigation. For example, the New Jersey Supreme Court so poorly drafted *Southern Burlington County NAACP v. Mt. Laurel Township* (*Mt. Laurel I*) (67 NJ 151, 336 A.2d 713 [1975], *cert denied & app dismissed* 435 US 808 [1975, mem]) that after eight years of litigation, the court rewrote its opinion - a rewrite that took 103 printed pages to undo the effects of one unclear opinion. (*See Southern Burlington County NAACP v. Mt. Laurel Township* [*Mt. Laurel II*], 92 NJ 158, 456 A.2d 390 [1983].) *Mt. Laurel II* contains none of the opinion-writing mistakes found in *Mt. Laurel I*. Unlike *Mt. Laurel I*, *Mt. Laurel II* uses a strongly worded introduction and headings to impart structure. *Mt. Laurel I* and II prove Witkin's point: "[Only a well-written opinion can tell anyone what it really holds. A badly written opinion, with inconsistent statements or unclear grounds of decision, can do a great deal of harm." (Bernard. E. Witkin, *Manual on Appellate Court Opinions* § 53, at 85 [1977].)

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Upcoming Conferences:

Kansas Department of Labor 39th Annual Workers' Compensation Seminar, August 6&7, 2013, Hyatt Regency, Wichita, Kansas.

<https://www.dol.ks.gov/WorkComp/seminar.aspx>

2013 Workers' Compensation Committee Midwinter Seminar and Meeting, March 14-16, 2013, The Biltmore Hotel, Coral Gables, Florida.
http://www.americanbar.org/calendar/2013/03/workers_compensationcommitteemidwinterseminarandmeeting.html

2013 Minnesota Workers' Compensation Institute, April 19&20, 2013, Minneapolis, Minnesota.
<http://www.minncle.org/seminardetail.aspx?ID=101261301>

2013 Sacramento Employment & Workers' Compensation Law Seminar, September 5, 2013, Sheraton Grand Hotel, Sacramento, California.
http://events.sfgate.com/sacramento_ca/events/show/307311047-2013-sacramento-employment-workers-compensation-law-seminar

11th Annual Seminar for Workers' Compensation Professionals, October 2&3, 2013, Country Springs Hotel, Pewaukee, Wisconsin.
<http://www.wiwforum.org/>

Georgia State Board of Workers' Compensation Annual Educational Conference, August 25-28, 2013, Hyatt Regency Atlanta, Atlanta, Georgia.
<http://sbwc.georgia.gov/conferences-and-seminars>

Indiana Workers' Compensation Institute, April 17&18, 2013, Radisson Hotel, Indianapolis, Indiana
<http://www.iwci.org/>

22nd Annual Workers' Compensation Forum, May 14, 2013 Hilton Hotel, San Bernardino, California.
<http://www.workerscompforum.org/All%20Day%20Seminar%202013%20info%20doc%20revised.pdf>

IAIABC CSA Spring Seminar, June 13-14, 2013, Concourse Hotel, Madison, Wisconsin.
<http://www.iaiaabc.org/i4a/pages/index.cfm?pageid=4059>

33rd Annual SEAK National Workers' Compensation & Occupational Medicine Conference, July 16-18, 2013, Cape Cod, Massachusetts.
<http://www.seak.com/workers-compensation-and-occupational-medicine-resources/>

These programs are not sponsored or endorsed by the NAWCJ, but are noted here for information.

How opinions are written affects all legal writing and the law itself. As Mellinkoff noted, "The recollection of how it is said often outlasts the recollection of what was said. For better or worse, the opinion affects the basic writing pattern of the profession. And that pattern is inseparable from 'the law' itself." (David Mellinkoff, *Legal Writing: Sense & Nonsense* 70 [1981].) Lawyers' writing is famously incomprehensible. Therefore, "[t]o 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." (Nancy A. Wanderer, *Writing Better Opinions: Communicating with Candor, Clarity, and Style*, 54 *Maine L. Rev.* 47, 55 [2002].)

To affect the law and the profession positively, and to bring respect for the court and the law, judicial opinions must be written well. Opinions, after all, "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" (Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 *Colum. L. Rev.* 810, 819 [1961].)

Gerry Lebovits has been a New York City judge since 2001. Currently in Civil Court, he previously served in Criminal Court and Housing Court. In addition to teaching as a Lecturer-in-Law at Columbia Law School, he is an Adjunct Professor of Law at Fordham University School of Law and at New York University School of Law. He was an Adjunct Professor of Law at St. John's University School of Law (2007-2012), where the students elected him Adjunct Professor of the Year and where he received the Dean's Teaching Award, and at New York York Law School (1989-2007), where he received the Order of Barristers and the Lifetime Achievement Award (for Moot Court) and was elected Adjunct Professor of the Year. Judge Lebovits was a staff attorney with The New York City Legal Aid Society, Criminal Defense Division, and a principal court attorney in Supreme Court, Criminal Term, both in Manhattan. He has authored or co-authored *New York Residential Landlord-Tenant Law and Procedure* (N.Y. St. B. Assn. 5th ed. 2013), *Advanced Judicial Opinion Writing* (N.Y. St. Jud. Inst. 7th ed. 2004), and more than 200 articles on civil practice, criminal law and procedure, ethics, family law, landlord-tenant law, legal writing, and trial and appellate advocacy. B.A., Carleton University (1976); LL.L. (J.D. equiv.), University of Ottawa, Faculty of Law, Civil Law Section (1979); M.C.L., Tulane University School of Law (1980); LL.M. (in Criminal Justice), New York University.

The foregoing was excerpted from Judge Lebovits almost 500 page treatise, *Advanced Judicial Opinion Writing, A Handbook for New York State Trial and Appellate Courts*, Edition 7.4. Judge Lebovits is a prolific writer. He has written on advocacy, judicial writing, ethics, trial preparation, skills for new lawyers, landlord tenant law, family law, legal research and more. A selection of his over 200 collected works can be found at http://works.bepress.com/gerald_lebovits/.

What Benefits are Subject to Marital Asset Distribution?

By: Hon. David Langham

The manner in which workers' compensation affects people's lives is fascinating. One important aspect of entitlement to benefits is not within the jurisdiction of the various state's workers' compensation systems, but their trial courts. With the dissolution of marriage comes the distribution of property. There is some reasonable agreement among the states on the generalities of disability benefit distribution in divorce. However, a recent Illinois decision has raised questions.

In February 2007, the Texas Fourth Court of Appeals¹ addressed distribution of about \$17,000 in Impairment Income benefits that were paid during a marriage. The Claimant's ex-wife sought to include these benefit payments in the marital property. The Court held the monies were "the separate property of" the injured worker and not subject to distribution.

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