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September, 2004

Short Judicial Opinions: The Weight of Authority

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NEW YORK STATE BAR ASSOCIATION

SEPTEMBER 2004 | VOL. 76 | NO. 7

Journal

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Short Judicial Opinions: The Weight of Authority

BY GERALD LEBOVITS

Some judges who lament that lawyers' papers are too lengthy are more guilty of overwriting than lawyers. Judges who write lengthy opinions think they're creating memorable precedent. They're really nudging their snoozing readers to wake up and take a sleeping pill.¹

Ultimately, "[t]hree factors influence the scope . . . of an opinion: the complexity of the facts and the nature of the issues, the intended audience, and whether the opinion will be published."² An opinion's scope is important to litigants, especially losing litigants, who must be assured that the court considered their contentions fairly. Scope is also important to the public, who rely on the judiciary for assurance that cases are decided correctly. And scope is important to lawyers and judges, who rely on opinions for precedent. Opinions whose scope are too narrow will be misunderstood.

Opinion length — as opposed to scope — is unimportant to litigants: "[W]here the lawyer's own case is involved, the winner is rarely critical of the length, and the loser often feels that his points were not adequately discussed."³ Even so, length matters to everyone else, including opinion writers.

Concision is a virtue. Wordiness, not complexity, creates long opinions.⁴ But brief opinions are better than lengthy opinions even if the lengthy opinion is concise. Brief opinions hold the reader's attention, allow readers to move on to other things, and distill the opinion's essence. Lengthy opinions lend meaning to the phrase "weight of authority." The goal is to get to the point in an instant, er, instantly.⁵ The reader is key: "Too often . . . judges write . . . as if to themselves and as if their only purpose were to provide a

documentary history of having made a judgment. [But] the purpose of an opinion is to make a judgment credible to a diverse audience of readers."⁶

According to New York's Chief Judge Judith Kaye, opinion readers "expect a certain level of 'scholarliness.'"⁷ Still, "readers lament today's long, heavily footnoted, subsegmented, law review encrusted opinions."⁸ And "as the length of writings grows, the number of people who actually read them dwindles."⁹

The length of opinions and the number of citations have increased over time. In the New York Court of Appeals "between 1880 and 1970 . . . [o]pinions . . . range from 3.6 to 4.4 pages with no discernible trend. . . . After 1980, the average length of a majority opinion rose to 5.7 pages and, in both 1990 and 1993, it rose again to approximately six pages."¹⁰ In that time, "the number of citations per opinion reached a new high of 12.4 in 1980 and fell off only slightly, to 12.3 in 1990 and 11.5 in 1993."¹¹ It frustrates the bar that opinions have grown longer. In 1940, when opinions were much shorter than they are today, "well over 80 per cent of the lawyers [the American Bar Association surveyed] were dissatisfied with the then length of the opinions and preferred shorter opinions."¹² Good news might be on the horizon. In 2000, the average New York Court of Appeals opinion dropped to 5.2 pages and 10.9 case citations.¹³

Federal opinions are even longer than New York opinions. The average federal court of appeals opinion rose between 1960 and 1980 from 2863 words to 4020. Footnotes climbed from 3.8 to 7.0. Citations soared from 12.4 to 24.7.¹⁴

In addition to verbosity, overwriting causes long opinions. First Circuit Judge Aldisert cautioned against writing in depth: "When I see an opinion heavily overwritten, it is a signal to me that it is the product not of a judge, but of a law clerk, a person who is generally not sophisticated or perhaps confident enough to separate that which is important from what is merely interesting."¹⁵ Judge Vann used this put-down about a New York Court of Appeals opinion: "The discussion outran the decision."¹⁶ Overwritten opinions cause readers to say, "I understood the law until I read this opinion."

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As The Bard's aphorism goes, "brevity is the soul of wit," meaning wisdom.¹⁷ Judicial bard Richard Posner once paid homage to brevity and concision: "Judge Dumbauld's opinion for this court is concise — one might say summary — and not without wit. I admire witty and concise opinions, remembering Holmes' adage that a judge doesn't have to be heavy in order to be weighty."¹⁸

Judges who write in uncomfortable positions write less. Justice Holmes often wrote his opinions standing at a high desk. He explained why: "If I sit down, I write a long opinion and don't come to the point as quickly as I could."¹⁹ Justice Holmes messed up his knees but wrote succinctly and quickly, "usually within a day or two of getting the assignment."²⁰ Hemingway also wrote "some of his fiction while standing up."²¹

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Critics have long urged that opinions be shortened. From the 1899 Albany Law Journal: "[I]t behooves a judge to begin where his predecessors left off and go on from that point. . . . Too many long opinions are merely padded for pedantic display, or represent the result of the judge's study of principles that are really trite, but happened to be unfamiliar to him."²²

Fewer long opinions will lead to more thoughtful ones. First Circuit Judge Selya offered this advice in two law-review articles. In the first, he wrote that "judges are faced with the choice of either reducing the number of full-dress opinions or lowering the level of mastery to which they aspire. . . . [J]udges must begin to think more and write less."²³ He elaborated in the second: "[I]f judges can steel themselves to abjure rote recitations of established legal principles, forgo superfluous citations, and work consciously toward economies of phrase, the game will prove to be well worth the candle. With apologies to Robert Browning, the reality is that 'less is more.'"²⁴

Less is more when opinions cut to the chase. Consider this California classic:

The court below erred in giving the third, fourth, and fifth instructions. If the defendants were at fault in leaving an uncovered hole in the sidewalk of a public street, the intoxication of the plaintiff cannot excuse such gross negligence. A drunken man is as much entitled to a safe street as a sober one, and much more in need of it.

The judgment is reversed and the cause remanded.²⁵

But brevity is vice if it leads to inadequate explanation. Writing should be economical, not clipped, casual, and abrupt. Here's one Michigan opinion:

The appellant has attempted to distinguish the factual situation in this case from that in *Renfro v. Higgins*

Rack Coating & Manuf., Inc. (1969), 17 Mich. App. 259. He didn't. We couldn't.

Affirmed. Costs to appellee.²⁶

Judicial brevity is also no virtue when a court decides too little: "[T]here is a Law of Judicial Parsimony, which states that a court should decide no more than it must. . . . But sometimes courts extend this 'law' to the point of deciding no more than is necessary to get the case off the desk. Judicial Parsimony then becomes judicial shortchange."²⁷ Nor is brevity a virtue when a court addresses new, complex, and important problems. The opinion "will be longer, it *may* have to be historic, and it *will* have to be learned. If done well, it will be judicial operation at its finest."²⁸

We remember the short and forget the long. The Golden Rule has 11 words, the Ten Commandments 75, the Gettysburg Address 267, the Declaration of Independence 1321. Note to my snoozing readers: This column has 1923. Enough said.

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1. Horace warned that "[w]hen a work is long, a drowsy mood may well creep over it." John M. Lindsey, *The Legal Writing Malady*, N.Y. L.J., Dec. 12, 1990, at 2, col. 3 (quoting Horace, *Ars Poetica*, lines 335-38 (H.R. Fairclough trans.) (Loeb Classical Library rev. ed. 1929)).
2. Federal Judicial Center, *Judicial Writing Manual* 4 (1991).
3. American Bar Association, Section on Judicial Administration, Committee Report, *Internal Operating Procedures of Appellate Courts* 37 (1961).
4. See, e.g., Joseph W. Little, *The Workload of the United States Supreme*

Court: Ruling the Pen with the Tongue, 6 J. Legal Profess. 51 (1981).

5. To shorten opinions, see J. Allen Crockett, *Decision Writing*, 48 A.B.A. J. 864 (Sept. 1962); Charles G. Douglas, III, *How to Write a Concise Opinion*, 4B7 Judges' J. 47 (1983); Robert Gardner, *Toward Shorter Opinions*, 55 Cal. St. B.J. 240 (1980); Herbert B. Gregory, *Shorter Judicial Opinions*, 34 Va. L. Rev. 362 (1948); Marshall F. McComb, *A Mandate from the Bar: Shorter and More Lucid Opinions*, 35 A.B.A. J. 382 (May 1949). To combine brevity with clarity, see Francis Bergan, *Opinions and Briefs: Lessons from Loughran*, N.Y. St. B. Ass'n Found. (1970), in which Court of Appeals Judge Bergan analyzed Chief Judge Loughran's opinions, and Charles A. Beardsley, *Judicial Craftsmanship*, 24 Wash. L. Rev. 146 (1949), which slashes a Washington Supreme Court opinion from 17 pages to one.
6. Dwight W. Stevenson, *Writing Effective Opinions*, 59 *Judicature* 134, 134 (1975).
7. Judith S. Kaye, *Judges as Wordsmiths*, 69 N.Y. St. B.J. 10, 11 (Nov. 1997).
8. *Id.*
9. *Id.*
10. William H. Manz, *The Citation Practices of the New York Court of Appeals, 1850-1993*, 43 *Buffalo L. Rev.* 121, 125-26 (1995) (footnote omitted).
11. *Id.*
12. Marshall F. McComb, *The Writing and Preparation of Opinions*, 10 *F.R.D.* 1, 1 (1951).
13. William H. Manz, *The Citation Practices of the New York Court of Appeals: A Millennium Update*, 49 *Buffalo L. Rev.* 1273, 1300 (2001); see also William H. Manz, *New York Appellate Decisions Show Preference for Recent Cases, Commentaries and Bill Memos*, 74 N.Y. St. B.J. 8, 8 (2002).
14. Richard A. Posner, *The Federal Courts: Crisis and Reform* 72 (1985).
15. Ruggero J. Aldisert, *Opinion Writing* 86 (1990).
16. *Wells v. Garbutt*, 132 N.Y. 430, 435, 300 N.E. 978, 979 (1892).
17. William Shakespeare, *The Tragedy of Hamlet, Prince of Denmark*, act II, sc. II (Polonius).

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18. *Alliance to End Repression v. City of Chicago*, 733 F.2d 1187, 1193 (7th Cir. 1984) (Posner, J., concurring & dissenting).
19. Peter Hay, *The Book of Legal Anecdotes* 172 (1989) (quoting Oliver Wendell Holmes).
20. William Domnarski, *In the Opinion of the Court* 35 (1996).
21. Kent Haruf, *Writers on Writing: To See Your Story Clearly, Start by Pulling the Wool over Your Own Eyes*, N.Y. Times, Nov. 20, 2000, at E1, col. 1.
22. Editorial, 60 Albany L.J. 76 (1899) (reprinted in Robert A. Leflar, *Appellate Judicial Opinions* 200, 200–01 (1974)).
23. Bruce M. Selya, *Judges on Judging, Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age*, 55 Ohio St. L.J. 405, 414 (1994).
24. Bruce M. Selya, *Favorite Case Symposium: In Search of Less*, 74 Tex. L. Rev. 1277, 1279 (1996). Judge Selya's favorite case is his own: *Levesque v. Anchor Motor Freight, Inc.*, 832 F.2d 702 (1st Cir. 1987), which cited nothing at all. Justice Holmes once wrote an opinion that cited not a single case. See *Springfield Gas & Elec. Co. v. City of Springfield*, 257 U.S. 66 (1921). In *Abrams v. United States*, 250 U.S. 616, 624 (1919), his greatest dissent, he again cited no case. Omitting citations sure shortens opinions.
25. *Robinson v. Pioche, Bayerque & Co.*, 5 Cal. 460, 461 (1855) (Heydenfeldt, J.).
26. *Denny v. Radar Indus., Inc.*, 28 Mich. App. 294, 184 N.W.2d 289 (1970).
27. Moses Lasky, *Observing Appellate Opinions from Below the Bench*, 49 Cal. L. Rev. 831, 837 (1961).
28. Moses Lasky, *A Return to the Observatory Below the Bench*, 19 Sw. L.J. 679, 682 (1965) (emphasis in original).