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Ethical Judicial Writing—Part II

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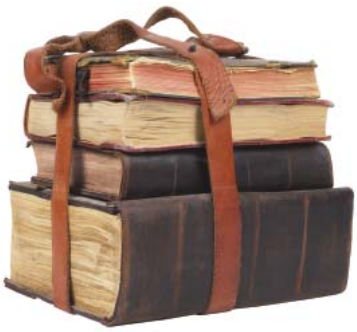

Ethical Judicial Writing — Part II*

Last issue the *Legal Writer* offered some suggestions on writing ethical judicial opinions. We continue.

Tone and Temperament

Judges must maintain impartiality, credibility, and objectivity. The Rules Governing Judicial Conduct (RGJC) require judges to promote integrity in the judiciary,[1] to maintain order and decorum in the courtroom,[2] and to be patient, dignified, and courteous to all.[3] Judges must not be advocates: "An ethical judge cannot be a polemicist."[4]

The RGJC prohibits judges from showing bias or prejudice "based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status."[5] Some judges, even United States Supreme Court Justices, have written biased opinions.[6] In *Plessy v. Ferguson*, for example, Justice Henry B. Brown commented that if segregation offended African-Americans, it was "solely because the colored race chooses to put that construction upon it."[7] When the Sioux Nation sued to get land promised by the 1868 Fort Laramie Treaty, a dissenting Justice wrote that "Indians did not lack their share of villainy."[8] Judges must refrain from making any statement that could be construed as biased. They must "identify and understand [t]he[i]r own biases and how they affect [t]he[i]r reaction to a case."[9]

Judges should likewise refrain from incorporating graphic sexual descriptions into their opinions[10] except as necessary to resolve a case. Opinions should be dignified. They must not cater to voyeurs. In our Internet age, in which the public has access to many more opinions than before, judges should be careful about how and whether to identify individuals unimportant to the litigation.

Judges should treat lawyers and litigants respectfully. Lawyers aren't always prepared. Sometimes litigants behave poorly or are involved in seemingly humorous situations. Litigants don't always bring perfect cases. Delusional litigants bring bizarre claims.[11] A judge tempted to condemn an unprepared lawyer, berate a nasty or delusional litigant, or ridicule a litigant's unfortunate situation might use sarcasm,[12] humor,[13] or scorn[14] to attack or make fun of lawyers and litigants. Attacking lawyers or litigants is unseemly.[15] Humor, sarcasm, and scorn have no place in judicial opinion writing.[16] Judges who write this way undermine "public confidence in the integrity . . . of the judiciary."[17] As Judge Joyce George wrote, "propriety is at the very core of what a judge writes . . . . A judge's professional responsibilities require him to select carefully the language and phraseology necessary to communicate the decision and not to be humorous at the litigants' expense or to satisfy some personal need to be funny."[18]

One Bankruptcy judge from Texas used humor to deny a defendant's motion as incomprehensible. The judge compared the defendant and his motion "to Adam Sandler's title character in the movie 'Billy Madison,' after Billy Madison had responded to a question with an answer that sounded superficially reasonable but lacked any substance."[19] Billy Madison, like the defendant in this case, was berated for his stupidity:

> [W]hat you've just said is one of the most insanely idiotic things I've ever heard. At no point in your rambling, incoherent response was there anything that could be considered a rational thought. Everyone in this room is now dumber for having listened to it. I award you no points, and may God have mercy on your soul.[20]

Attacking lawyers or litigants is unseemly.

Judges are different from everyone else in a courtroom. They should decipher rambling, irrational, incoherent thoughts. They should unearth the buried argument, comprehend the incomprehensible, clarify the opaque. They shouldn't give up easily on a litigant who sounds like Billy Madison. Judges who act disrespectfully to lawyers and litigants will in turn be treated disrespectfully.

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* *Editor's Note*: An updated version of Judge Lebovits's November/December 2006 Legal Writer column, "Ethical Judicial Writing — Part I," is available on Westlaw and through the Publications link on our Web site, www.nysba.org.

Treating litigants respectfully means avoiding innuendo. In *Main v. Main*,[21] a divorce action, an Iowa court attacked a husband for his past failed marriages and the wife for marrying for money. The reader is left wondering whether the court denied the divorce for legal or private reasons. This question recurs with judges who have had negative experiences in legal matters, like an unpleasant divorce or custody case. Judges affected by personal experiences must take precautions against prejudging cases or litigants. They must leave their baggage at the courthouse door.

Litigants question the impartiality of a judge who fails to consider the losing side's facts.

Litigants don't always see eye to eye with one another. Judges don't always get along with other judges. Judges shouldn't use opinions to criticize other judges, whether on a lower court,[22] on a higher court,[23] a dissenting judge,[24] or the author of a majority opinion.[25] Judges are entrusted to promote public confidence in the legal system. Judges who engage in infighting set a poor example to the public, who will believe that the case was decided because of animosity, not on the merits.

Judges should also avoid writing in formats foreign to opinion writing.[26] Some judges have written opinions as poetry[27] and prose.[28] Others have included fables,[29] animal references,[30] folksy language,[31] parody,[32] or popular references.[33] One judge disparaged medical-liability law by writing that "the work of the Alabama Legislature in the area of medical liability is a mule — the bastard offspring of intercourse among lawyers, legislators, and lobbyists, having no pride of ancestry and no hope of posterity."[34] Judges who use unusual formats send a message that they take lightly their opinions and their role as judges. Using clever prose or poetry forecloses the best and clearest language. A judge who tries to be a poet can't use all available language and hence creates the appearance that the attempt to be clever had priority over clarity and candor.

A good opinion is credible and impartial.[35] A dispute that requires judicial intervention is serious to society and the litigants. Judges owe a duty to deal with litigants' claims.[36] They may inject their own style and character in their written opinions. They may include emotional themes, without writing emotionally.[37] But an opinion should be written in the format the public expects: It should address the litigant's claims in an organized, reasoned, and honest manner. Deriding litigants, using droll references, and treating the opinion as though it were literature diminishes the opinion's quality.

The Facts

Facts set the stage for a judicial opinion. The law can be applied only to the facts the judge incorporates into a written opinion. It's an ethical problem when a judge fails to include key facts or incorporates too many facts. Judges should use accurate facts and use them accurately.[38] Without accurate facts, the ruling will be wrong. A judge who includes too many facts forces the reader to sift through irrelevant ones. That makes the opinion unfocused and results in dictum.[39] Irrelevant facts lengthen an opinion and decrease clarity.[40] A judge who omits important facts will write an erroneous opinion,[41] one that will affect a litigant's ability to appeal. An appellate court can't consider what's absent from the record.

Litigants shade facts to further their interests. Judges may never shade facts. An opinion should make the reader agree with the judge's rationale and conclusion[42] without crossing the line from persuasion to distortion. Nor should judges adopt a litigant's version of the facts verbatim[43] or fail to verify the facts in the record.[44] The law belongs to the judge, but facts belong to the parties, who won't forgive a judge who cheats or doesn't think independently.

Judges should incorporate facts helpful to the losing side to strengthen the opinion and assure the reader that the judge considered the relevant facts.[45] Without facts helpful to the losing side, the court's reasoning might be unsound — the judge couldn't justify the result in the face of the losing side's facts. Litigants question the impartiality of a judge who fails to consider the losing side's facts.

Getting the facts right on appeal is important not only to the litigants but also to the trial judge: "The prime expectation of the trial judge, when his adjudication goes to an appellate court, is that the latter, in its published decision, will make an honest statement of the case."[46]

Claims, Issues, and Standards of Review

Litigants are taught to pose issues persuasively. Judges should "[w]rite a judicious opinion, not a brief [, and s]tate the question to be decided neutrally."[47] Claims and issues should be introduced by combining law with fact. Only after they frame the issue can judges accept a party's argument. Judges who use headings in an opinion should write them neutrally, too.

Judges shouldn't choose one line of authority over another without explaining why.[48] When judges don't explain themselves, a reader familiar with the authority ignored will believe that the judge was sloppy, unable to distinguish the authority, or agenda-driven.

As to issues, a trial-court opinion should offer a logical, disinterested explanation of the case for the litigants that allows appellate review.[49] Intermediate appellate courts review trial-court opinions for correctness and sharpen the issues for further appellate consideration.

An appellate court that reviews a lower-court or agency determination must state the appropriate standard of review, such as "reasonable doubt," "clear and convincing evidence," "clearly erroneous," or "arbitrary and capricious." The standard should be stated neutrally, followed by a fair application of law to fact. Standards of review, and how they're written, often determine outcomes. Judges should avoid polarized standards, defined as one line of cases in which one class of litigant (*e.g.*, defendants) prevailed. Polarized standards, which lead to inevitable conclusions, confuse litigants. They allow "the court merely [to] invoke[] the 'tough' or 'easy' version of the standard of review."[50]

Next issue: This column continues with judicial writing style, boilerplate, plagiarism, law clerks, and extrajudicial writing. ■

1. 22 NYCRR 100.2(A).

2. *Id.* 100.3(B)(2).

3. *Id.* 100.3(B)(3).

4. David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 Geo. J. Legal Eth. 509, 515 (2001).

5. 22 NYCRR 100.3(B)(4).

6. *See, e.g.*, *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 597 (1998) (Scalia, J., concurring) (attacking French immigrants); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 156 (1994) (noting that majority's decision "is an inspiring demonstration of how thoroughly up-to-date and right-thinking we Justices are in matters pertaining to the sexes (or, as the Court would have it, the genders) and how sternly we disapprove the male chauvinist attitudes of our predecessors.") (Scalia, J., dissenting); *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring) ("To hold that the act of homosexual sodomy is somehow protected as a fundamental right would . . . cast aside millennia of moral teaching."); *Buck v. Bell*, 274 U.S. 200, 207 (1927) (Holmes, J.) (affirming sterilization order against mentally challenged woman, stating that "[t]hree generations of imbeciles are enough").

7. 163 U.S. 537, 551 (1896) (Brown, J.).

8. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 435 (1980) (Rehnquist, J., dissenting).

9. McGowan, *supra* note 4, at 515.

10. *See, e.g.*, *Lason v. State*, 12 So. 2d 305, 305 (Fla. 1943) (Buford, C.J.) (describing sexual encounter graphically); *United States v. Irving*, No. 76–151 (E.D. Cal. 1977) (McBride, J.) (commenting in verse on size of defendant's sexual organ) (unpublished opinion quoted in George Rose Smith, *A Critique of Judicial Humor*, 43 Ark. L. Rev. 1, 14 (1990). Compare those cases with *United States v. Thomas*, 32 C.M.R. 278, 280 (Ct. Mil. App. 1962) (Kilday, J.) ("The evidence adduced at the trial presents a sordid and revolting picture which need not be discussed in detail other than as necessary to decide the certified issues."). *See generally* Gerald Lebovits, The Legal Writer, *Poetic Justice: From Bad to Verse*, 74 N.Y. St. B.J. 48 (Sept. 2002).

11. *E.g.*, *Searight v. New Jersey*, 412 F. Supp. 413, 414 (D. N.J. 1976) (Biunno, J.) (claiming that physician injected plaintiff with radium electric beam that caused voices in plaintiff's head); *Lodi v. Lodi*, 173 Cal. App. 3d 628, 630–31, 219 Cal. Rptr. 116, 117–18 (3d Dis't 1985) (Sims, J.) (deciding case about plaintiff who sued himself for raiding own trust fund). For more on delusional claims, see Gerald Lebovits, The Legal Writer, *The Devil's in the Details for Delusional Claims*, 75 N.Y. St. B.J. 64 (Oct. 2003).

12. *E.g.*, *Bd. of Educ. of Kiryas Joel Vill. Sch. Dis't v. Grumet*, 512 U.S. 687, 737 (1994) (Scalia, J., dissenting) (using capital letters as sarcasm to attack majority opinion); *Continental Illinois Corp. v. Commr.*, 998 F.2d 513, 515 (7th Cir. 1993) (Posner, J.) ("The parties and the amici have favored us with more than two hundred pages of briefs, rich in detail that we can ignore."); *Smith v. Colonial Penn Ins. Co.*, 943 F. Supp. 782, 784 (S.D. Tex. 1996) (Kent, J.) (addressing motion to change venue).

13. *E.g.*, *United States v. Prince*, 938 F.2d 1092, 1093 (10th Cir. 1991) (Brorby, J.) (using humor to comment on defendant's attempt to rid himself of public defender by relieving himself on defender's table in front of jury); *Republic of Bolivia v. Phillip Morris Cos.*, 39 F. Supp. 2d 1008, 1009–10 (S.D. Tex. 1999) (Kent, J.) (using humor in granting motion to transfer case). One federal judge was so frustrated with the "Gordian knots that the parties have been unable to untangle without enlisting the assistance of the federal courts" that he used the children's game "Rock, Paper, Scissors" as alternative dispute resolution. *See Avista Mgmt., Inc. v. Wausau Underwriters Ins. Co.* (Presnel, J.) (M.D. Fl.) (June 27, 2006), *at* http://www.symtym.com/index.php?/site/category/Humor/ (last visited Aug. 4, 2006). Some will cheer the judge for using humor to discourage the parties from engaging in petty squabbles. Others will condemn the judge for directing the parties to resolve a question based on chance. *Cf.*, *In re Friess*, Ann. Rpt., N.Y. St. Comm'n on Jud. Conduct 84 (1984) (Mar. 1983), at 1983 WL 189799, at *3 (removing judge for, in part, using coin flip to make substantive decision); *In re Brown*, 468 Mich. 1228, 662 N.W.2d 733, 736 (Mich. 2003) (censuring judge for same); *In re Daniels*, 340 So. 2d 301, 303 (La. 1976) (same).

14. *E.g.*, *Bradshaw v. Unity Marine Corp.*, 147 F. Supp. 2d 668, 670–71 (S.D. Tex. 2001) (Kent, J.) (ridiculing attorneys' briefs); *In re Rome*, 542 P.2d 676, 680–81 (Kan. 1975) (per curiam) (reciting poem written by judge who sentenced prostitute to probation).

15. For an opinion in which a village justice appears to have decided a criminal case based in part on his dislike of how a prosecutor handled an unrelated matter, see *People v. Slade*, N.Y.L.J., Oct. 24, 2006, at 24, col. 1 (Nyack Vill. Ct.).

16. *E.g.*, Benjamin N. Cardozo, Law and Literature and Other Essays and Addresses 10 (1931), *reprinted in* 52 Harv. L. Rev. 471, 475 (1939), *and in* 48 Yale L.J. 489, 493 (1939), *and in* 39 Colum. L. Rev. 119, 123 (1939) (humor); Richard Delgado & Jean Stefancic, *Scorn*, 35 Wm. & Mary L. Rev. 1061 (1994) (scorn); James D. Hopkins, *Notes on Style in Judicial Opinions*, 8 Trial Judges' J. 49, 50 (1969), *reprinted in* Robert A. Leflar, *Quality in Judicial Opinions*, 3 Pace L. Rev. 579, 586 (1983) ("[S]arcasm directed toward the parties is seldom in good taste."); Adelberto Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. Miami L. Rev. 693 (1987) (humor); Marshall Rudolph, *Judicial Humor: A Laughing Matter?*, 41 Hastings L.J. 175 (1989) (humor); Susan K. Rushing, *Is Judicial Humor Judicious?*, 1 Scribes J. Legal Writing 125 (1990) (humor); George Rose Smith, *A Primer of Opinion Writing, for Four New Judges*, 21 Ark. L. Rev. 197, 210 (1967) (humor). For more about sarcasm, humor, and scorn, see Gerald Lebovits, The Legal Writer, *Judicial Jesting: Judicious?*, 75 N.Y. St. B.J. 64 (Sept. 2003).

17. 22 NYCRR 100.2(A).

18. Joyce J. George, Judicial Opinion Writing Handbook 334 (4th ed. 2000).

19. *Factac, Inc. v. King*, No. 05-56485-C (Bankr. W.D. Tex. Feb. 21, 2006) (Clark, J.), *available at* http://www.txwb.uscourts.gov/opinions/opdf/05-56485-lmc_King.pdf (last visited Aug. 4, 2006).

20. *Id.*

21. 168 Iowa 353, 356, 150 N.W. 590, 591 (1915) (Weaver, J.).

22. *E.g.*, *Akers v. Sellers*, 114 Ind. App. 660, 662, 54 N.E.2d 779, 780 (Ind. 1944) (Crumpacker, C.J.) (en banc) (attacking trial court's decision).

23. *E.g.*, *Salt Lake City v. Piepenburg*, 571 P.2d 1299, 1299–1300 (Utah 1977) (Ellett, C.J.) (attacking U.S. Supreme Court's obscenity standard), *disavowed by State v. Taylor*, 664 P.2d 439, 448 n.4 (Utah 1983).

24. *E.g.*, *People v. Arno*, 90 Cal. App. 3d 505, 514 n. 2, 153 Cal. Rptr. 624, 628 n.2 (2d Dis't 1979) (Thompson, J.) (directing at dissent seven consecutively numbered sentences, with first letters spelling "S-C-H-M-U-C-K").

25. *E.g.*, *Webster v. Reprod. Health Srvs.*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring) (stating that majority "cannot be taken seriously").

26. *See generally* Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. Chi. L. Rev. 1421 (1995).

27. *E.g.*, *In re Love*, 61 Bankr. 558, 558 (S.D. Fla. 1986) (Cristol, J.); *Mackensworth v. American Trading Transp. Co.*, 367 F. Supp. 373, 374 (E.D. Pa. 1973) (Becker, J.); *Nelson v. State*, 465 N.E.2d 1391, 1391 (Ind. 1984) (Hunter, J.); *Wheat v. Fraker*, 107 Ga. App. 318, 318, 130 S.E.2d 251, 252 (1963) (Eberhardt, J.). For more, see Gerald Lebovits, The Legal Writer, *Poetic Justice: From Bad to Verse*, 74 N.Y. St. B.J. 48 (Sept. 2002).

28. *E.g.*, *State v. Baker*, 644 P.2d 365 (Idaho Ct. App. 1982) (Burnett, J.) (writing opinion like murder mystery); *Cordas v. Peerless Transp. Co.*, 27 N.Y.S.2d 198 (City Ct. N.Y. County 1941) (Carlin, J.) (writing opinion like pulp fiction).

29. *E.g.*, *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 274 (1974) (Douglas, J., concurring) (appending Gourmond fable to opinion); *Hatfield v. Bishop Clarkson Mem. Hosp.*, 701 F.2d 1266, 1272 (8th Cir. 1983) (Lay, C.J., dissenting) (imitating Aesop's fable).

30. *E.g.*, *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982) (Fay, J.) (using fish references in case about fraudulently selling shrimp), *cert. denied*, 459 U.S. 1170 (1983); *Miles v. City Council of Augusta*, 551 F. Supp. 349 (S.D. Ga. 1982) (Bowen, J.) (using cat

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references in case about taxing cat's earnings), *aff'd*, 710 F.2d 1542, 1544 (11th Cir. 1983) (per curiam).

31. *E.g. State v. Knowles*, 739 S.W.2d 753, 754 (Mo. Ct. App. 1987) (Nugent, J.) ("Old Dave Baird, the prosecuting attorney up in Nodaway County, thought he had a case against Les Knowles for receiving stolen property, to-wit, a chain saw, so he ups and files on Les").

32. *E.g.*, *Schenk v. Comm'r*, 686 F.2d 315, 316 (5th Cir. 1982) (Goldberg, J.) (parodying Ecclesiastes 3:1); *Allied Chemical Corp. v. Hess Tankship Co. of Delaware*, 661 F.2d 1044, 1046 (5th Cir. 1981) (Brown, J.) (parodying opening line from Edward George Earle Bulwer-Lytton's 1830 novel *Paul Clifford*: "It was a dark and stormy night.").

33. *E.g.*, *City of New York v. U.S. Dep't of Commerce*, 739 F. Supp. 761, 762 (E.D.N.Y. 1990) (McLaughlin, J.) (opening opinion with Bible lesson); *Carter v. Ingalls*, 576 F. Supp. 834, 835 (S.D. Ga. 1983) (Bowen, J.) (using Star Wars reference to express frustration about pro se defendants). One British judge even added his own code in a case about the *Da Vinci Code*. *See* http://www.hmcourts-service.gov.uk/images/judgment-files/baigent_v_rhg_0406.pdf (last visited Aug. 4, 2006). For more about popular references in opinions, see Gerald Lebovits, The Legal Writer, *A Pox on Vox Pop*, 76 N.Y. St. B.J. 64 (July/Aug. 2004).

34. *Hayes v. Luckey*, 33 F. Supp. 2d 987, 995 n.16 (N.D. Ala. 1997) (Smith, J.).

35. *See generally* William A. Bablitch, *Reflections on the Art and Craft of Judging*, 37 Judges' J., 40, 40 (Winter 1998) (discussing principled decision making).

36. 22 NYCRR 100.2(A) (requiring judges to act with integrity).

37. Bablitch, *supra* note 35, at 40 (noting that opinions should "neither [be] laden with emotion nor totally bloodless").

38. Moses Lasky, *A Return to the Observatory Below the Bench*, 19 Sw. L.J. 679, 689 (1965) ("[H]onesty allows no leeway in [a judge's] statement of facts, for they are not his.").

39. Timothy P. Terrell, *Organizing Clear Opinions: Beyond Logic to Coherence and Character*, 38 Judges' J. 4, 38 (Spring 1999) ("Although the urge behind overinclusion is the defendable one of thoroughness, a truly controlled presentation is also focused.").

40. For more about writing shorter opinions, see Gerald Lebovits, The Legal Writer, *Short Judicial Opinions: The Weight of Authority*, 76 N.Y. St. B.J. 64 (Sept. 2004).

41. *See* Anthony D'Amato, *Self-Regulation of Judicial Misconduct Could be Mis-Regulation*, 89 Mich. L. Rev. 609, 619 (1990) (noting that one of worst things judges can do is ignore or misstate facts).

42. Judith S. Kaye, *Judges as Wordsmiths*, 69 N.Y. St. B.J. 10, 10 (Nov. 1997) ("Writing opinions is a lot like writing briefs. Both are, at bottom, efforts to persuade."); *accord* Alan B. Handler, *A Matter of Opinion*, 15 Rutgers L.J. 1, 2 (1983).

43. Although this practice is disapproved, "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous," *Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985), or if the court didn't exercise independent judgment, *see* Kristen Fjelstad, Comment, *Just the Facts, Ma'am — A Review of the Practice of the Verbatim Adoption of Findings of Fact and Conclusions of Law*, 44 St. Louis U. L.J. 197 (2000).

44. *In re Las Colinas, Inc.*, 426 F.2d 1005, 1008 (1st Cir. 1970) (McEntee, J.); Merrill E. Otis, *Improvements in Statement of Findings of Fact and Conclusions of Law*, 1 F.R.D. 83, 85 (1940–1941).

45. Am. B. Ass'n, Section of Jud. Admin., Cttee. Report, *Internal Operating Procedures of Appellate Courts* 31 (1961) ("[A] lawyer may forgive a judge for mistaking the law. But not so if his facts are taken away from him . . . .").

46. William J. Palmer, *Appellate Jurisprudence as Seen by a Trial Judge*, 49 A.B.A. J. 882, 883 (Sept. 1963).

47. Robert E. Keeton, Judging 143 (1990).

48. Ruggero J. Aldisert, Opinion Writing 7 (1990) (stating that judges err when they don't explain why they choose one line of authority over another).

49. *See generally* Dwight W. Stevenson & James P. Zappen, *An Approach to Writing Trial Court Opinions*, 67 Judicature 336 (1984).

50. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1394 (1995).

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MEMBERSHIP TOTALS

NEW REGULAR MEMBERS 1/1/06 - 11/29/06	8,341
NEW LAW STUDENT MEMBERS 1/1/06 - 11/29/06	914
TOTAL REGULAR MEMBERS AS OF 11/29/06	69,012
TOTAL LAW STUDENT MEMBERS AS OF 11/29/06	2,922
TOTAL MEMBERSHIP AS OF 11/29/06	71,934