Ethical Judicial Writing—Part I

Gerald Lebovits
Building Bridges Between Parallel Paths

The First New York Listening Conference for Court Officials and Tribal Representatives

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No judicial function is more important than deciding cases ethically. Judges resolve disputes. They create, apply, and enforce rights and obligations. Judges affect lives. Society trusts judges to rule fairly and impartially, irrespective of issue or litigant. Judges, who must behave with integrity, professionalism, and respect, must be ethical on and off the bench. Judicial ethics are scrutinized in written opinions. Judges leave their mark in written opinions. An unethically written opinion is a black mark that defines a judge, while the honest, just, well-written opinion is celebrated. This three-part article addresses ethical issues that arise in judicial writing, with a New York focus.

Codes, Rules, Commissions, and Beyond

Judges must write within the bounds of the law and the bounds of ethics. They must look for guidance to the law in the jurisdiction where they preside, but no code or rule addresses judicial opinion writing directly.

Federal judges have their own code of judicial conduct. United States Circuit, District, Court of International Trade, Court of Federal Claims, Bankruptcy, and Magistrate judges must comply with the Code of Conduct for United States Judges.

The American Bar Association formulated the Model Code of Judicial Conduct in 1972. The ABA wrote the Model Code, as the preamble explains, so “that judges . . . respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system.” The New York State Bar Association has adopted the Model Code, known as the New York Code of Judicial Conduct (CJC).

The New York State Constitution provides that “[j]udges and justices . . . shall . . . be subject to such rules of conduct as may be promulgated by the chief administrator of the courts with the approval of the court of appeals.” Pursuant to the State Constitution, Judiciary Law § 212(2)(b) directs the Chief Administrator of the Courts to “promulgate rules of conduct for judges and justices of the unified court system with approval of the court of appeals.” The Administrative Board of the Judicial Conference promulgated the Rules Governing Judicial Conduct (RGJC) in 1972. New York’s Chief Administrator of the Courts adopted the RGJC with the Court of Appeals’s approval.

The RGJC and the CJC are nearly parallel. The CJC consists of canons and sections. The canons set out broad standards; the sections, delineated under each canon, set out specific rules. Commentaries after each section explain the purpose and meaning of the canons and sections. The RGJC consists of rules, not canons. The Chief Administrator of the Courts has not adopted the CJC’s commentaries. Where inconsistencies arise between the RGJC and the CJC, the RGJC prevails, except that the CJC prevails regarding a non-judge candidate for elective judicial office.

The Advisory Committee on Judicial Ethics (ACJE) advises New York judges who have ethical questions. A judge who telephones an ACJE member or staff attorney might get some informal, oral guidance, although the member or staff attorney will often recommend that the query be posed in writing. E-mailed inquiries are not accepted. A judge who writes to the ACJE will get a written answer from the full Committee. The ACJE issues confidential opinions and publishes them without identifying information. A judge who follows the ACJE’s written advice is presumed to have acted ethically if faced with a complaint to the New York State Commission on Judicial Conduct.

The Commission on Judicial Conduct is the agency authorized “to receive and review written complaints of misconduct against judges, initiate complaints on its own motion, conduct investigations, file Formal Written Complaints and conduct formal hearings . . . subpoena witnesses and documents, and make appropriate determinations as to dismissing complaints or disciplining judges . . . .” The Commission’s staff investigates complaints about “improper demeanor, conflicts of interest, violations of defendants’ or litigants’ rights, intoxication, bias, prejudice, favoritism, gross neglect, corruption, certain prohibited political activity and other misconduct on or off the bench.”

The Advisory Committee interprets only the RGJC, not the CJC. The Commission currently considers alleged violations of the RGJC, not the

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CJC, but the CJC may still be a basis for discipline.

The Commission determines whether to admonish or censure judges publicly, remove them from office, or retire them for disability, subject to

undecided within 60 days after final submission and any undecided motion for interim maintenance or child support within 30 days after final submission.20 In summary proceedings like matters in the New York City Civil Court’s Housing Part, judges must resolve within 30 days after final submission cases involving nonhazardous or hazardous violations and within 15 days after final submission cases involving immediately hazardous violations or injunctions.21

Administrators must remind Supreme Court justices to resolve motions. The deputy chief administrative judge for courts inside and outside New York City must tell the justice that a motion “has been pending for 60 days after final submission.”22 If a motion is “unusually complex,” the justice may apply to the local administrative judge no later than 20 days after final submission to designate the motion “complex.”23 If the administrative judge agrees, the justice has 120 days to decide the motion.24

In one case, In re Greenfield, a New York State Supreme Court justice delayed issuing opinions between seven months and nine years.25 Some litigants were forced to begin proceedings against the justice to compel him to render decisions. Despite a strong dissent, the Court of Appeals declined to sanction him. The court noted that imposing sanctions under the RGJC would be appropriate if a judge purposely concealed delays or failed to cooperate with an administrative judge’s efforts to assure that decisions are rendered timely.26 The court found that the justice’s actions were not a “persistent or deliberate” neglect of judicial duties that would warrant formal penalties. When Greenfield was decided, the rules requiring judges to report late decisions had been promulgated only recently and were loosely enforced.27 Numerous courts have since disagreed with Greenfield.28

Today, the rules requiring judges to report cases are enforced strictly. Court administrators keep close track of undecided cases, remind judges about

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review before the Court of Appeals at the judge’s request. The Commission may also issue a confidential letter of dismissal and caution containing suggestions and recommendations after concluding an investigation and instead of a disciplinary proceeding. The Commission may send a confidential letter of caution to a judge when a disciplinary proceeding is sustained.

Lack of knowledge that an act or omission is improper is no defense.16

But guidance is available. New York advisory opinions can be accessed on Westlaw’s NYETH-EO database. New York disciplinary determinations can be obtained from the NYETH-DISP database. New York advisory opinions are inaccessible on LEXIS, but New York disciplinary opinions can be obtained on LEXIS by clicking “States Legal — U.S.” “New York,” “Agency & Administrative Materials,” and “New York Commission on Judicial Conduct Opinions.” Judges and the public may also access ACJE advisory opinions for free on New York’s Unified Court System Web site17 and Commission information, including determinations, on the Commission’s Web site.18

Timeliness

Judges should render justice, but not at the expense of making litigants wait. The RGJC requires judges to “dispose of all judicial matters promptly, efficiently and fairly.”19 In New York, all judges must report to the Chief Administrator of the Courts all cases

Candor

Candid judges give real reasons for their decisions. A judge uncomfortable with doing so should decide the case differently or on different grounds.29 A judge who recognizes that the real reason for deciding a case is inappropriate should use the occasion to reconsider.

Our democratic process requires reasoned opinions.30 But reasoned opinions aren’t necessarily candid. Candid opinions help readers — litigants, lawyers, law students, appellate judges, and the public — understand precedent and outcomes and decide for themselves whether judges are doing their jobs.31 A lack of candor reveals a lack of integrity.32

Candor has its limits, however. Precedent, collegiality, the lawyers’ and litigants’ personalities, and politics test those limits, and judges should avoid revealing their personal thoughts in the guise of candor.33

An opinion isn’t easy to write.34

The result isn’t always pleasant. The law can be complex. It can lead to peculiar results. A judge shouldn’t talk about the opinion in the opinion. Judges shouldn’t state how difficult the opinion was to write, how much the judge worked on the opinion, or the effort the judge made to ensure a
fair opinion. Justice Oliver Wendell Holmes made an ethical appeal to his readers when he wrote in his dissent in *Lochner v. New York* that “[t]his case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should study it further and long before making up my mind.”

Judges who say how deliberate, conscientious, hard-working, honest, or smart they are will leave readers unpersuaded. An opinion should resolve issues, not be a vehicle for self-congratulation.

Judges might also be unsure about the opinion’s result. A tentative opinion is a draft opinion that a judge issues seeking comment before the final decision. In a dubitante opinion, a judge expresses findings of fact and conclusions of law with reservations.

The public expects judges to decide difficult controversies. Litigants know that one side will lose and the other will win. A judge must deal with the good, the bad, and the ugly. Judges must bring finality to disputes and take responsibility for their decisions.

**Humility and Humanity**

Some judges get so caught up with their power that they lose sight of their goal: to “be both lawyer and philosopher of the highest grade, blessed with saving common sense and practical experience as well as sound comprehensive learning.” Judges should write intelligent, honest, and clear opinions that adhere to ethical and moral principles. Harvard Law Professor Lon Fuller synthesized that rare quality of great judges: “[T]heir fame rests on their ability to devise apt, just, and understandable rules of law . . . [T]hey were able to bring to clear expression thoughts that in lesser minds would have remained too vague and confused to serve as adequate guideposts for human conduct.” Some non-judges naively believe that judges have supernatural powers. Judges are lost souls when they take to heart the compliments and honorifics they receive. Judges must never confuse the law’s power with its dignity.

An example of an immodest opinion is *Bianchi v. Savage*. The court treated the New York landlord-tenant issue in that case as if civilization itself depended on the court’s ruling. The judge’s lack of modesty is endless. He used the royal “we” and “us”; he used capitals, italics, italicized capitals, and exclamation marks. To emphasize, the judge used adverbs, adjectives, Latin, metadiscourse, and self-congratulatory phrases. Justice Holmes in *Haddock v. Haddock* used a more modest approach when he wrote, “I do not suppose that civilization will come to an end whichever way this case is decided.”

Judges must rely on their humanity to write opinions that offer just solutions to all. Judges who attempt to write literary masterpieces will lose sight of “the holy function of justice.” Justice demands just solutions, not brilliant opinions or purple prose. Judges must not use opinions to display their intelligence. Modesty, humility, and dignity are essential in opinion writing.

**Dicta and Public Policy**

Judges should be careful about creating or relying on dicta. Dictum is “[a]n opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision.” Overusing and misusing dicta lead readers to confuse dicta with findings and holdings. Public confidence in the judiciary isn’t promoted if the public doesn’t understand what the opinion holds and why.
2002 and June 2003. Several citations in this article are taken from that manuscript.

