Ethical Judicial Writing—Part I

Gerald Lebovits
Building Bridges Between Parallel Paths

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

by Marcy L. Kahn, Edward M. Davidowitz and Joy Beane

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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 just, well-written opinion is celebrated. That defines a judge, while the honest, well-written opinion is a black 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 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. 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 site and Commission information, including determinations, on the Commission’s Web site.

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.” In New York, all judges must report to the Chief Administrator of the Courts all cases or hazardous violations and within 15 days after final submission cases involving immediately hazardous violations or injunctions.

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.” 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.” If the administrative judge agrees, the justice has 120 days to decide the motion.

In one case, In re Greenfield, a New York State Supreme Court justice delayed issuing opinions between seven months and nine years. 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. 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. Numerous courts have since disagreed with Greenfield. Most commentators believe that judges who issue decisions late act unethically.

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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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 the opinion’s result. A tentative opinion 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.

Dictum arises when judges try to resolve too many contentions. Some issues are more important than others. Some contentions are argued heatedly, but a judge will discover later that the contention isn’t relevant to the ultimate determination. A judge may resolve a somewhat minor issue in a short paragraph or two. Overly considering minor claims detracts from important issues and sounds defensive.

Courts should discuss all the separate grounds for an opinion’s holding. Doing so doesn’t create dicta. It’s important for lawyers to argue in the alternative; they don’t know whether a judge will reach an argument. But judges who use alternative holdings, as opposed to separate arguments for a single holding, dilute opinions and perplex readers. Readers might mix up findings with ruminations when judges hold in the alternative.

Judges sometimes use dicta to lecture about policies ancillary to the issues before them. Judges may use public policy to supplement, but not supplant, existing legal rules. Judges who disagree with a rule should state why it’s unwise and may appeal to the legislature to change the law. They must not mislead the reader into believing that policy — not the law — is the basis for the holding. To take a landlord-tenant example, a court that considers whether a tenant is entitled to remain in an apartment should decide the case on legal grounds. A judge who discusses homelessness or slumlord-ism risks letting the reader believe that the case was decided for personal or political reasons. The discussion might also reflect prejudice: It might imply that a party falls into a category not established in the particular case.

**Next issue:** This three-part column continues with tone, temperament, facts, claims, issues, and standards of review.
2002 and June 2003. Several citations in this article are taken from that manuscript.


7. N.Y. Const. art. VI, § 20(b)(4).

8. 22 NYCRR Part 100. The RGJC are also available at http://www.courts.state.ny.us/ruules/chief-admin/101.shtml (last visited Aug. 4, 2006).


10. 22 NYCRR 100.6(E).

11. Id. Part 101.


15. Id. Part 101.


19. 22 NYCRR 100.3(B)(7).