Fordham University School of Law

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Technique: A Legal Method to the Madness—Part I

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Legal writers must know more than writing. They must know how to write in a legal context. To do that they must know how to research. Researching is less about finding authority than about analyzing authority. Analyzing authority requires understanding method and applying technique – the science and craft lawyers use to help society and their clients.

As the great Professor Llewellyn has taught, “Technique without ideals is a menace. But ideals without technique are a mess.”¹ This column, which continues next month, explains some essentials of method and technique. Other essentials, like parsing precedent and interpreting statutes, are reserved for future columns.

Opinions. A “judicial opinion” is a court’s reasoned explanation of its decision: “An opinion is simply an explanation of reasons for the judgment.”² An opinion may be oral or written. An attorney gives a “legal opinion” to a client or on a client’s behalf.

Per Curiam Opinions. They are unsigned and decided by “the court.” In the federal appellate courts, per curiam opinions are reserved for cases deemed routine and squarely controlled by precedent or for cases in which the court wants to control the result without writing to explain why. In most appellate courts in New York, opinions are rendered per curiam because a majority of the judges agree with the result but not with the reasoning or because, for one reason or another, the judges or justices do not wish to be personally identified with the court’s opinion. Thus, opinions in disciplinary appeals and judicial-misconduct appeals are decided per curiam.

True per curiam opinions are more authoritative than signed opinions when they contain no reservations or exceptions. The authority extends only to the result, not to the reasoning. Per curiam opinions are less authoritative than signed opinions when the court uses them to decide mundane questions. Per curiam opinions are the most authoritative opinions of all when the court wants to make a politically important decision come from a unanimous court, not from an individual judge appointed by a particular appointing authority. Some readers might have heard about a few recent examples of this form of per curiam opinion writing, such as all the federal and state opinions in Bush v. Gore.³

The Appellate Term, First Department, which for historical reasons designates all its opinions per curiam, does not render true per curiam opinions. Appellate Term, First Department, opinions are signed only to the extent that the justices concur or dissent separately. These opinions are really memorandum opinions – and that’s what the Appellate Term, Second Department correctly calls them. Judgments of the Appellate Term, First Department, are set out in the concurrences, but “[a] true per curiam opinion has neither a concurrence nor a dissent” that sets out a judgment.⁴ A true per curiam opinion itself contains the judgment, not the signed concurrences and dissents attached to it.

Memorandum Opinions. True memorandum opinions are unsigned, except by the clerk of the court. In New York, memorandum opinions are unsigned in the First, Second, and Fourth Departments. Because the justices in the Third Department sign their memorandum opinions, the Third Department does not render true memorandum opinions. Memorandum opinions are brief and conclusory on the law, the facts, and the procedural history. Memorandum opinions, typically written when the court believes that the matter is not of first impression, are directed to the litigants and not to the public at large. They always have less weight than signed, or full, opinions.

Research is less about finding authority than about analyzing authority.

At least one commentator opined that “a memorandum opinion should not be used when disposing of a case by reversal or remand . . . .”⁵ That is not the policy of the New York State appellate courts, which affirm, reverse, modify, and remand in memorandum opinions when they believe that the case does not warrant a full, signed opinion.

En Banc Opinions. A case decided en banc – pronounced in banc by many – is decided by an entire court of intermediate appellate jurisdiction, not just by one panel. This procedure is used in the federal circuits but not in New York State courts. Unless an en banc opinion has numerous concurrences or dissents, it’s the most persuasive opinion in the federal system below a Supreme Court opinion.

Concurrences, Dissents. Unanimity enhances stability in the law, promotes collegiality, reduces the number of motions for reargument, and promotes public confidence. But “separate opinions . . . compelled by an abiding belief in an intellectual, factual, or analytical difference [signify] a healthy judiciary.”⁶ The availability of concur-
Concurrences and dissents limits judicial advocacy by judges in the majority, fosters judicial accountability, and provides a safety valve for judges to blow off steam. Nevertheless, judges should not write concurrences and dissents unless they have something significant to express beyond personal dissatisfaction.

Concurrences and dissents are written for the future, when another panel might adopt the reasoning; for a higher appellate court, which might consider the concurrence and dissent and even affirm or reverse for the reasons stated there; for the panel’s other judges, who might ultimately adopt part or all of the concurrence or dissent; or for outside forces, such as the Legislature, to correct perceived mistakes.

A concurrence agrees with the result but for different reasons. Some concurrences are written to disagree with the majority’s rationale. Others are written to assure the losing side that all is not lost, to highlight a ground the majority did not mention prominently enough, or, in cautioning against too broad an interpretation, to note that the majority did not go as far as its language suggests. Sometimes concurrences are written to create a majority and avoid a plurality.8 Conurrences are calm. Dissents are often agitated.

Dissents object to the result. Most judges dissent reluctantly. Dissenting means disagreement, makes no law, requires extra work, and possibly means not being read. Busy practitioners tend to read only majority opinions, not dissents. They care about what the law is, not what some judges believe it should be.

Dissents fail when they are overly collegial: “A sense of urgency and of impending doom is almost a sine qua non of the dissenting voice.”9 Dissenting judges need not play hostage to judicial politics. They can exercise their First Amendment rights using whatever rhetorical flourishes they wish. Some of the most famous judicial writings come from dissents, and many famous judicial writers – Justices Black, Brandeis, Douglas, and Holmes, to name a few – were great dissenters. Often, though, spirited dissents lead to judicial jab-trading, which is something to avoid.10

Until it was dropped from the 1972 Code revision by an ABA committee headed by California Chief Justice Roger J. Traynor, Canon 19 of the 1924 ABA Canons of Judicial Ethics, drafted by Chief Justice William H. Taft, provided that “[e]xcept in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.”

Canon 19 was enacted because of sentiments like these:

A dissenting judge is not limited in his dissent and often is tempted to go beyond the record. He sometimes may indulge in sarcasm and far-fetched logic, unreasonable constructions and interpretations ... He wants to make his view stand out in bold relief, and by undue emphasis, unreasonable criticism, unfair interpretation, and a failure to follow the record he affords by his dissent much that makes good reading in the press, all to the harm of the court as a whole.11

The 1972 Code revisors dropped Canon 19 because they deemed it unhelpful to make dissenting an ethical issue.12 One of New York’s solutions to avoid unfair dissents is to allow the majority to respond to dissents. Before an appellate opinion is issued, drafts are circulated, and the majority may answer the dissent. Another solution is to allow a dissenter to “give his reasons without entering into a debate with the majority or even referring to the majority opinion,”13 except in shorthand to explain the rationale for the dissent.

Dissenting and concurring opinions should offer explanations. Unexplained dissents or concurrences have little utility and frustrate litigants and readers.14 As Professor Cappalli has observed, “The dissenter or concurring should state, even if briefly, her disagreement in reasoning and result from the majority.”15

The majority’s decision is the court’s decision. Concurring and dissenting judges do not speak for the court. Thus, one may never write that a concurring or dissenting judge “found,” “held,” or “decided.” A concurrence is dictum. A dissent is argument.

Special rules apply to dissents in the Appellate Division. The Court of Appeals takes leave as of right if two Appellate Division justices dissent on a question of law.16

Majority Opinions. A “majority opinion” is one in which more than half the court agrees with the result and the reasoning.

The desire for unanimity, or even for a majority, causes institutional pressures that greatly affect appellate opinion writing. As Judge Wald explained, “Opinion writing among judges of widely disparate views and temperaments is, like governing, the art of the possible.”17 To reach consensus, for example, a judge’s “best lines are often left on the cutting room floor.”18 Moreover, “the writer may sacrifice full treatment of all non-frivolous issues properly before the court.”19 In a close case, rationales change for votes: “[A] would-be dissenter may agree to go along with a disfavored result if a disfavored rationale is avoided.”20 Influenced as well are the precedents on which the judges rely. According to Judge Wald, pariahs include Korematsu v. United States,21 the Japanese-internment case, and Rust v. Sullivan,22 the abortion gag-rule case.23 To achieve consensus, authors of books and articles are included or excluded because of personalities and views.24 Language, too, is sacrificed, from “literary allusions or humor” to “style preferences” to “generalities or expressions of high-flown precepts.”25

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Many appellate opinion writers, such as Chief Justice Charles Evans Hughes, sacrificed language for consensus: “[I]f in order to secure a vote he was forced to put in some disconnected or disjointed thoughts or sentences, in they went and let the law schools concern themselves with what they meant.”

**Plurality Opinions.** A “plurality opinion” resolves an appeal in which a majority agrees with the result but not with the reasoning. Only the result of a plurality opinion is binding; the reasoning in a plurality opinion is dictum. Plurality opinions sometimes lead to unusual results. In *National Mutual Ins. Co. of District of Columbia v. Tidewater Transfer Co., Inc.*, for example, a plurality opinion upheld a statute the majority considered unconstitutional. In *Oregon v. Mitchell,* Justice Hugo Black’s opinion became law even though eight Justices repudiated his views.

The rule for plurality opinions: “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of a majority considered unconstitutional. In *Oregon v. Mitchell,* Justice Hugo Black’s opinion became law even though eight Justices repudiated his views.

The rule for plurality opinions: “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of a majority of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .’” A plurality is best labeled “Opinion Announcing the Court’s Judgment,” not “Opinion of the Court.”

**Next Month:** Decrees, Orders, Rulings, Judgments, Decisions, Seriatim Opinions, Reversals, Advisory Opinions, Affirmances, and related variations in the statements made by courts.

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7. *See generally Ruth Bader Ginsburg, Remarks on Writing Separately*, 65 Wash. L. Rev. 133 (1990); Alex Simpson, Jr., *Dissenting Opinions*, 71 U. Pa. L. Rev. 205, 216 (1923) (“[N]o dissent should be filed unless it is reasonably certain that a public gain, as distinguished from a private one, will result.”). For two pieces on separate writing from a New York perspective, see Hugh R. Jones, *Cogitations on Appellate Decision Making*, 34 Record of Ass’n of Bar of City of N.Y. 543, 549–58 (1979); Stanley H. Fuld, *The Voices of Dissent*, 62 Colum. L. Rev. 923 (1962).
17. *Wald, supra* note 9, at 1377.
18. *Id.*
19. *Id.* at 1378.
20. *Id.* at 1379.
21. *32 U.S. 214 (1944).*
24. *Id.* at 1379.
25. *Id.* at 1379–80.
27. *337 U.S. 582 (1949).* (plurality).

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