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Technique: A Legal Method to the Madness—Part II

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The Legal Writer continues from last month, discussing concepts that make the grammatical New York lawyer a legal scientist.

**Decrees.** A “decree” decides a motion or matter that sounds in equity.

**Orders.** An “order” is an oral or written court directive on a question of law, as opposed to equity, punishable by contempt if disobeyed. Orders are directed to preliminary matters like motions. Every motion is an application for an order under N.Y. Civil Practice Laws and Rules 2211 (CPLR), and, under CPLR 2219(a), an order in long or short form must resolve every motion. Rather than write “Settle order,” trial judges should render opinions that are also orders. Doing so saves litigants from settling orders. The magic words for trial judges in the decretal paragraph are “It is ordered that” and, at the end of the written order and opinion, “This opinion is the court’s decision and order.” This phraseology is more active and concise, and less legalistic, than the current standards: “It is hereby ordered” and “The foregoing opinion constitutes the decision and order of the court.”

**Rulings.** A “ruling” is a court order made during litigation, and necessarily before judgment. “Rules” are “reaffirmed” (if followed later by the same court), “adopted,” “accepted,” “no longer followed,” and “stated.” Rules are not “laid down,” “set down,” or “set forth.”

**Judgments.** A “judgment” is the final or interlocutory resolution of an action or proceeding. The word is spelled “judgment” in England but “judgment” in America. A judgment should state “It is adjudged.” If a judgment contains declaratory aspects, it should state, “It is ordered and adjudged,” or separate decretal paragraphs may cover the order and judgment. There can only be one judgment in a case. Note that cases, not judgments, are remanded. Judicial opinions legitimize judgments by giving reasons for them, but “[t]he operative legal act performed by a court is the entry of a judgment.”

**Decisions.** A “decision” resolves a motion, application, writ, or appeal.

**Seriatim Opinions.** A “seriatim opinion” is a separate writing such as a concurrence or dissent that accompanies a full or per curiam opinion. Before Chief Justice Marshall (1801–1835) changed the policy to conserve judicial resources, all federal appellate opinions rendered before 1801 were rendered seriatim, with each judge writing separately. Chief Justice Marshall, incidentally, did more than just abolish seriatim opinions. He introduced the written opinion to the common-law world. Before the Chief Justice began his tenure, the Supreme Court followed the English tradition of delivering opinions orally and then editing them for occasional printing.

**Reversed, Affirmed, Reversed or Affirmed in Part, Remanded.** Rulings and judgments, not rules or reasoning, are affirmed or reversed. Rules and reasoning are followed or not followed. An appellate decision that affirms the judgment below, but which uses reasoning different from the reasoning of the court below, is still an affirmation. If a case has more than one result, one result can be affirmed and another reversed. A case remanded is returned to a lower court with directions to redo or reconsider some aspect of the case. The New York Court of Appeals may remand to the Appellate Division or to the court of first instance.

**Overturred, Upheld, Sustained, Overruled, Disapproved.** A case “overturned” or issue “overruled” on appeal is overturned or overruled by another, later case of the same court, and thus only indirectly. A lower court’s opinion is “disapproved,” not overturned or overruled, by a later case, not reversed or modified directly. Res judicata does not affect an earlier case whose holding or rationale is overturned. A case, or issue, “upheld” on appeal is upheld by another, later case. Courts “sustain” or “overrule” objections, but motions are “granted” or “denied.” Dictum — statements unnecessary to the court’s ultimate ruling — is “approved” or “disapproved,” not “affirmed” or “overruled.”

Technique and method translate ideals into results.

**Modified.** Modifications cover one or more aspects of a determination below but do not reverse the judgment below. For example, a conviction is affirmed, but a sentence is modified.

**Questions of Fact, Questions of Law, Mixed Questions of Fact and Law.** New York State and federal appellate courts review legal determinations de novo (plenary review). All federal appellate courts may review questions of fact and law. Both the Appellate Division and the Appellate Term may review questions of fact and law. But the New York Court of Appeals may review only questions of law, unless the Appellate Division below decides a matter on facts not determined in first instance. If the Appellate Division’s finding on a mixed question of law and fact has record support, the Court of Appeals’s review is at an end.

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Interest-of-Justice Discretion.

New York intermediate appellate courts have the discretion in the interest of justice to consider claims of error unreserved below. The federal standard, other than for jurisdictional matters or for fundamental constitutional questions, which may be raised for the first time on appeal, is whether the error is “plain error” — whether it should have been obvious to the district court that a litigant made a mistake in not asserting an argument or objecting. If so, the error need not be preserved. The New York Court of Appeals has no interest-of-justice prerogative to review unreserved claims, but it, like federal appellate courts, must consider jurisdictional questions raised for the first time on appeal.

Brandeis Briefs. When Louis D. Brandeis, Esq., appeared before the Court in Muller v. Oregon,10 he included in his brief scientific studies outside the trial record. The Court found the studies reliable. Brandeis’s briefing technique has borne his name since then.

Leave and Certiorari Granted or Denied. When a New York State appellate court may hear or decline to hear an appeal, the decision is called “leave granted” if the court agrees to do so and “leave denied” if it declines to do so. These appeals by permission are distinguished from appeals as of right. The decision is not called “appeal granted or denied,” although Westlaw calls it that. In the federal system, according to U.S. Supreme Court terminology, the decision to hear an appeal or to decline to hear an appeal by permission is called “certiorari granted” or “certiorari denied.” In both the New York and the federal systems, the decision no longer to hear an appeal on which leave or certiorari was granted is called “appeal dismissed.”

Before the New York Court of Appeals, two judges must grant leave before the Court may review a civil case;11 in criminal cases, only one judge decides whether to grant leave. The Appellate Division may also grant an applicant leave to appeal to the Court of Appeals.12 A litigant obtains a right to appeal if two Appellate Division justices dissent on a matter of law.13 Four justices must grant certiorari for the U.S. Supreme Court to hear the matter.14 Execution of the judgment below is stayed pending appeal before the Court only if five justices grant the application for a stay. Several times prisoners have been executed because the Court, having granted certiorari, denied a stay.15

Leave denials and denials of certiorari have no precedential value. But legal writers should add to their citations all leave and certiorari denied citations, even though the Bluebook instructs writers to add only recent ones. Adding them proves that the writer completed the research and that the reader need not conduct additional research. Legal writers should also always add all leave and certiorari granted citations to show that the cited proposition might quickly be affected by a more authoritative affirmation, reversal, or modification.

Petitions are granted and writs are issued. Lawyers apply for leave and writs. They do not move for them.

Certified Questions. A “certified question” is a lower court’s question to a higher court; or a question from a court of one jurisdiction to a court of another jurisdiction. For example, the Second Circuit may certify a question to the Court of Appeals if a state matter is in federal court on diversity jurisdiction and if the Second Circuit cannot determine the answer to a question posed by state law. A certified question seeks an advisory opinion to resolve a question of law. Certified questions are different from questions raised for appellate review, such as questions on certiorari.16

Advisory Opinions. They are not binding. New York courts may not give advisory opinions except in response to a certified question. Federal courts may never give advisory opinions. Courts may decide only real, justiciable controversies.17

Affirmed by an Equally Divided Court. When an appellate court splits evenly (3-3, 4-4), the preceding opinion is automatically affirmed. An opinion affirmed by an equally divided court has no precedential value.18 When the U.S. Supreme Court affirms by an equally divided vote, the Court does not announce which justices fell on which side of the question. The Court states only that the opinion below is affirmed by an equally divided vote.

Mootness Doctrine. New York and federal courts may not decide a case that lacks a controversy. Thus, a court may not decide an academic question unless the issue is likely to recur, either between the litigants or among members of the public; unless the issue has evaded review; and unless the issue is substantial and novel. Most cases include collusive and fictitious actions and proceedings, settled cases, controversies disposed of by lapse of time (such as injunctions), criminal cases abated by death, and criminal appeals in which a defendant has not appeared.

Judicial Notice. This rule of evidence allows trial and appellate courts to accept facts outside the record not subject to reasonable dispute. From Justice Frankfurter: “[T]here comes a point where this Court should not be ignorant as judges of what we know as men.”19

Reversible Error and Harmless Error. This doctrine applies to errors of law. Jurisdictional issues are not subject to harmless-error analysis. Errors of constitutional magnitude are subject to harmless error if the error is harmless beyond a reasonable doubt. The classic justification for harmless-error analysis: “Wrong directions which do not put the traveler out of his way, furnish no reasons for repeating the journey.”20

Standard of Review. Before a court applies law to fact, it must apply a
standard to review the facts it accepted. Facts are meaningless without a standard within which to interpret them. Standards include “overwhelming evidence,” reasonable doubt,” “clear and convincing,” “preponderance,” “legally sufficient evidence,” “probable cause,” “reasonable suspicion,” “facts interpreted in the light most favorable to the nonmoving party,” “assuming all the allegations in the complaint to be true,” “evidence interpreted in the light most favorable to the side that won the jury trial,” “strict scrutiny,” “intermediate scrutiny,” and “rational-basis test.” Some of the doctrines in this column are standards of review, as are the following.

**Clearly Erroneous.** That is the federal appellate standard to review questions of fact. New York State’s intermediate appellate courts review factual determinations under their factual review power with varying degrees of deference depending on the issue, the fact finder, and the proceeding.

**Substantial Evidence.** Federally, or in a New York State CPLR Article 78 proceeding, the substantial-evidence standard determines whether an administrative-law ruling will be upheld, confirmed, or disturbed. If substantial evidence supports the administrative ruling, the ruling will be confirmed or upheld, even if the reviewing court would have reached a different result had the matter appeared before the reviewing court de novo, so long as the ruling is not arbitrary and capricious or an abuse of discretion.

**Substantial Deference.** Courts give “substantial deference” or “considerable weight” to the expertise of an administrative agency to interpret its own regulations. The administrative body’s interpretation – federally, it’s called Chevron-style deference cannot be upheld if the interpretation is consistent with established law, rational and reasonable, within the agency’s jurisdiction, and not contrary to statute. If so, the reviewing court may not substitute its interpretation in place of the agency’s.

**Substantial Justice.** This concept lowers procedural and evidentiary hurdles in Small Claims Court. Judges follow substantive law in Small Claims Court and on appeal from a small-claims judgment.

Essentials like organization and tone, combined with a readable, grammatically correct style, make for good writing. But good legal writing also requires good lawyering: technique and method that translate ideals into results. As Dean Wigmore noted, lawyers must know “legal science. By ‘legal science’ is meant all that is above, below, between, and behind the particular rules and precedents – the system of legal knowledge – that which distinguishes the architect from the carpenter.”

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1. See Supreme Court, Civil Branch, New York County, Guide to the Form of Orders and Judgments 8–9 (2d ed. 1998).
2. CPLR 5011.
6. E.g., *Helvering v. Gournan*, 302 U.S. 238, 245 (1937) (“[T]he rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.”).
7. CPLR 5001(c), (d).
8. CPLR 5001(b).
10. A brief on Brandeis: Justice Brandeis had a profound influence on the Court and in opinion writing. He was the first to footnote heavily, to cite law-review articles, and to hire law clerks in a formal program. See William Donnsmark, *In the Opinion of the Court* 64–65 (1996).
11. CPLR 5602(a).
12. Id.
13. CPLR 5601(a).
15. See, e.g., *Hamilton v. Texas*, 497 U.S. 1016, 1017 (1990) (mem.) (Marshall, J., dissenting from denial of stay) (“[F]our Members of this Court have voted to grant certiorari in this case, but because a stay cannot be entered without five votes, the execution cannot be halted.”).
17. For some pros and cons of that rule, see Jack B. Weinstein, *Rendering Advisory Opinions – Do We, Should We?, 54 Judicature 140 (1970); Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. Rev. 1002 (1924).