Ethical Judicial Writing—Part III

Gerald Lebovits
When High-Priced Celebrity Lawyers Are Tax Deductible

Drawing the fuzzy line between personal and business expenses for those in the public eye.

by Robert W. Wood
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or the past two issues, the Legal Writer offered suggestions on writing ethical judicial opinions. We continue.

Writing Style
A good opinion “expresses the decision and rationale of the court in language and style that generate confidence in the reader that justice has been fairly and effectively administered.” Judges may make their opinions readable: “[A] judicial opinion need not be a dull, stereotyped, colorless recital of facts, issues, propositions, and authorities but can be good writing and make good reading.” Memorable opinions with literary style best communicate the law. Nevertheless, a satisfactory “objective is not a literary gem but a useful precedent, and the opinion should be constructed with good words, not plastered with them.”

Judges must avoid pitfalls common to all legal writing. Nominalizations and the passive voice add unnecessary words that hide substance and allow a judge to escape or downplay responsibility for a decision. Hiding the subject, or actor, can both deceive and make sentences abstract. Nominalizations turn nouns into verbs. One way to spot some nominalizations is to watch for an “of” or a word ending in “ion”: “He committed a violation of the Penal Law.” Passives place the action’s object before the actor. Look for the word “by”: “Opinions are written by judges.” It’s unethical to use a blank, or double or nonagentive, passive to hide an important actor or to misdirect the reader. Example: “A mistake was made.” Becomes: “This court made a mistake.”

Metadiscourse is written throat-clearing, a needless preface to a substantive point. It introduces what the writer plans to write: “For all intents and purposes, the defendant disregarded the court’s order.” Becomes: “The defendant disregarded the court’s order.” Phrases like “bear in mind that,” “that is to say,” “it is the court’s conclusion that,” “the court recognizes that,” “it is well settled that,” “after careful consideration,” “it appears to be the case that,” and “it is hornbook law that” are metadiscursive. Metadiscourse is pedantic and condescending. Without saying that they’re getting to the point, and especially without saying how well they researched or how seriously they considered the case, judges should get to the point, research fully, and consider the case carefully.

Judges should also refrain from writing pretentiously or overusing adjectives, adverbs, clichés, and overdeveloped metaphors. The opinion should leave the judge’s personality in the background and focus on logical analysis. Likewise, judges shouldn’t try to impress readers with vocabulary. Forcing readers to look up words lessens clarity and insults readers. Judges should also avoid writing in Latin or French if a simple English equivalent is available. So, too, should judges avoid legalisms. As New York’s Chief Judge Judith S. Kaye said it best: “[G]ender-neutral writing is not only a good habit but also an easy one to acquire and internalize.”

Trial judges shouldn’t use “I” or “we.” It’s inappropriate because it’s informal, placing the judge on the same level as the winning side. A trial judge writing an opinion shouldn’t use “we”; the word is inaccurate. It’s better to write “the court” or “this court.” Using “we” is appropriate only at the appellate level, where more than one judge will contribute to the opinion. “I” is acceptable in concurring and dissenting opinions. Concurrences and dissents aren’t the court’s ruling but the individual author’s argument.

Boilerplate Opinions
Faced with ever-increasing caseloads, judges are tempted to rely on the same cases or language to resolve issues encountered repeatedly. Boilerplate saves time. It’s convenient. But a judge who relies on boilerplate might not pay attention to facts and issues particular to the case. A boilerplate opinion can ignore issues. It can amount to nothing more than an ill-advised judicial shortcut. Writing quickly is necessary but never advisable. In place of boilerplate, judges should research and consider the case carefully and craft an opinion that offers a lasting precedent.

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important,12 but the litigants’ interests shouldn’t be sacrificed for judicial economy. Missing an issue because a judge used form precedent or form language is inexcusable. It causes litigants expense, delay, and anguish.

Judges, who must keep an open mind, should consider each case anew, even if the issues seem familiar. Judges who pen boilerplate opinions signal their laziness, and “[a] court must constantly be the alert against mental laziness. The decision suggested by habit might not be the right one.”13

Plagiarism
Plagiarism is “the unauthorized use of the language and thoughts of another author and the representation of them as one’s own.”14 Judges who don’t attribute fairly act unethically. No specific code or rule exists on this topic, but two New York rules are implicated. First, the Rules Governing Judicial Conduct (RGJC) require judges to act “in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”15 Second, the RGJC requires judges to “be faithful to the law and maintain professional competence in it.”16

Judges may not steal words, intentionally or otherwise.17 They must avoid obvious and intentional plagiarism: copying headnotes or quoting without crediting. Sometimes judges plagiarize by copying language from a lawyer’s brief. A famous example is from Chief Justice John Marshall in M’Culloch v. Maryland.18 He used Daniel Webster’s words as his own: “An unlimited power to tax involves, necessarily, a power to destroy.”19

A court that copies commits reversible error if in doing so it doesn’t exercise independent thought. Judges may direct attorneys to submit for signature judgments, orders, and decrees, but “no authority . . . countenances the preparation of the opinion by the attorney for either side. That practice involves the failure of the trial judge to perform his judicial function.”20 The other extreme occurs when a judge decides a case without reading the lawyers’ papers.21

The rules prohibiting plagiarism affect extrajudicial writing as well. A Michigan judge was publicly censured for not acknowledging passages from one article and for incorporating without attribution portions of another.22

Judges may use language from case law or a lawyer’s brief if they cite the source when paraphrasing or use quotation marks and attribution when words are taken verbatim. The opposite of plagiarism is scholarship: It’s scholarship to cite the starting point from which the judge’s idea was derived.

Law Clerks
It’s ethical for judges to rely on law clerks to research and help draft opinions.23 Although doing so is an accepted judicial practice,24 judges must be wary about potential dangers. The RGJC requires judges to perform their duties diligently.25 Diligence doesn’t mean delegating a task and forgetting about it. Even if the clerk plays a large role writing the decision, the judge must always take a hands-on approach.

Judges should give their clerks direction.26 If the clerk believes that the judge is mistaken, the judge should listen to the clerk and adjust the opinion, if necessary.27 This process should continue throughout the research and writing. The judge should edit the clerk’s drafts for style, research, and substance.28

Regardless how much the law clerk contributed to the decision, the judge is responsible for the result.29 A well-written opinion reflects a judge’s skill and temperament. Every word and citation must be the judge’s authentic voice. A judge shouldn’t credit the law clerk’s work. In New York, the Law Reporting Bureau (LRB) has put into effect the Court of Appeals’s policy forbidding judges from thanking their law clerks or interns in opinions: The LRB won’t publish the acknowledgment. Before this rule went into effect, many judges lauded clerk and intern contributions.30 Some still do.

A judge may use a law clerk, student intern or extern, special master, or referee to assist in opinion writing. A judge may not use an outside expert, such as a law professor, to write the opinion.31 Judges who let court outsiders write for them can be reprimanded, censured, or removed from office.

Extrajudicial Writing
Judges may write things other than judicial opinions if the writing doesn’t cast doubt on their ability to act impartially, affect the court’s dignity, or interfere with judicial performance.32 Judges are prohibited from writing about pending or impending cases, whether about the merits, the facts, the litigants, or the attorneys.33 The RGJC doesn’t expressly prohibit judges from commenting on cases they’ve decided, but judges should avoid doing so.34 Unlike statutes, which legislative history clarifies, an opinion is self-contained. A judge’s extrajudicial comments shouldn’t guide future courts.35 Controversy on this issue arose recently when a New York Family Court judge on the verge of retiring wrote a New York Law Journal commentary criticizing the Appellate Division, Second Department, for reversing one of his decisions.36

The RGJC provides that “[a] judge shall not lend the prestige of judicial office to advance the private interests
of the judge or others.” The Advisory Committee on Judicial Ethics has issued several advisory opinions about extrajudicial writing that advances private interests.

Judges face ethical dilemmas when they write personal recommendations that give the appearance of partiality. Judges should mark “personal and unofficial” on whatever letter isn’t part of the court’s official business, and they should avoid writing unsolicited letters.

That said, New York judges may write recommendation letters on behalf of a law-school or job applicant or an attorney who seeks admission to an 18-B panel. A judge may recommend a former assistant district attorney for private employment. A judge may recommend a court employee seeking work in another court. A Criminal Court judge may not write a recommendation on behalf of a law student to a district attorney whose assistants appear before the judge. A judge may authorize a job candidate to list the judge’s jurisdiction. A judge may also serve as a reference for attorneys seeking employment with a law firm that doesn’t appear before the judge. A judge may recommend a candidate to list the judge as a reference; a judge may also respond to a district attorney’s request for information about the candidate. A judge may recommend a candidate with a “To Whom It May Concern” letter that the judge gives the candidate. A judge may also serve as a reference for attorneys seeking employment with a law firm that doesn’t appear before the judge and is located outside the judge’s jurisdiction. A judge may write a character letter for a co-op application. A judge shouldn’t write a recommendation for a police officer who will likely be a witness in a case before the judge. A judge is prohibited from giving a reference letter to a bank on behalf of a friend seeking a loan.

Judges may not lend their office’s prestige to further a friend’s private business interests. Or their own interests: Judges shouldn’t use judicial stationery for private matters.

Judges may teach, write, and speak on the law, the legal system, and the administration of justice and be compensated for doing so. But judges shouldn’t give continuing legal education instruction to associates of a law firm, even if the law firm doesn’t have pending cases before the judge. This behavior “associate[s] the judge with the competence of a private law firm and would serve the exclusive interests of that firm . . . rather than the common professional interests of a heterogeneous, unconnected group of lawyers, who . . . might be the beneficiaries of a judge’s lecture on legal practice, e.g., at a bar association program.”

A judge may publish fictional works but, again, may not publicly comment on pending or impending cases, even if a judge uses fictitious names to protect the innocent or guilty. Judges may write a book review but may not endorse the book: Judges “may not provide a quotation about a book for the purpose of its being used in the book jacket in conjunction with its sale. Such activity would involve a judge in the commercial and promotional aspects of marketing and . . . is prohibited.”

Judges must also be careful about publicly commenting on the law. Judges may not comment on a legal issue that might come before them or state a political view that might call their impartiality into question. It’s also improper for a judge to attack higher-court decisions. Doing so detracts from confidence in the judiciary and casts doubt on the judge’s ability to follow precedent. Still, judges may — and should — write to explain substantive law and procedure and comment on issues facing the judiciary, such as judicial-writing ethics.

Conclusion

A judge’s behavior on the bench might be forgotten. Not so a judge’s writing. Being ethical is critical for judges. They set examples for lawyers and laypersons. They decide cases and expound on the law. Written opinions reflect a judge’s values — and society’s values. Judges must never forget the special role entrusted to them. They must never forget to do what’s right within the bounds of the law and the law of ethics. Judges who stay within these bounds have done their jobs. For doing their jobs well, they will be venerated. The judiciary, the litigants, and society are better for it.
After reviewing draft, judge should ask clerk to make changes ranging from grammatical corrections to major rewrite.


32. 22 NYCRR 100.4(A)(1), (2) & (3).


35. Ross, supra note 33, at 602.


37. 22 NYCRR 100.2(C).


39. Id. at 96-32 (Vol. XIV). Under County Law art. 18-B, courts appoint 18-B attorneys to represent litigants financially unable to hire their own attorneys.

40. Id. at 94-36 (Vol. VII).

41. Id. at 90-46 (Vol. V).

42. Id. at 88-53 (Vol. III).

43. Id.

44. Id.

45. Id.

46. Id. at 01-114.

47. Id. at 98-103.

48. Id. at 89-15.

49. 22 NYCRR 100.4(B); 100.4(H)(1); Formal Op. 96-143 (Vol. XV), 90-204 (Vol. VII).


51. Id.; see also 22 NYCRR 100.2(C) (requiring judge in all judicial activities to avoid impropriety and its appearance).


53. Id. at 97-133.


55. Ross, supra note 33, at 624–34.

56. See Barbara E. Reed, Tripping the Rift: Navigating Judicial Speech Fault Lines in the Post-White Landscape, 56 Mercer L. Rev. 971, 996 (2005) (noting judges’ “affirmative duty to speak on the record about certain types of issues, and to help educate the public about the role and function of the judiciary and the courts”).