The Art and Science of Appellate Opinion Drafting: An Annotated Bibliography

Michael J. Slinger
The Art and Science of Appellate Opinion Drafting: An Annotated Bibliography, 1977-1987*

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"Is there any guidance available to new members of appellate courts on how to write their opinions so as to achieve literary quality, sound professional craftsmanship, and in general the ends that good appellate opinions are supposed to serve?" When the Honorable Robert A. Leflar wrote these plaintive words in 1961, there existed comparatively few words devoted to an analysis or explanation of the craft of appellate opinion drafting. However, in the past twenty-five years, judicial scholars have recognized the importance of this topic. This is graphically demonstrated by the publication of fifty-five books or articles totally or partially devoted to this subject. C. E. Bolden, working through the auspices of the National Judicial College, performed an invaluable service for the judiciary and students of the judicial process by developing and compiling his fine bibliography, Appellate Opinion Preparation, in which works discussing the drafting of appellate opinions are prominently featured. Mr. Bolden's work permits appellate judges and scholars to examine comprehensively, at a glance, works on the topic of appellate opinion preparation in the United

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2. My analysis of the literature reveals no books and only thirty-four articles devoted to the discussion of appellate opinion drafting covering the period from the nineteenth century to 1960.

3. Eighteen of these books or articles were published between 1961 and 1976 and are therefore not included in this bibliography. But see C. Bolden, Appellate Opinion Preparation (1978).
States from the 1800s through 1976. The purpose of the following bibliography is to provide an annotated listing of those articles and books published subsequent to the portion of Mr. Bolden's work devoted to appellate opinion drafting. It is my hope that this bibliography will be of value to judges and scholars interested in this important subject.

Monographs


Bolden, C.E. Appellate Opinion Preparation. Reno: National Judicial College, University of Nevada, 1978. The outstanding bibliography on the subject lists almost 1,800 citations to materials on the topic of opinion preparation, including writing techniques. The work also contains sections on reporting opinions, and surveys of state constitutional provisions relating to judicial opinions. Covers materials from the 1800s to 1976.


Periodicals

of the Third Circuit. Postulates that guidelines and standards for reviewing an opinion are the same as those used in writing one. Contains four basic guidelines that should help produce clearly written opinions.


Jones, Hugh R. “Cogitations on Appellate Decision Making.” Record of the Association of the Bar of the City of New York 34 (1979): 543-60. In this published lecture, an associate judge of the New York State Court of Appeals presents a subjective view of the differences between an advocate and an arbiter. Briefly identifies three aspects of the decision-making process. Comments on opinion writing, especially dissents and concurrences.
Jordan, Adalberto. "Imagery, Humor, and the Judicial Opinion." *University of Miami Law Review* 41 (1987): 693-727. The author postulates that judges are unencumbered by the need to resort to dry legal jargon in their writings by virtue of their position as developers of opinions that are designed to affect the whole society. Accordingly, he suggests the use of imagery and humor in judicial opinions to “demystify” and humanize law, crystallize points, breathe life into facts, and achieve self-fulfillment and satisfaction in the lives of judges. Numerous examples of the use of imagery and humor in judicial opinions are included. Arguments against the use of humor and imagery are also included.

Kelman, Maurice. "Getting in the Last Word: The Forensic Style in Appellate Opinions." *Wayne Law Review* 33 (1987): 247-52. Professor Kelman beemoans the shift from merely stating views in opinions to the burgeoning practice of using the forum of the opinion to trade debating jabs with one’s colleagues on the court. Kelman believes critiquing the writing of other judges in the same opinion takes away from the important issues of law and fact at hand in the case. He states that if presented at all, rebuttals to the positions of other judges should be placed in a separate appendix to the formal opinion. Kelman postulates that the United States Supreme Court has made this argumentative style of writing acceptable in state appellate opinions.


Leflar, Robert A. "Honest Judicial Opinions." *Northwestern University Law Review* 74 (1979): 721-41. Decries failure of opinions to state real reasons for their decisions. Gives examples of opinions where real reasons are not stated. Maintains that greatness and integrity are closely related and integrity is necessary to good opinion writing. Applauds the current trend to be more intellectually honest in opinion writing.


Little, Joseph W. “The Workload of the United States Supreme Court: Ruling the Pen with the Tongue.” *Journal of the Legal Profession* 6 (1981): 51-73. Presents data in nine graphs detailing the Court’s docket as it relates to opinion drafting. Concludes that longer opinions are due to wordiness rather than complexity. Recommends shorter opinions, with the excess going into law review articles.

McKenna, James A., III. “The Judge as Dramatist.” *American Studies Association Forum* 5 (Spring 1981): 40-49. Directed toward both trial and appellate work. Considers teaching aspect of judicial decisions. Asserts that an aesthetic form of judicial opinion should be used, especially in “hard” cases. Offers a sonnet to show how cases may be dramatized in opinions.


Mikva, Abner J. “Goodbye to Footnotes: Relinquishing a Tradition.” *Trial* 22 (August 1986): 46-51. Judge Mikva of the D.C. Circuit Court of Appeals considers the use of footnotes in judicial opinions to be an abomination. In this breezy article, he discusses the problems with footnotes and the effect their abolition would have on judicial opinions.


Singer, Shelvin. "The Opinion Drafting Craftsmanship of Justice Seymour Simon." _Decaloque Journal_ 32 (September 1986): 7-12. Professor Shelvin presents samples from the opinions of this distinguished Illinois Supreme Court Justice. Shelvin believes that Justice Simon's opinions will be considered by legal historians as "among the finest examples of legal literature."


Waits, Kathleen. "Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction." _University of Illinois Law Review_ (1983): 917-75. Opines that stages of judicial process, such as "writing an opinion" are not distinct. Suggests that value choices are basic to appellate process and that benefits of opinion writing accrue when opinions are honestly written to reflect those values. Maintains that threat of dissent improves quality of majority opinion. Does not discuss technique of opinion writing but advocates a strong emphasis on thought process and honesty in writing.


Younger, Irving. “On Judicial Opinions Considered as One of the Fine Arts: The Coen Lecture.” *University of Colorado Law Review* 51: (1980) 341-53. Lecture uses examples from music, literature, and painting to explain three Supreme Court opinions. Asserts that judicial opinion writers must hold themselves to as high a standard as other artists.