2019 William S. Fulton, Jr.
Appellate Military Judges' Conference

Thurgood Marshall Federal Judicial Building

Washington, DC

Sept. 26, 2019

JUDICIAL OPINION WRITING: Beyond Logic to Coherence and Strength

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Table of Contents

Page

Part I: The Foundations of Good Writing and Effective Editing

Part II: Implementing the Principles

Part III: Writing "Style"

Part I: The Foundations of Good Writing & Effective Editing

Some Preliminary Perspective:

Acknowledging the New Context of Writing in the Age of Computer Reading

The Bad: A renewed emphasis on writing "gimmicks" rather than substance

The Good: A new sense of reader impatience and hostility

The Usual Topics: A quick summary of observations made in the growing literature:

- fonts
- headings, summaries, and structural cues
- use of white space
- first paragraphs dominate
- first sentences dominate
- problem of "back references"
- problem of footnotes
- use of hyperlinks

Judicial Writing: The Basic Challenges

I. The Most Basic Issue: Although good legal writing is certainly important concerning what judges *read*, does it matter concerning what they *write*?

A. What is your professional function and responsibility?

- writing "the law" vs. writing essays
- expeditious results vs. reasoning toward justice

B. What is "clarity"?

- certainty vs. credibility and rectitude

C. Who is your audience?

- litigants? lawyers? other courts? newspapers?
- short term vs. long term

II. Why Teaching Lawyers to Write is Such a Challenge: Understanding the Stages of Intellectual Growth of All Legal Writers

A. The Challenge: Clarity in the face of complexity
B. Becoming a Good Lawyer: Managing complexity by being thorough, logical, and precise
C. Becoming a Good Writer: Generating clarity by being focused, coherent, and forceful
D. Becoming a Superior Legal Writer: Achieving confidence and authority by being efficient, practically valuable, and professionally engaging

III. Why Teaching Lawyers to Write Ought to be *Less* of a Challenge: Using "Legal Reasoning" to Understand "Writing Reasoning"

A. The Nature of "Guidance" (page 6, *infra*)

- Structure, rather than chaos
- Theoretical foundation, rather than personal whimsy
- Hierarchy (more important to less important), rather than equality

B. Resulting Fundamental Elements of Effective and Efficient Editing

- Principles "down" to techniques (deductive rather than inductive)
  - Explaining and justifying the edit
- Macro "down" to micro
  - Making the edit efficient

C. The Communication Theory of "Containers"

D. The *Principles* -- Rather Than the Rules -- of Excellent Communication

COMPARING LEGAL REASONING AND WRITING REASONING

Legal reasoning analyzes a form of "social guidance," and reveals that it has several distinctive characteristics:

1. **Structure**: Legal propositions are not scattered, random, and independent; they are instead linked and patterned.

2. **Foundation:** Some background theory or set of theories initiates and supports the formation of patterns in the law (*e.g.*, "economic efficiency," or "individual rights essential to a free people," or "personal responsibility for unforced choices").

3. **Hierarchy:** Legal propositions can be divided between those that are fundamental, abstract, competitive, and generally directive ("principles"), and others that are narrow, objective, and specifically directive ("rules").

Writing reasoning analyzes "communicative guidance," and similarly reveals that it has the same distinct characteristics.

1. **Structure:** All writing guidance falls within a comprehensive pattern.

2. **Foundation:** The patterns are based on a theory of communication that seeks to make writing a method of transferring information effectively and efficiently.

3. **Hierarchy:** At every level of document- from overall organization to sentence structure and diction- fundamental "principles" determine the appropriateness of any particular "technique" or writing.

THINKING LIKE A WRITER:
THE PRINCIPLES OF "SUPER-CLARITY"

To become a good legal writer, most of us must go through two stages of intellectual growth. First, either in law school or through practical experience, we learn that what seems simple to non-lawyers—"the law"—is in fact quite complex. Then—perhaps in law school, but usually much later—we learn that, to communicate about the law, we must turn our new sophistication upside down. We must return to a simplicity based on our mastery of all that complexity. This simplicity has nothing to do with over-simplification. Rather, it results from organizing complex information so that our readers can understand it as easily and clearly as possible.

In the first stage, as we learn to "think like a lawyer," we worry mostly about logic and precision—about having exactly the right information or ideas and putting them in exactly the right order. In the second stage, we realize that logic and precision are not enough. To "think like a writer," we also have to make our logic easy for our readers to see and understand. And, even if we are not writing as an advocate, we have to be persuasive: we must convince readers to accept our judgment about what matters, to believe us when we say that we have a fact or idea worth their attention.

To write clearly and persuasively, therefore, lawyers must master two kinds of clarity. They must impose a rigorous logic on often-recalcitrant material. Then they must make that logic obvious to their readers from the document's start through every page to the end. By training and inclination, most lawyers are expert at the first task. But they are seldom as good at the second. In fact, many never realize that the two are different, that an impeccably logical and precise analysis may still leave readers exhausted, confused, and unpersuaded.

To avoid inflicting this kind of pain, you must do more than create logic and precision in your material—more, that is, than think clearly and choose your words carefully. You also have to create coherence—the perception of focus and organization—in your readers' minds. A coherent document has to be logical, but it also has to be much more.

From logic to coherence:

To create coherence, begin by seeing your document from your readers' perspective. To you, it is a finished product that you can grasp as a whole. For them, as they are reading it, the document as a whole never exists. At any one point, readers will remember only a few sentences, if that, in relatively precise form. What has gone before will have been winnowed and compressed to fit into their memory, and what is to come is largely a mystery.

When you write a document, therefore, you are organizing a complex process: the flow of information through your readers' minds. In fact, they are trying to cope with two flows at once: the page-by-page progression of large-scale themes, ideas, and over-arching syllogisms, and the sentence-by-sentence stream of details. In the face of this onslaught, they do not remain passive. They read actively, although much of the action happens in split seconds and never reaches full consciousness. At each moment, they are deciding how much of what they just read they need to remember, figuring out how the next sentence connects with the previous ones, and forecasting where the analysis is heading.

To help readers through this process, writers have to create a clarity based not just on logic, but also on how a reader's mind deals with complicated information. This "cognitive" clarity is based on three facts about how people read. In terms of logic alone, none of them matters. In terms of coherence—of clarity in the reader's head at every moment, not just at the document's end—they are critical.

- Because readers have trouble grasping dissociated details, they focus on and remember details better if they fit together with others to form a coherent pattern. Only the pattern—the story, the logic, the theme—enables readers to decide how a detail matters and whether they should bother to remember it. The harder they must work to see the pattern or fit new information into it, the less efficiently they read, and the greater the chance they will misinterpret or forget the details. In a detective story, readers are not supposed to appreciate the significance of the broken watch strap on the corpse's wrist until much later, when they realize how smart the detective has been—and how dumb they were. With good legal writing, in contrast, they should never have trouble understanding the significance of and the relationship among details as they flow past.

- As the information flows past, they want its structure and sequence to match the logical order of the propositions or events it is describing. In other words, they want the document to unfold in step-by-step synchrony with the legal analysis or factual story it conveys, so that its form matches its underlying substance. They don't like it, for example, when your writing follows the wandering path you took in researching an issue, rather than the logic of the analysis you finally uncovered. Nor do they like it if you recite facts chronologically when the key factual issues have nothing to do with the interminable tale of who-did-what-when. They are irritated if a section is divided into five sub-sections that look of equal importance, when the fourth is logically subordinate to the third. And they are annoyed, if only subliminally, when a sentence's structure implies that three details are equally important, although two are just appendages to the other.

- With words as with food, they cannot easily ingest an unbroken flow. At both the large scale (the document as a whole) and the small (paragraphs and sentences), they want writing cut into manageable pieces, so they can pause and begin to digest each before they go on to the next.

From these facts, this program draws three principles that apply at all levels of a document, from its overall organization down to its sentences. In the summary fashion in which they are outlined below, they may seem too abstract to be useful. Properly understood and applied, however, they blossom into a rich, practical, and efficient approach to improving your writing and editing. If you edit or supervise other lawyers' writing, they will also give you concepts and a vocabulary that will enable you to talk about drafts more clearly and effectively (and objectively).

This emphasis on principles is closely analogous to a lawyer's approach to the law itself. "Thinking like a lawyer" does not mean relying on simple rules or clear-cut precedents, for the law is seldom so convenient. It means instead grasping the more abstract legal principles that underlie the rules and provide the context in which they must be understood and applied. Correspondingly, "thinking like a writer" does not mean relying on the familiar lists of writing

"tips." It means starting from the principles that lie at the foundation of effective communication.

The Principles

Principle 1. Readers absorb information best if they understand its significance as soon as they see it. They can do so only if you provide an adequate focus or framework before you confront them with details. Therefore:

- **a. Put focus before details.**
- **b. Put familiar information before new information.**
- **c. Make the information's structure explicit.**

Principle 2. Readers absorb sequences of information best if the sequence's order (its "form") is consistent with the information's purpose (its "substance"). Therefore:

- **a. At the "macro" levels of a document:**
  1. **Match the organization of your information to the logic of your analysis.**
  2. **Pay attention to the difference between how you initially encountered and understood complex information (its "superficial" order) and how you later analyzed and assessed that information (its "deep structure"). You communicate more confidently by using the latter as your organizing guide.**
- **b. At the sentence level, link the sentence's grammatical form (its "syntactical core") to the focus or theme of your information. You communicate more clearly and efficiently by telling your story through the subjects, verbs, and objects of your sentences.**

Principle 3. Readers absorb information best if they can absorb it in relatively short pieces.

- **a. Break information into segments.**
- **b. Put the most important information into the most emphatic segments.**
- **c. Make the segments concise.**

Although all these principles apply at all levels of a document, their order here is significant: They are listed in the basic order of an effective and efficient edit. Principle 1 and 2(a) are more about the "command" you have over your information—the message you want to preach—while 2(b) and 3 are more about the "control" you have over the details that comprise the message. Both levels, of course, are important to a good document. But this program is organized to emphasize the former first and the latter second. It will begin by focusing primarily on large-scale organization, for two reasons: First, contrary to what most editors believe instinctively, structural elements are more crucial than syntactical polishing to the success of any document. Second, in contrast, to the years of training writers have endured about elegant sentences, few have ever been given any practical guidance about structuring complex documents.

Overall, the program has three specific goals and two more general ones. It will show you how to:

- capture and hold a reader's full attention, even when your reader is impatient, irascible and tempted to skim;

- create not just average clarity, but what we'll call "super-clarity," by analogy with super-glue: a clarity that will reach out and adhere to the mind of even the most hurried reader; and

- write a prose that is energetic, perhaps even graceful, and that projects an image that enhances your credibility.

In addition, the program will:

- make you a more effective, disciplined editor; and

- allow you to talk about drafts with other people more clearly and analytically.

If you are interested in further discussion of issues within legal reasoning that are reflected in the materials for this program, I can recommend another text: Terrell, *The Dimensions of Legal Reasoning: Developing Analytical Acuity from Law School to Law Practice* (Carolina Academic Press 2016).

Part II: Implementing the Principles

IMPLEMENTING PRINCIPLE 1:
THE IMPORTANCE OF "META-INFORMATION"

The three corollaries to Principle 1 reflect some bad news: To be an effective communicator, you must provide your reader with two different kinds of information. One is obvious, although a challenge all by itself to grasp and organize—the law or facts that form the substance of your argument or analysis. The other, however, is far less obvious and a separate challenge. For your reader to appreciate your substantive information, you must also provide information *about* your information, information that prepares your reader's mind to absorb your substance. This critical preliminary perspective we call "meta-information," and the corollaries capture the methods for presenting it to your reader most effectively and efficiently.

Principle 1, Corollary a:

PUT FOCUS BEFORE DETAILS

Unless they have photographic memories, readers cannot absorb and remember complicated information if they don't know why the details matter and which ones matter most. If they can't grasp the significance of the details, they will balk at reading them. As a result, before you dump data on readers, you must provide a context. The context's job is to make them smart enough to understand why the details matter, which will be most important, and how they are organized.

ILLUSTRATING THE PRINCIPLES

FOCUS BEFORE DETAILS: EXAMPLE #1

Before:

MOTION TO SUPPRESS AND EXCLUDE EVIDENCE
UNLAWFUL SEARCH AND SEIZURE

At approximately 4:00 p.m. on December 7, 1981, West Carolina State Troopers Charles Jones, Ronald Brown and David Green, accompanied by Assistant State's Attorney Frank Smith, went to Torrance's home located at 1819 Fawn Way, Centerville, West Carolina. A search of the premises was conducted resulting in the seizure of a brown calendar book and a red notebook from Torrance's bedroom. Torrance attempts to suppress these items.

Torrance had developed as a prime suspect in a homicide that occurred during the afternoon of December 7, 1981. That fact led the troopers to his residence. At trial, Troopers Jones and Brown and Torrance's father testified about what happened in the Torrance residence.

Jones stated that Brown was in charge, and that upon arriving at the front door, they were greeted by Torrance's mother. Brown asked permission to search the house for Torrance. She allowed them to enter the house, but asked that they wait for the arrival of her husband. Brown's version of the initial contact is similar. There is no question that the purpose of the troopers was to determine if Torrance was in the house. Brown also told her that Torrance was a suspect in the homicide case and that the police wanted to search the home for Torrance. The troopers and Mrs. Torrance waited in the kitchen for the arrival of Mr. Torrance, a wait of some fifteen to twenty minutes. During the wait two events took place. First, Brown testified that while they waited they observed and listened for the signs of any movement in the house. Second, as a result of a conversation between Brown and Mrs. Torrance about a gun missing from the ……..

After (insert before the original first paragraph):

Torrance attempts to suppress evidence seized from a drawer in his bedroom by the state troopers who searched his parents' home, where he lived. They conducted the search after Torrance's father had signed a form permitting them "to search my home . . . in an attempt to locate my son ... and to seize and take any letter, papers, materials or other property that they may require for use in their investigation." The troopers did not clearly explain the form to the father, however, and stated explicitly that they were searching only for Torrance himself. The evidence they seized is therefore inadmissible.

At approximately 4:00 p.m. on.....

FOCUS BEFORE DETAILS: EXAMPLE #2

Before:

This is an appeal from a dismissal of a suit to enforce a compromise settlement and judgment rendered pursuant to the settlement.

Appellant filed a claim with the Industrial Accident Board (IAB) for a work-related injury that he had sustained on October 10, 1970. Dissatisfied with the outcome of that proceeding, and in a timely manner, he filed suit in the district court of Hightop County, West Carolina, to set aside the award of the IAB. On March 17, 1972, the parties entered into a compromise settlement whereby an agreed judgment was rendered in favor of the appellant, setting aside the IAB award and granting him $6,000. Further, as a part of the agreed judgment, the appellee agreed to provide necessary future medical treatment and other related services incurred within two years of the date of judgment.

During that two-year period, appellant made a request for further medical treatment, which was refused by the appellee. Appellant then filed suit in district court on the agreed judgment alleging that appellee's refusal to provide the requested service was wrongful and in fraud of his rights. Appellee answered the suit…….

After (substitute for first paragraph):

Appellant, an injured worker, sued in district court to enforce a settlement of a claim before the Industrial Accident Board (IAB), and a judgment based on that settlement. The court dismissed the case because jurisdiction remained with the IAB. We reverse, finding the court had jurisdiction because the case before it was not an extension of the original claim, but instead arose from the wrongful refusal to fulfill a contract.

Appellant filed a claim…….

Principle 1, Corollary b:

PUT OLD INFORMATION BEFORE NEW INFORMATION

One way of putting context before details is to put "old" information before "new" information. To apply this principle, you should recognize that old information comes in a variety of forms. Some of it is information you are certain your audience possesses before it begins to read. This can range from the very basic, like the meaning of "case law," to the more particular, like the methods by which courts interpret statutes, to the very specific, like the law of fraudulent conveyance. The other large block of old material is the information you give them as they read, so that they approach each new paragraph (and sentence) with a constantly increasing stock of old information.

OLD INFORMATION BEFORE NEW: EXAMPLE #1

Before:

The Fourth Amendment protects citizens of the United States against unreasonable searches by the government. The Supreme Court applies a reasonableness test to determine whether a citizen's rights have been violated in unreasonable search cases. The test balances the citizen's privacy interests against the government's interests that are furthered by the search.

After:

The Fourth Amendment protects citizens of the United States against unreasonable searches by the government. To determine whether a citizen's rights have been violated in a search, the Supreme Court applies a reasonableness test. This test balances the citizen's privacy interests against the government's interests that are furthered by the search.

OLD INFORMATION BEFORE NEW: EXAMPLE #2

Before:

This case is not so much a contest between the United States Department of Justice and the two defendant companies as a skirmish in a broader battle over the direction American economic life will take in the coming years. The concept of the conglomerate corporation -- not a particularly new idea, but one that lately has gained great momentum -- is at the center of this struggle. The attempt of companies to expand through acquisition of other firms, while avoiding the antitrust problems of vertical or horizontal mergers, is one reason for the recent popularity of this concept. The resulting corporations have had none of the earmarks of the traditional trust situation, but they have presented new problems of their own. Although the market shares of the several component firms within their individual markets remain unchanged in conglomerate mergers, their capital resources become pooled -- that is, concentrated into ever fewer hands. Economic concentration is economic power, and the government is concerned that this trend, if left unchecked, will pose new hazards to the already much-battered competitive system in the United States.

After:

This case is not so much a contest between the United States Department of Justice and the two defendant companies as a skirmish in a broader battle over the direction American economic life will take in the coming years. At the center of this struggle is the concept of the conglomerate corporation -- not a particularly new idea, but one that lately has gained great momentum. One reason for its recent popularity is the attempt of companies to expand through acquisition of other firms, while avoiding the antitrust problems of vertical or horizontal mergers. The resulting corporations have had none of the earmarks of the traditional trust situation, but they have presented new problems of their own. In these conglomerate mergers, although the market shares of the several component firms within their individual markets remain unchanged, their capital resources become pooled -- that is, concentrated into ever fewer hands. Economic concentration is economic power, and the government is concerned that this trend, if left unchecked, will pose new hazards to the already much-battered competitive system in the United States.

"FOCUS BEFORE DETAILS" IS MORE IMPORTANT THAN "OLD →NEW":

Example # 3

Original

I. PARTNERSHIP OR CORPORATE TAX STATUS UNDER SECTION 7704

A **publicly traded partnership shall be treated** as a corporation pursuant to § 7704(a). However, Congress created an **exception** for publicly traded partnerships with **passive-type income**. To be a publicly traded partnership with **passive-type income**, a partnership must meet the gross income requirements of § 7704(c)(2), which requires 90% or more of a partnership's gross income to be **"qualifying income**." **Qualifying income** means, among other things, "in the case of a partnership described in the second sentence of subsection (c)(3), income and gains from commodities . . . or futures, forwards, and options with respect to commodities." **The partnership** that is described in the second sentence of subsection (c)(3) is one whose "principal activity" is "the buying and selling of commodities . . . , or options, futures, or forwards with respect to commodities." *The issue is* whether a publicly traded partnership's activities of entering into and terminating commodity forward contracts is within the meaning of buying and selling of forwards with respect to commodities under § 7704(c)(3).

Revision

Our client, which is a publicly traded partnership, would ordinarily be taxed as a corporation rather than a partnership under § 7704 unless it can show that it falls within an exception to that section for its particular business of trading in commodity futures contracts. To make this argument, § 7704 will require a series of steps:

(1) . . . .

Principle 1, Corollary c:

MAKE THE STRUCTURE EXPLICIT

Here's bad news: It's not enough for your writing to be organized logically. The organization also has to be obvious to the reader, from the start and at each step along the way.

MAKE THE STRUCTURE EXPLICIT: EXAMPLE #1

Before:

The reason that funded programs have been less utilized than unfunded programs is that under the tax law if employees are given a non-forfeitable interest in a non-qualified trust they will experience immediate taxation on the amounts set aside for them. Furthermore, the complex and onerous requirements of Title I of ERISA would normally apply to a funded program.

After:

Funded programs have been used less than often than unfunded ones for two reasons. First, they have tax disadvantages: If an employee is given a non-forfeitable interest in a non-qualified trust, he will be taxed immediately on the amounts set aside for him. Second, they have administrative disadvantages: They are normally subject to the complex and onerous requirements of Title I of ERISA.

or

Funded programs have been less used than unfunded programs because they have both tax and administrative disadvantages. In funded programs, because employees are given a non-forfeitable interest in a non-qualified trust, they are immediately taxed on the amounts set aside for them. Furthermore, funded programs are normally subject to the complex and onerous requirements of Title I of ERISA.

MAKE THE STRUCTURE EXPLICIT: EXAMPLE #2

Before:

You have asked me to research whether our client, a corporation seeking to interview a former employee suspected of wrongdoing, has a duty under the penal laws of Ohio or of the United States to report any criminal activity it becomes aware of during the interview. In addition, you have asked me whether under the penal laws of Ohio or of the United States, the corporation may agree, prior to the interview, not to divulge information regarding criminal activity in exchange for restitution to the corporation.

After:

Our client, a corporation, seeks to interview a former employee suspected of wrongdoing. You have asked whether, under the penal laws of Ohio or the United States, our client:

1. has a duty to report any criminal activity it becomes aware of during the interview, and

2. may agree, prior to the interview, not to divulge information regarding criminal activity in exchange for restitution to the corporation.

MAKE THE STRUCTURE EXPLICIT: CREATING ROADMAPS

Example #1:

This case raises two hearsay issues, one relating to the business records exception and one relating to out-of-court admissions. We will consider each in turn.

* * * * * *

Example #2:

The Division's claim raises three issues. Was an overpayment made? If so, does W.C.S.A. 44:10-4(a), and the case law interpreting it, authorize a client to recover the money? If not, can the Division rely on W.C. Reg. 44:10(4), which purports to authorize a lien despite the lack of direct statutory authorization?

* * * * * *

Example #3:

By this motion, Smith seeks dismissal of the only claim in Jones's complaint that survived the jury's verdict. The complaint recited six causes of action. One, breach of contract, was dismissed by Jones prior to trial. Another, tortious interference with business relations, was dismissed by this Court at the close of Jones's case. Of the four claims that went to the jury, the jury found in Smith's favor on three: fraud and breach of express and implied warranties of title. The only claim on which the jury found in Jones's favor was breach of the implied warranty of merchantability.

In this memorandum, we shall demonstrate that judgment should be entered for Smith on this claim as well. Four reasons compel this conclusion. First, although the jury found that the warranty of merchantability had been breached, Jones introduced no evidence on the subject of whether "The Orchard" would be deemed marketable under the standards of the international art market. The jury received no guidance as to the standards of merchantability for Old Master paintings, and its verdict was thus based on sheer speculation.

Second, the alleged breach of warranty occurred with respect to goods that were never sold to Jones. Jones was therefore left to argue that Smith had anticipatorily repudiated its contract within the meaning of Section 2-609 of the Uniform Commercial Code. But before there can be a finding of anticipatory repudiation, a party must make a written demand for adequate assurance of due performance. Jones made no such written demand.

Third, there is a fundamental inconsistency between the jury's findings that the warranties of title were not breached and that the warranty of merchantability nevertheless was. Jones alleged no defects in "The Orchard" other than a defect in title. He claimed that the painting was unmerchantable because title was defective, and for no other reason. The jury found no defect in title and thus removed the only basis for finding a breach of warranty of merchantability. Jones has, in effect, proceeded on the theory that a breach of warranty of merchantability is a "lesser included offense" of a breach of warranty of title. No case decided under the Uniform Commercial Codes supports that theory.

Fourth, even if there was a breach of the warranty of merchantability, that breach was not a proximate cause of any injury to Jones. It is undisputed that Gekkoso, Jones's client, knew that Romania had tried to seize the painting in Spain in 1982. Knowing this, it was nevertheless willing to enter into a contract with Jones to purchase the painting. If Jones's view of the evidence is accepted, Gekkoso ultimately cancelled because it believed that Jones had lied about this incident. Under this view, it was Jones's deception, and not any breach of warranty, that caused him injury.

* * * * * *

Example #4 (How not to do it):

Generally, a court will not second-guess the decision the directors of a corporation make when it can be shown that the directors acted in an informed manner, in good faith, and in the honest belief that the action taken was in the best interest in the corporation. As will be discussed below, we think that you can show that you have complied with these requirements.

1. Good Faith …..
2. Disinterestedness …..
3. Due Care …..

MACRO-ORGANIZATIONAL ISSUE #1

META-INFORMATION THROUGHOUT THE DOCUMENT: CREATING FOCI AND ROADMAPS WHENEVER NECESSARY

Example #1:

The BCCI Liquidators' task has been a daunting one. The former management of BCCI -- all of whom were displaced by the regulatory actions of July 1991 -- left a morass caused by mismanagement, self-dealing and fraud, and a shortfall between realizable assets and liabilities of several billion dollars. That shortfall will come from the pockets of depositors and other creditors, all of whom are truly "victims" of BCCI. The mission of the BCCI Liquidators, in essence, has been to maximize the funds available for ultimate distribution to these victims. Included in the funds potentially available to diminish this inevitable shortfall were an estimated $550 million in accounts, loan portfolios and other assets of BCCI in the United States as of the time of the collapse.

[**MAP & FOCUS:**] The BCCI Liquidators have pursued their goal by two means: (1) initiating proceedings under Section 304 of the Bankruptcy Code that would enable the entire BCCI estate to be administered in a foreign proceeding for the benefit of creditors worldwide; and (2) reaching an agreement with the United States that would prevent the forfeiture of all BCCI assets in this country.

A. The Section 304 Proceedings

On August 1, 1991, in the United States Bankruptcy Court for the Southern District of New York, the BCCI Liquidators filed petitions pursuant to Section 304 of the Bankruptcy Code. Section 304 is an unusual provision because its use does….

* * * * * *

Example #2:

Although the cases above present favorable support for defendant's position, the 25th Circuit has declined to follow Carter's holding.

[**FOCUS:**] In four decisions, the 25th Circuit has held that a promise of immunity made by a United States Attorney in one district does not necessarily bind a United States Attorney in another district. Instead, these cases have held that an agreement that includes a promise of immunity must be construed in light of its circumstances.

In a 1972 case, United States v. Smith, Judge Green listed two factors that limit the enforceability of such an agreement…..

In a 1979 case, in contrast, Judge Green upheld an agreement on the grounds that….

Example #3:

…. To effect a valid pledge of an intangible chose in action such as a bank deposit, the pledgor must transfer possession of an "indispensable instrument" to the pledgee. Id. at 562; see Peoples Nat'l Bank of Washington v. United States, 777 F.2d 459, 461 (9th Cir. 1985).

"Indispensable instrument" is defined in Restatement of the Law, Security § 1 comment (e), as "formal written evidence of an interest in intangibles, so representing the intangible that the enjoyment, transfer or enforcement of the intangible depends upon possession of the instrument." See Annot. Pledge by Transfer of Instrument, 53 A.L.R.2d § 2 (1957). Indispensable instruments have been held to include, for example, a passbook that is necessary to the control of the account. Peoples Nat'l Bank, 777 F.2d at 461; Walton v. Piqua State Bank, 204 Kan. 741, 466 P.2d 316, 329 (1970). On the other hand, they have been held not to include a telex key code. In Miller v. Wells Fargo, the corporation did not have a passbook account, but rather gained access to its account by telex key code. The bank argued that ....

[FOCUS FOR DETAILED CASE DISCUSSION:] The transfer of an indispensable instrument may not be necessary to effect a valid pledge, however, when an account has been set up by agreement between creditor and debtor to secure the debtor's obligations. In Duncan Box & Lumber Co. v. Applied Energies, Inc., 270 S.E.2d 140 (W. Va. 1980), the bank agreed to finance the purchase of land by a subdivider, Applied Energies, Inc. ….

Example #4:

Before:

The amendment thus explains the circumstances under which a lender who has acquired something more than its initial security interest in a property will be categorized as an "owner or operator" for environmental liability purposes. This is achieved by setting out the requirements that must be met before liability will be imposed.

First, the lender in this position must take actual "possession" of the vessel or facility. This requirement is open to interpretation, as the term "possession" is not defined. Under one reading, "possession" calls for something more than the lender taking simple title or acquiring one of the additional interests set out above. It also calls for some tangible presence on the property. This might consist of anything from putting up a protective fence to assuming and continuing the facility's ongoing operations. Under an alternative reading, taking "possession" may not be an additional requirement where possession necessarily results from taking title or ownership, as in the case of foreclosure. It would represent an additional requirement only where the lender has acquired "operation, management, or control" without acquiring ownership. Under this construction, the legislature's inclusion of the term often would appear superfluous. Reading the plain language of the amendment, then, the first interpretation makes more sense, as the "possession" requirement clearly has been set apart in the amendment as a separate criterion. For these purposes, it is important to note the fact that this amendment was enacted to achieve clarity and provide lenders with a more precise idea of what activities they may undertake within the exemption. Thus, it should be construed narrowly, with ambiguous terms construed in favor of lender protection.

The second prong of the amendment's two-part test for liability is whether the lender exercises "actual, ….

After (changes in italics):

The amendment thus explains the circumstances under which a lender who has acquired something more than its initial security interest in a property will be categorized as an "owner or operator" for environmental liability purposes. *Before liability will be imposed, two requirements must be met: the lender must take actual possession of the property and must exercise actual control over it.*

1. *Actual possession*. First, the lender must take actual "possession" of the vessel of facility. Because the amendment does not define the term "possession," this requirement is open to *two possible* interpretations:

Under the first *and more likely* reading, "possession" calls for something more than the lender taking simple title or acquiring one of the additional interests set out above. It also calls for some tangible presence on the property. This might consist of anything from putting up a protective fence to assuming and continuing the facility's ongoing operations.

Under an alternative reading, taking "possession" may not be an additional requirement where possession necessarily results from taking title or ownership, as in the case of foreclosure. It would represent an additional requirement only where the lender has acquired "operation, management, or control" without acquiring ownership. Under this construction, the legislature's inclusion of the term often would appear superfluous.

Reading the plain language of the amendment, then, the first interpretation makes more sense, as the "possession" requirement clearly has been set apart in the amendment as a separate criterion. It is important to note that this amendment was enacted to achieve clarity and provide lenders with a more precise idea of what activities they may undertake within the exemption. Thus, it should be construed narrowly, with ambiguous terms construed in favor of lender protection.

2. *Managerial control*. The second prong of the amendment's two-part test for liability is whether the lender exercises "actual, ….

MACRO-ORGANIZATIONAL ISSUE #2: STRONG INTRODUCTIONS

There is a difference between starting an opinion and introducing it. A start simply takes hold of a loose end of string, most often one point in the case's history. A true introduction, on the other hand, is much more ambitious and useful to both the author and the reader: it makes the reader smart enough to cope with the complexities that follow; it grabs the reader's attention; and it gains the reader's respect. Here are the basic ingredients for accomplishing these goals.

SMART—provide information about your information.

1. Label: What is the topic? How can it be described so that it triggers a reader's "old" information—the knowledge he or she brings to the document?

2. Map: What is the opinion's structure? Does the reader get a map of the opinion's conceptual structure?

3. Point: What should the reader look for or think about as she or he reads? What is the crux or legal significance of the opinion?

Even if your introduction does a superb job of making the reader smart, it may still fail unless it also answers three other sets of questions that every reader brings to every document:

ATTENTIVE—specify the information's relationship to the reader.

A. *"Bottom line" or practical point:* How does this information relate to me? Why should I care? How will this help me—in concrete, practical terms?

B. *Efficiency:* Will you waste my time?

RESPECT—establish common ground.

C. *Character and Language:* What is our relationship? Master and servant? Do we speak the same language? Share the same assumptions? Want the same things? Or are we from different planets?

POTENTIONAL INGREDIENTS FOR AN INTRODUCTION

I.	Nature of the case, parties and necessary Procedural history including results below.	[LABEL]
II.	Who wants what?	[LABEL; POINT]
III.	Specific issues: what questions do you ultimately have to answer?	[POINT; MAP]
IV.	Decision, and reason for it.	[PRACTICAL POINT; EFFICIENCY; CHARACTER AND LANGUAGE]
V.	"Road map."	[MAP; EFFICIENCY]
VI.	Controlling legal principle (burden of proof, summary judgment standard, etc.)	[PRACTICAL POINT; CHARACTER AND LANGUAGE]

The following pages provide examples of introductions that combine some or all of these ingredients with varying degree of success. The first two examples are in fact unsuccessful. The first just starts. The second offers what looks like an introduction, but it leaves us in the dark about the substance of the case.

As you read Examples 3-11, ask two questions: First, do they give you the crux of the dispute: what legal or factual issues must be resolved at this stage of the case? Second, do you now feel confident that you know enough to read the facts intelligently?

STARTING WITHOUT AN INTRODUCTION #1

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 812460
	)	
JOHN THOMAS FLOWER,	)	
	)	
Defendant.	)	
	)	

_____

On or about October 25, 1969, the appellant, John Thomas Flower, Peace Education Secretary of the American Friends Service Committee for Texas, Oklahoma, and Arkansas, received a properly prepared and executed order of debarment (Appendix "A") from the Deputy Commander of Fort Sam Houston located in San Antonio, Texas. In the order Flower was told that his re-entry upon the reservation would result in his arrest and prosecution under the provision of 18 U.S.C. § 1882 (Appendix "B"). This order was issued because information had been received at headquarters that on or about October 22, 1969, the appellant had participated in an attempt to distribute an unauthorized publication contrary to Fort Sam Houston Regulation 210-6 dated June 12, 1969 (Appendix "C"). This regulation governed the distribution and dissemination of publications on Fort Sam Houston and was promulgated under the authority of Army Regulation 210-10 issued by the Secretary of the Army pursuant to 10 U.S.C. § 3012(b)(1) (Appendix "D").

On December 11, 1969, the appellant re-entered Fort Sam Houston in defiance of the order dated October 24, 1969. At the time of his arrest, he was in the vicinity of the post library distributing leaflets advertising a "Town Meeting on the Vietnam War" which was to be held at Trinity University. …

STARTING WITHOUT AN INTRODUCTION #2

STEPHEN KELLY, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 812460
	)	
PAN-AMERICAN LIFE INSURANCE COMPANY, ET AL.,	)	
	)	
	)	
Defendant.	)	
	)	

ORDER

Before this Court is the motion to dismiss of defendants Pan-American Life Insurance Company ("Pan American") and National Insurance Services, Inc. ("National"). Defendant Babel-Peak Agency, Inc. ("Babel-Peak") moves separately to dismiss and joins in Pan-American and National's suggestions in support. For the following reasons, Pan-American and National's motion to dismiss will be granted in part and denied in part. Babel-Peak's motion to dismiss will be denied.

Facts

Plaintiffs Stephen and Lana Kelly are husband and wife. ….

#3 Underlying Action (type of case, parties who wants what): pending motion.

MARTIN BROWN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 812460
	)	
CRANDALL BOARD OF EDUCATION	)	
	)	
	)	
Defendant.	)	
	)	

Plaintiff, an employee of defendant Board of Education ("Board"), commenced this civil rights action pursuant to 42 U.S.C. §§ 1983, 1985 and 1986 challenging defendants' refusal to grant him tenure as a day high school principal. He seeks damages, back pay, declaratory judgment that he is a tenured principal, and an order directing defendants to expunge from his records an adverse report and recommendation and to amend his records to reflect his tenured status. The action is before the court on defendants' motion for summary judgment.

#4 Underlying action: nature of a pending motion: emphasis on issues related in the motion.

MICHAEL H. COTE, KATHY J. COTE, and DAVID COTE, ppa KATHY COTE Plaintiffs, v. DURHAM LIFE INSURANCE COMPANY and UNITED PLANS, INC., Defendants.	)	No. 812460

This action arose from defendants' cancellation of plaintiffs' medical insurance. Plaintiffs sued in Connecticut Superior Court, alleging breach of contract, bad faith, unfair insurance practices, unfair trade practices, and intentional infliction of emotional distress. The case was removed by defendants to this court on the grounds of diversity. Defendant now move for summary judgment, arguing that all claims relate to an employee benefit plan covered by ERISA, and thus that these state claims are preempted by Section 514 of ERISA. Plaintiffs contend that their insurance coverage was not an ERISA plan. Even if it were such a plan, they also contend, ERISA does not preempt their claims under the Connecticut Unfair Trade Practices Act and The Connecticut Unfair Insurance Practices Act.

#5 Underlying action: pending motions: results briefly stated.

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 812460
	)	
ROGER EDMONDS,	)	
	)	
Defendant.	)	
	)	

Roger Edmonds was convicted on three criminal counts involving conspiracy to distribute cocaine base. Pursuant to Federal Rule of Criminal Procedure 29(c), Edmonds now renews his motion for a judgment of acquittal. In the alternative, Edmonds requests a new trial, pursuant to Federal Rule of Criminal Procedure 33, based on the insufficiency of the evidence. For the reasons stated below, both motions are denied.

#6 Underlying action: history of the case: emphasis on results.

VERNON B. PRESSLEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 812460
	)	
ROBERT BROWN, JR., ET AL.,	)	
	)	
Defendants.	)	
	)	

This is a 42 U.S.C. § 1983 action filed pro se by plaintiff Vernon B. Pressley, an inmate at Marquette Branch Prison, against the director of the Michigan Department of Corrections and the warden of the prison. Pressley claims that exercise restrictions have been unconstitutionally imposed on him, in violation of the eighth and fourteenth amendments, whils he was in punitive segregation. On September 28, 1990, U.S. Magistrate Timothy P. Greeley issued a report and recommendation granting defendants' motion for summary judgment. After reviewing Pressley's timely objections de novo as required by 28 U.S.C. § 636(b)(1), the court grants summary judgment as to the fourteenth amendment claim. It denies summary judgment as to the eighth amendment claim, however, because the defendants have failed to show the absence of a genuine issue of material fact regarding whether the lack of exercise, which Pressley claims has resulted in physical and psychological problems, constitutes cruel and unusual punishment.

#7 Focus on legal question, arguments, and result.

STATE	)	
	)	
v.	)	No. 812460
	)	
Hicks	)	
	)	

This case presents the question whether an officer's knowledge that the registered owner of a vehicle has a revoked license provides reasonable suspicion to stop the vehicle, where the officer makes no effort to determine, prior to the stop, whether the driver of the vehicle is the registered owner. The State appeals from the district court's grant of Defendant Brian Hick's motion to suppress. See NMSA 1978, Section 39-3-3(B)(2) (1972) (permitting the State to take an interlocutory appeal from an order granting a defendant's motion to suppress). The State contends the district court erred in concluding the stop of Defendant's vehicle was not supported by reasonable suspicion and thus violated the New Mexico Constitution. In *State v. Candelaria,* which was decided after the district court's decision in this case, we held that a stop effected on the basis of similar information did not violate the United States Constitution because it was supported by reasonable suspicion. [cite] We now hold the same result is warranted under the New Mexico Constitution. Accordingly, we reverse.

#8 Focus on legal issue, rationale, and result.

Kenneth Badilla	)	
	)	
v.	)	No. 812460
	)	
Wal-Mart Stores East, et al.	)	
	)	

This case requires us to determine whether a complaint based solely on the Uniform Commercial Code's (UCC) provisions for breach of warranty, but seeking personal injury damages, is a claim under the UCC or a tort claim for personal injury. The determination affects which statute of limitation applies and, thus, whether the claim was properly dismissed as barred under the three-year limit on personal injury actions. We hold that the three-year personal injury statute of limitations applies because the essence of the claim is for personal injury, even though it is presented as a breach of warranty. Such a determination is in keeping with this State's historical distinction between tort and contract claims based on the nature of the claimant's injury and the primacy of our tort statute of limitation in the absence of a more specific statute. Because the statute of limitation issue is dispositive, we need not address the merits of the claim under contract law. We affirm the district court's dismissal of the case as timed barred.

#9 Underlying action: pending motion: issues raised by the motion: result: judge's map of the analysis.

PENN CENTRAL NATIONAL BANK ET AL.	)	
Plaintiff,	)	
v.	)	No. 812460
CONNECTICUT GENERAL LIFE INSURANCE COMPANY	)	
Defendant.	)	

In this civil action for breach of contract, plaintiffs seek damages for money allegedly owed them under a medical insurance policy. Presently before the court is defendant's motion for summary judgment, which shall be granted for the reasons that follow.

Defendant Connecticut General contends that a "General Limitation" policy provision that excludes coverage for expenses reimbursable under a no-fault policy is valid. Therefore, it argues, it properly refused to pay plaintiffs costs that had already been reimbursed by a no-fault policy. Plaintiffs assert that the General Limitation clause is contrary to the law of both the Commonwealth of Pennsylvania and the state of Michigan.

There are two issues to be resolved. The threshold issue is a conflicts of law question: whether, under Pennsylvania choice-of-law rules, Michigan or Pennsylvania law applies. The second issue is whether, under the relevant state law, the General Limitation clause is valid.

#10 Underlying action: pending motion and issues: judge's map of the analysis: results.

MARK BUTLER AND BRENDA BUTLER	)	
Plaintiffs,	)	
v.	)	No. 812460
AQUA WATER SHOWS, INC. ET AL.,	)	
Defendants.	)	

This case involves the validity of a release signed by Mark Butler, who was killed while performing in a waterski show sponsored by Aqua Water Shows, Inc., a nonprofit corporation. Butler's widow, Brenda Butler, both as personal representative of his estate and in her own capacity, sued the corporation's officers and various participants in the show and their personal liability insurers. Both sides have moved for summary judgment. The defendants contend that Butler had released all other participants from liability for negligence in connection with the performance, and Brenda Butler contends that the release was invalid on public policy and other grounds.

The issues are: (1) whether the release signed by Butler prior to the show should be held unenforceable for reasons of public policy; and (2) if the release is valid, does it reach (a) Brenda Butler's separate claim for her husband's wrongful death and loss of his society and companionship and (b) the claim against the driver of the boat, which may involve reckless conduct?

We conclude that the release is not void on public policy grounds, and that it bars Brenda Butler's action in all respects except for her claim for loss of consortium and any claim based on reckless conduct by the driver of the boat.

#11 The whole picture.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MARIA BUTLER et al., Plaintiffs and Appellants, v. BELL HELICOPTER TEXTRON, INC., et al., Defendants and Respondents.	B152609 (Los Angeles County Super.. Nos. BC 206780; BC207404)

SUMMARY

Bell Helicopter Textron is the manufacturer of a helicopter that crashed in Griffith Park on March 23, 1998. The crash was caused by the in-flight failure of the helicopter's tail rotor yoke. The two survivors and the successors of four others who died in the crash sued Bell Helicopter and others, asserting products liability theories of strict liability, negligence, warranty and fraud. Bell sought summary judgment based on a federal statute of repose, which bars actions against manufacturers of general aviation aircraft if the part that allegedly caused the accident is more than 18 years old.

We conclude an exception to the statute of repose applies, precluding its application to this lawsuit. An action is excepted from the statute of repose if the claimant proves the manufacturer concealed or withheld from the Federal Aviation Administration "required information" material to the maintenance or operation of the aircraft or part that is causally related to the harm. There is evidence Bell, within the period of repose, withheld information

from the FAA about five military aircraft accidents Bell knew were caused by the failure of identical tail rotor yokes installed on those aircraft. We hold that FAA regulations required Bell to report those failures, and its withholding of that information falls squarely within the statutory exception to the time limitations on civil actions that would otherwise apply. We therefore reverse the judgment of the trial court and remand the cause for further proceedings.

#12 Starting with the facts:

STATE OF WEST DAKOTA	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 812460
	)	
DONNA YAKLICH	)	
	)	
Defendant.	)	

On December 12, 1985, Charles and Eddie Greenwell shot and killed Donna Yaklich's husband in the driveway of his home as he stepped out of his truck. She was inside the house asleep.

After her husband's death, Yaklich received payment under his three life insurance policies, and she admitted that she paid the Greenwells $4,200 in several installments for murdering her husband. Consequently, she was brought to trial on charge of first-degree murder and conspiracy to murder, under a theory that she had arranged her husband's death to obtain the insurance money.

The defense, however, maintained that Yaklich suffered from the "battered woman syndrome" and that her actions were therefore justifiable acts of self-defense committed under duress resulting from years of physical and psychological battering by her husband.

The central issue on appeal is whether a woman who has hired a third party to kill her abuser but who presents evidence that she suffered from the battered woman syndrome is entitled to a self-defense instruction. We hold that a self-defense instruction is not available in a contract-for-hire situation, even though the accused presents credible evidence that she is a victim of the battered woman syndrome. Accordingly, we disapprove the trial court's ruling on the issue.

#13 Focusing on the issue and the result

XYZ ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 812460
	)	
STATE OF CALIFORNIA ET AL.,	)	
	)	
	)	
Defendants.	)	
	)	

_____

We are called upon to determine whether the California public school financing system, with its substantial dependence on local property taxes and resultant wide disparities in school revenue, violates the equal protection clause of the Fourteenth Amendment. We have determined that this funding scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors. Recognizing as we must that the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth, we can discern no compelling state purpose necessitating the present method of financing. We have concluded, therefore, that such a system cannot withstand constitutional challenge and must fall before the equal protection clause.

IMPLEMENTING PRINCIPLE 2:

AVOIDING DEFAULT ORGANIZATIONS

Our minds are stocked with ready-made organizing patterns that we use more often than we should, especially when we're tired, bored or in a hurry. For example, when we write about facts we turn instinctively to chronology. When we respond to someone else's argument, we're tempted to adopt its structure as our own. When we write about a complicated analysis, it's easiest just to retrace the path we took in thinking through the issue. None of these organizing patterns is necessarily inadequate. But they are overused, and a good writer learns to regard them with suspicion.

ORGANIZING A DISCUSSION OF THE LAW:

THE PROBLEM OF "DEFAULT" (OR "READY-MADE") ORGANIZATIONS

The most common traps:

- Chronology (Example #1)
- History of your research or thinking (Example #2)
- Someone else's analysis

The basic choice:

Show the reader how you thought through the problem

or

write a clear report of the results of your thinking.

Avoiding the default:

Impose an organization that matches the logic of your analysis, as you look backwards from your conclusion:

- Write a good introduction before each section of the analysis.
- If necessary, reorganize the sequence of topics or authorities.

ORGANIZING A DISCUSSION OF THE LAW: EXAMPLE #1

Before:

Several recent decisions have considered the obligations of a so-called "successor employer" under collective bargaining agreements. None deals with our specific question: under what circumstances is a employer bound by his predecessor's agreement to contribute and subscribe to employee trust funds? But these decisions provide useful guidance.

In the first of these decisions, John Smith v. Jones, the Supreme Court held ….

In NLRP v. Acme Manufacturing, Acme had succeeded Superior ……

Acme was followed by Clover Valley Packaging Co. v. NLRB, holding ….

Finally, in Comfort Hotels v. Hotel Employees, the Court….

In concluding that under the circumstances of the case, the successor employer had no duty to arbitrate, the Court in a footnote made the following illuminating statement: ….

After:

Although several recent decisions have considered the obligations of a so-called "successor employer" under collective bargaining agreements, none has dealt with our specific question: under what circumstances is a employer bound by his predecessor's agreement to contribute and subscribe to employee trust funds? In the absence of direct authority, we must draw guidance from decisions dealing with collective bargaining agreements in general.

As these cases show, the question cannot be answered by deciding whether the new employer satisfies a definition of "successor employer" that always entails the assumption of certain obligations. "There is, and can be, no single definition of 'successor' which is applicable in every legal context." [Citation.] A decision about which obligations a new employer has assumed must rest on the facts of each case.

In the first two decisions discussed below, the facts showed a substantial continuity of identity between the business enterprises of the predecessor and successor employers. As a result, the courts held that the new employers had to assume the obligations at issue. In the other two decisions, there was less continuity, and the courts reached the opposite result.

In NLRB v. Acme Manufacturing, ….

In Comfort Hotels v. Hotel Employees, ….

In John Smith v. Jones, ….

In Clover Valley Packaging Co. v. NLRB, ….

ORGANIZING A DISCUSSION OF THE LAW: EXAMPLE #2

Before:

The complaint alleges jurisdiction under 28 U.S.C. § 1333 and 46 U.S.C. § 740, which vest the District Court with admiralty and maritime jurisdiction. Callahan argues that admiralty and maritime jurisdiction does not extend to accidents, like this one, that involve purely pleasure craft with no connection to commerce or shipping.

Callahan bases his complain primarily on Executive Jet Aviation, Inc. v. City of Cleveland. In that case, the plaintiff, whose jet aircraft sank in Lake Erie ….

Callahan suggests that Executive Jet requires a significant relationship to traditional maritime activity in all cases, not just those involving aircraft. Several Courts of Appeal have taken this view. ….

In Edynak v. Atlantic Shipping, Inc., however, the Third Circuit, assuming that Executive Jet could be read ….

Callahan argues that this discussion to Edynak signals an adoption by the Third Circuit of the "locality plus" test for admiralty jurisdiction ….

After:

The complaint alleges jurisdiction under 28 U.S.C. § 1333 and 46 U.S.C. § 740, which vest the District Court with admiralty and maritime jurisdiction. Callahan argues that admiralty and maritime jurisdiction does not extend to accidents, like this one, that involve purely pleasure craft with no connection to commerce or shipping.

Callahan bases his argument primarily on Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 93 S. Ct. 493, 34 L.Ed.2d 454 (1972). In that case, the Supreme Court held that admiralty jurisdiction does not extend to claims arising from airplane accidents unless they bear "a significant relationship to traditional maritime activity." Callahan argues that this test must be applied to all accidents that would otherwise fall within admiralty jurisdiction, and that accidents involving pleasure craft fail to meet the test. We disagree. Executive Jet's "locality-plus" test applies only to aircraft accidents. Even if it were to apply more broadly, an accident involving pleasure craft meets the test.

In Executive Jet, the plaintiff, whose jet aircraft sank in Lake Erie ….

ORGANIZING A DISCUSSION OF THE LAW: EXAMPLE #3

Before:

ASSESSMENT OF COSTS

Appellant admits that the assessment of costs is a discretionary matter for the trial judge but asserts that, under the particular facts, the trial court abused its discretion.

Appellant relies upon E. L. Gholar, et al. v. Security Insurance Co., et al., 366 So. 2d 1015 (La. App. 1st Cir. 1978). The court there reversed the trial court and relieved the defendant from paying costs where he was not found negligent and had not prolonged the trial. The court held that:

> C.C.P. Art. 1920 gives the court discretion to assess costs but limits this discretion. The general rule is that ….

After:

ASSESSMENT OF COSTS

Appellant admits that the assessment of costs is a discretionary matter for the trial judge but asserts that, under the particular facts, the trial court abused its discretion. As the court's opinion demonstrates, however, the court correctly based its assessment on the principle that costs must be assessed on the basis of the results at trial.

This principle arises from LSA-C.C.P. Article 1920:

….

The principle is stated even more explicitly in Comment (b) to Article 1920:

….

Although appellant rightly points to E.L. Gholar, et al. v. Security Insurance Co., et al., 366 So. 2d 1015 (La. App. 1st Cir. 1978) as an authoritative application of Article 1920, he ignores crucial differences between the facts of that case and of the present situation. ….

ORGANIZING A DISCUSSION OF THE LAW: EXAMPLE #4

B. The Purported Lease Restrictions Were Not Referred to in the Non-Disturbance Agreement, Nor Does the Amended Complaint Allege Facts Sufficient To Show That Defendants Had Actual Knowledge of These Restrictions

Before:

In an effort to rebut the absence of factual allegations showing actual knowledge, Mitsubishi argues that it "has clearly alleged that Capital Group knew of the Notes, the Mortgages and the Lease Assignments and/or of their material terms . . . ." Mitsubishi Mem., p. 55 (emphasis supplied). Mitsubishi reaches this conclusion by alleging that the Non-Disturbance Agreement between Mitsubishi and Capital Group refers to the existence of a mortgage in favor of Mitsubishi covering the subject premises. As a result, the argument continues, Mitsubishi has pled facts sufficient to establish that Capital Group and one of its former officers, as well as an officer of First Boston, who was not even involved in the execution of that agreement, had "actual knowledge" of certain lease restrictions purportedly imposed upon Bailey Tarrytown.

Mitsubishi ignores, however, the fact that the Non-Disturbance-Disturbance Agreement does not refer to restrictions imposed upon Bailey Tarrytown's right to amend or terminate its lease with Capital Group or any other tenant of the Christiana Building. Nor does the Amended Complaint otherwise allege facts sufficient to establish that the defendants had actual knowledge of these restrictions. Mitsubishi has at best alleged facts as to which most commercial tenants have "knowledge"….

After:

As a prerequisite to a tortious interference claim, Mitsubishi must allege that defendants had actual knowledge of the lease restrictions at issue. Instead of alleging facts that would show actual knowledge, however, Mitsubishi adopts two tactics: (1) it attempts to establish such knowledge on the basis of inferences drawn illegitimately from the Non-Disturbance Agreement, which does not refer to the restrictions, and (2) it mischaracterizes the kind of knowledge required.

1. The Content of the Non-Disturbance Agreement

Mitsubishi alleges that the Non-Disturbance Agreement between Mitsubishi and Capital Group refers to the existence of a mortgage….

ORGANIZING A DISCUSSION OF THE LAW: EXAMPLE #5

The opening pages of the opinion have been omitted. This extract begins at the point where the opinion formulates and analyzes the crucial issues in the case.

As appellants point out, this consent decree provision, on its face, clearly permits an infringement of otherwise existing First Amendment rights of students. The question for our determination is whether there are any otherwise existing rights. Since the First Amendment does not require the government to permit unfettered access to its property, the answer depends upon whether or not the graduation ceremony at Downingtown Senior High School qualifies as a public forum.

1. Whether the Graduation Is a Public Forum

The Supreme Court has adopted a framework of forum analysis to assess whether a government entity must permit speech or expressive activity on its property. In Perry Forum Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983), the Court set forth three types of forums that a government may establish. First are "quintessential public forums" such as streets and parks in which the state can only enforce time, place, and manner restrictions or content-based restrictions that are necessary to serve a compelling state purpose. Id. at 45. Second are "designated public forums," which the state creates by deliberately opening them to the public. As long as a government entity maintains such a forum, it is subject to the same restrictions as a quintessential public forum. Id. at 45-46. Thus, in either type of public forum, a content-based restriction is only permissible if it can survive strict scrutiny.

The third and final category is the "non-public forum." Here, the state may enforce not only time, place, and manner restrictions, but also any other reasonable restriction that is not based on an attempt to suppress a particular viewpoint. Id. at 46. Thus, these

restrictions may exclude certain categories of speech by subject matter and type of speaker, provided that the rules are reasonable and the viewpoint neutral. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985).

There is no question that the Downingtown Senior High School graduation ceremony is not a quintessential public forum. Rather, the present dispute centers on whether the commencement is a designated public forum or a non-public forum. The determination of whether the government has designated a public forum is based upon two factors: governmental intent and the extend of use granted. Gregoire v. Centennial School Dist., 907 F.2d 1366, 1371 (3d Cir.), cert. denied, Ill. S. Ct. 253 (1990). We must also bear in mind that "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only be intentionally opening a nontraditional forum for public discourse." Cornelius, 473 U.S. at 802.

To assess government officials' intent under the first factor, we focus on their policies and practices, the nature of the property, and the compatibility of the property with expressive activity. Cornelius, 473 U.S. at 802. When examining the extent of use granted, we must be mindful that a designated public forum "may be so designated for only limited uses of for a limited class of speakers. Student Coalition for Peace v. Lower Merion School Dist. Bd. of School Directors, 776 F. 2d 431, 436 (3d Cir. 1985). Restrictions of this type do not mean that the forum is non-public, but show that the government has created a "limited public forum," a type of designated public forum, whose scope is circumscribed either by subject matter or category of speaker.

We are guided in this inquiry by several prior cases that have considered whether a given facility owned and operated by a public school constitutes a designated public forum. Most significantly, in Hazelwood School Dist. V. Kuhlmeier, 484 U.S. 260 (1988), the Supreme

Court held that a public high school's student newspaper was not a designated public forum. The student plaintiffs in Hazelwood alleged that the decision of school officials to censor and delete certain articles concerning the subjects of pregnancy and divorce violated their First Amendment free speech rights.

En route to its holding in Hazelwood that the newspaper was a non-public forum, the Supreme Court distinguished its prior decision in Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969), which had permitted a broad scope for student free speech. Tinker held that students' free speech rights were violated by a school's policy prohibiting junior and senior high school students from wearing black armbands to protest the Vietnam War, in the absence of any showing that the conduct would "materially and substantially interfere with the requirements of appropriate discipline," id. at 509, or infringe the rights of other students, id. at 508. The Hazelwood court found that Tinker had simply raised the question of whether a school must tolerate certain expressive activity, whereas the case before it asked "whether the First Amendment requires a school affirmatively to promote particular student speech." Hazelwood, 484 U.S. at 270. In the latter context, it held, forum analysis was appropriate.

The Hazelwood court grounded its conclusion that the newspaper was not a public forum upon findings that the newspaper was sponsored by the school as a part of the regular educational curriculum, that the journalism teacher exercised a great deal of control over the final product, and that school officials had not opened the paper to indiscriminate use by the student body or even by the student reporters and editors. Id. at 568-69. The Court also noted that the paper might reasonably be seen to bear the imprimatur of the school. Id. at 569. Since the Court found that the newspaper was a non-public forum, it held that any reasonable non-viewpoint-based restrictions were acceptable, provided that the school officials' regulations were

"reasonably related to legitimate pedagogical concerns." Id. at 571.

The Supreme Court also engaged in a type of public forum analysis in Widmar v. Vincent, 454 U.S. 263 (1981), which involved a university's policies for granting various student organizations access to its facilities. Although the case was decided before the Supreme Court fully articulated its public forum doctrine in Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983), the Widmar court framed the inquiry in public forum terms, as whether the university, having "opened its facilities for use by student groups can now exclude groups because of the content of their speech." 454 U.S. at 273. The court held that because the university had recognized approximately 100 student groups and permitted them to meet on campus, it had created a public forum which it was also required to open to student religious organizations.

Our Court has also considered the public forum doctrine in the context of public schools' access policies. Most recently, in Gregoire v. Centennial School Dist., 907 2d 1366 (3d Cir.), cert. denied, Ill. S. Ct. 253 (1990), we examined an unsuccessful attempt by a non-student religious organization to secure permission to use a public high school's auditorium. We observed that the school had opened its auditorium extensively to various groups including local labor unions and the Rotary Club, id. at 1374, and had even permitted religious speech in an afternoon student forum, id. at 1379, but had only denied access for an evening event by the particular non-student religious group. In this manner, the school had demonstrated its intent to open the auditorium to a wide variety of expressive activity, and had simply singled out the plaintiff group for discriminatory treatment. As a result, we held that the school had designated the auditorium as a public forum.

In reaching our conclusion in Gregoire, we relied in part on the Supreme Court's

holding in Widmar v. Vincent, 454 U.S. 263 (1981), that religious groups must be included under open forum policies. We found that Widmar's logic was not restricted to the university level, particularly because the high school's practices at issue in Gregoire demonstrated that in other contexts the school had trusted the maturity of its students. 907 F.2d at 1377-78. In this respect, we also cited the Supreme Court's decision in Board of Educ. V. Mergens, 496 U.S. 226 (1990). See 907 F.2d at 1378. Mergens upheld the constitutionality of the Equal Access Act, 20 U.S.C. §§ 407-74 (1988), which statutorily extended Widmar's holding to public secondary schools. Furthermore, we pointed out in Gregoire that in examining school officials' intent, we must consider their acts, and not their argument in litigation that they had no desire to create a forum. 907 F.2d at 1374.

In Student Coalition for Peace v. Lower Merion School Dist. Bd. of School Directors, 776 F.2d 431, 436 (3d Cir. 1985), by contrast, we held that another public school's athletic field did not qualify as a public forum. In that case, the plaintiff's sought to hold a peace demonstration on the school's athletic field. As in Gregoire, many student and external organizations had been granted access, but we further found that authorization for use was not granted as a matter of course, 776 F.2d at 436, and many other groups had also been denied permission. Id. at 434. Thus, unlike the religious group denied access in Gregoire, the student peace group had not been singled out, and the school policies at issue in Student Coalition for Peace did not demonstrate an intent to designate the field as a public forum.

Under the analysis required by these precedents, it appears unlikely that the commencement exercises at Downingtown Senior High School have been designated as a public forum. The process for setting the format and contents of a graduation ceremony are more likely to resemble the tightly controlled school newspaper policies at issue in Hazelwood than the

broad group access policies considered in Widmar and Gregoire. Moreover, at least one court has considered the issue of whether a high school graduation ceremony is a public forum, and found that the particular graduation at issue was a non-public forum. See Lundberg v. West Monona Community School Dist., 731 F. Supp. 331 (N.D. Iowa 1989).

In Lundberg, a group of students sought an injunction to allow a minister to deliver a benediction at their commencement. Thus, although the case did not involve a motion to intervene, the plaintiffs' free speech claims were similar to those of the applicants for intervention in the present suit. The Lundberg court premised its conclusion that no public forum had been created on its findings that school officials organized and sponsored the graduation ceremony at issue and had "the sole discretion to dictate its content," and that "[w]hile the school [could] not dictate the actual words spoken, [it did] retain control over the type of speech admissible at the ceremony." Id. at 337. In addition, the court stated that "[g]raduation ceremonies have never served as forums for public debate or discussions, or as a forum through which to allow varying groups to voice their views." Id. at 339. Lundberg also relied on the Supreme Court's decision in Hazelwood, noting that school officials were legitimately concerned that the content of the graduation bore the imprimatur of the state. Id. at 339-39.

Nonetheless, the commencement exercises at Downingtown could qualify as a public forum. Nothing in the record demonstrates otherwise. More specifically, although the terms of the consent decree suggest that graduation speakers must be members of the school community or invited guests, this simply indicates that any forum created is a limited one. The ceremony could still be a public forum. See Hazelwood, 484 U.S. at 267 ("school facilities may become public forums if 'by policy or by practice' [school officials have] opened those facilities

'for indiscriminate use by some segment of the public, such as student organizations'").

If, for example, school officials have authorized students to choose which of them will speak, and have permitted these speakers to select their own topics, including controversial subject matters, then officials may have created a limited public forum. Not only would such a practice demonstrate an intent to foster public discourse, but it would avoid attaching the imprimatur of the school to the views expressed in students' speeches. Moreover, we must reiterate our cautionary admonishment from Gregoire, that an assessment of school officials' intent should be governed by their acts, and not by their bald assertions that they had no desire to create a public forum. 907 F.2d at 1374.

Yet, given the procedural history of this case, there are no established facts in the record as to the nature and history of commencement ceremonies at Downingtown Senior High School. The motion to intervene was decided on the motion papers, which included no affidavits, and the underlying suit was resolved by consent decree without any development of facts. We have no information as to such critical facts as who selects the topics for graduation speeches and by what process, or how many graduation speakers address each commencement and by what method they are chosen. Nor do we know how broadly participatory the ceremonies have been or what issues and subjects have been discussed in the past.

Public forum analysis is, however, highly fact-dependent, and this question cannot be decided without a factual record. The Brody group contends in its brief that the graduation ceremony is not a public forum, because school officials have closely regulated the content of graduation speeches by providing the topic for and editing these speeches. Appellee's Brief of 20-21. While we agree that, if true, such facts would suggest that the graduation has not been designated as a public forum, see Hazelwood, 484 U.S. at 267-70; Lundberg, 731 F. Supp.

at 337, there are no such facts in the record, and appellees' brief does not cite to any.

As a result, the present record is insufficient to make any final decision on the public forum issue. In fact, counsel for the Brody group conceded this point at oral argument. (Tr. At 33). Consequently, this case must be remanded for development of the relevant facts and a decision by the district court as to whether the Downingtown Senior High School graduation ceremony constitutes a designated public forum. The outcome of this assessment on remand will determine which of two alternate paths must then be followed.

ORGANIZING FACTS

The Methods:

1. Chronology
2. Main actor or other character
3. Geography
4. Issues
5. Witnesses or other sources of information

The Danger:

Relying solely on a chronological organization when some of the facts don't fit into the chronology.

ORGANIZING FACTS: EXAMPLE #1

By Chronology & Protagonist: J. entered first grade ….

In 1981, he was placed in ….

Two years later, he was moved to ….

By issue: Starting in 1980, J. began to exhibit behavior that …. As a result of this behavior, by 1983 school authorities concluded that ….

By Witness: On the question of whether his present non-residential program has resulted in significant educational progress, Dr. Jones stated that ….

Mr. Smith, on the other hand, stated that ….

ORGANIZING FACTS: EXAMPLE #2

Before:

On August 4, 1983, Jessica Hall was involved in a motor vehicle accident at the intersection of routes 6 and 25 and the spur from exit 9 of I-84 in Newtown. Jessica was a passenger in a pickup truck driven by her mother, Wendy Hall. Wendy Hall left exit 9 of I-84 and proceeded eastbound on the exit spur to routes 6 and 25. At this point, routes 6 and 25 overlap into one road. When she approached the intersection of the spur and routes 6 and 25, she attempted to turn left to go north on routes 6 and 25. She testified that because her vision was obstructed by brush, she could not see traffic traveling south on routes 6 and 25 so she inched her way onto the highway to obtain a view. At that point, a tractor trailer driven by John Jones was driving southbound on routes 6 and 25. Wendy Hall did not see the tractor trailer until it was suddenly upon her vehicle. Jones attempted to avoid a collision by braking and swerving to the left but was unable to do so and struck Wendy Hall's truck, severely injuring Jessica Hall.

After:

[FIRST, THE CONTEXTUAL FACTS] Jessica Hall was severely injured when a pickup truck driven by her mother, Wendy Hall, collided with a tractor trailer driven by John Jones.

[NEXT, THE GEOGRAPHY] The accident occurred at the intersection of exit 9 from I-84 with routes 6 and 25. At this point, routes 6 and 25 merge into one road as they are joined by the exit spur. According to Wendy Hall's testimony, the view from the exit spur is obstructed by brush, so that drivers leaving the exit cannot see traffic traveling south on routes 6 and 25.

[FINALLY, THE NARRATIVE] Wendy Hall left I-84 and proceeded east on the exit spur to routes 6 and 25. When she approached the intersection, she attempted to turn left to go onto the highway to obtain a view. She did not see Jones' tractor trailer until it was suddenly upon her vehicle. Jones attempted to avoid a collision by braking and swerving to the left, but was unable to do so and struck Wendy Hall's truck.

ORGANIZING FACTS: EXAMPLE #3

Appellant Hann was convicted of criminal trespass after taxiing his airplane from a hangar across part of an airport which the complaining witness, Hyde, leased and had posted with "no trespassing" signs. Appellant argues that two agreements signed as the airport changed ownership over the years constituted effective consent to his crossing of the property, or at least created reasonable doubt about his guilt.

Before:

The Aero-Valley Airport was constructed around 1970 by Edna Gardner Whyte on thirty-four acres of her land. She later bought more land northeast of the original tract and made additional improvements, including extensions to the runway and taxiways.

In 1980, Whyte sold to Gene Varner the runway and taxiways together with a portion of the land, including the portion where the transient area is located. Part of the purchase price was carried by a note from Varner to Whyte and secured by a vendor's lien and deed of trust. In the deed to Varner, Whyte reserved certain easements and rights for access to the runway from her property located in the northeast corner of the airport. In 1982, Hyde-Way, Inc., owned by Hyde, acquired all of Varner's interest and assumed the note owed by Varner to Whyte.

Sometime prior to October 19, 1983, Hyde's corporation purchased 119 acres located west of the runway and referred to as the Northwest Development Addition. Misunderstandings and disputes arose between Whyte and Hyde concerning obligations, rights, and other matters pertaining to the airport. On October 19, 1983, a settlement agreement was entered into between Whyte and Hyde-Way, Inc. and Glen Hyde, individually, and by which Hyde agreed to convey to Whyte certain real property located on the Northwest Development Addition. This conveyance was apparently in payment of the balance owed to Whyte under the 1980 note from Varner. This conveyance also included ten hangars located on the land, one of which was being used by appellant as a tenant of Whyte at the time of his arrest. Whyte was then still the owner of the hangar and told the appellant that he had access to the runway across the transient area under the terms of the settlement agreement between Whyte and Hyde.

Under that agreement, Whyte agreed to quit claim to Hyde all rights and reservations saved and excepted in her deed to Varner:

> [E]xcept that Whyte shall have the right to convey easements to persons who are tenants or heirs or assigns of land she presently owns or will own in the future within the confines of the Aero-Valley Airport as it now exists, including the residential lots in the Northeast corner of said airport. Whyte agrees, however, that on the sale of any of the hangars granted to her in their agreement or purchased by her in the Northwest Development Addition she or her buyers will execute the Runway License Agreement now required by Hyde from purchasers in the Northwest Development Addition.

On February 5, 1987, Hyde sold whatever property he owned, including the transient area, to a Nevada mining corporation. At the time appellant was arrested for trespassing, on April 20, 1987, Hyde owned only a month-to-month tenancy under a verbal lease from the mining company.

The testimony shows that there has been a long history of disputes between Whyte and Hyde over their airport transactions, and that they had been in civil litigation for over two years before appellant was convicted in this case. This litigation apparently did not involve the interpretation of the above quoted language from the settlement agreement insofar as it was determinative of appellant's right to cross the transient area on April 20, 1987. Appellant urges that as Whyte's tenant he had access across the transient area on that date by virtue of the easement rights which Whyte retained in her agreement with Varner and which she was authorized to convey under the settlement agreement with Hyde.

After:

[FIRST, THE CONTEXT]

The Aero-Valley Airport was constructed around 1970 by Edna Gardner Whyte on her land. Over the years, parts of it changed hands several times. Throughout these changes, Whyte retained part of the property, some of which she leased to tenants such as Hann.

[NEXT, THE BACKGROUND NARRATIVE]

In 1980, Whyte sold to Gene Varner the runway and taxiways together with a portion of the land, including the portion on which appellant allegedly trespassed. Part of the purchase price was carried by a note from Varner to Whyte.

In 1982, all of Varner's interest was acquired by Hyde- Way, Inc., owned by Hyde. Hyde- Way also assumed the note. Sometime thereafter, it purchased more land located west of the runway and referred to as the Northwest Development Addition.

On October 19, 1983, Hyde- Way, Inc., and Hyde individually entered into an agreement with Whyte in which, among other matters, Hyde agreed to convey to Whyte certain real property in the Northwest Development Addition, in payment of the balance owed under the 1980 note. This conveyance included ten hangars, including the hangar that appellant was renting at the time of his arrest.

On February 5, 1987, several weeks before the arrest, Hyde sold his airport property to a Nevada mining corporation. On the day of the arrest, he owned only a month-to-month tenancy under an oral lease from the mining company.

The testimony shows that there has been a long history of disputes between Whyte and Hyde. The 1983 agreement between them was intended to settle these disputes, but they had been in civil litigation for over tow years before appellant was convicted in this case. The litigation, however, did not address the issues raised by this appeal.

[NEXT, THE FACTS ON WHICH THE CASE TURNS]

Appellant relies on the terms of Whyte's 1980 sale of the airport to Varner, Hyde's predecessor, and of Whyte's 1983 agreement with Hyde. Based on those agreements, appellant argues, there is sufficient reason to believe that he had effective consent to enter Hyde's property so that the trial court could not have found him guilty beyond a reasonable doubt.

In 1980, when Whyte sold part of her land to Varner, the deed reserved to Whyte certain easements and rights for access to the runway from hjer property. In relevant part, the deed states:

[NOTE: IN THIS FORM OF ORGANIZATION,M IT BECOMES CLEARER THAT A CRUCIAL ITEM—THE RELEVANT LANGAUGES FROM THE 1980 DEED—IS MISSING.]

Under Whyte's 1983 agreement with Hyde, Whyte agreed to quit claim to Hyde all rights and reservations saved and excepted in her deed to Varner, with the following exceptions:

> Whyte shall have the right to convey easements to persons who are tenants or heirs or assigns of land she presently owns or will own in the future within the confines of the Aero-Valley Airport as it now exists, including the residential lots in the Northeast corner of said airport.

ORGANIZING FACTS: EXAMPLE #4

MORISSETTE v. UNITED STATES, 342 U.S. 246, 72 S. Ct. 240 (1952)
OPINION: MR. JUSTICE JACKSON delivered the opinion of the Court.

This would have remained a profoundly insignificant case to all except its immediate parties had it not been so tried and submitted to the jury as to raise questions both fundamental and far-reaching in federal criminal law, for which reason we granted certiorari.

On a large tract of uninhabited and untilled land in a wooded and sparsely populated area of Michigan, the Government established a practice bombing range over which the Air Force dropped simulated bombs at ground targets. These bombs consisted of a metal cylinder about forty inches long and eight inches across, filled with sand and enough black powder to cause a smoke puff by which the strike could be located. At various places about the range signs read "Danger -- Keep Out -- Bombing Range." Nevertheless, the range was known as good deer country and was extensively hunted.

Spent bomb casings were cleared from the targets and thrown into piles "so that they will be out of the way." They were not stacked or piled in any order but were dumped in heaps, some of which had been accumulating for four years or upwards, were exposed to the weather and rusting away.

Morissette, in December of 1948, went hunting in this area but did not get a deer. He thought to meet expenses of the trip by salvaging some of these casings. He loaded three tons of them on his truck and took them to a nearby farm, where they were flattened by driving a tractor over them. After expending this labor and trucking them to market in Flint, he realized $84.

Morissette, by occupation, is a fruit stand operator in summer and a trucker and scrap iron collector in winter. An honorably discharged veteran of World War II, he enjoys a good name among his neighbors and has had no blemish on his record more disreputable than a conviction for reckless driving.

The loading, crushing and transporting of these casings were all in broad daylight, in full view of passers-by, without the slightest effort at concealment. When an investigation was started, Morissette voluntarily, promptly and candidly told the whole story to the authorities, saying that he had no intention of stealing but thought the property was abandoned, unwanted and considered of no value to the Government. He was indicted, however, on the charge that he "did unlawfully, wilfully and knowingly steal and convert" property of the United States of the value of $ 84, in violation of 18 U. S. C. Sec. 641, which provides that "whoever embezzles, steals, purloins, or knowingly converts" government property is punishable by fine and imprisonment. Morissette was convicted and sentenced to imprisonment for two months or to pay a fine of $ 200. The Court of Appeals affirmed, one judge dissenting.

PARAGRAPHS: CONTEXTS, TRANSITIONS, AND EMPHASIS

In the realm of paragraphs, the principles at the beginning of these materials translate into the following advice:

1. Make the paragraph's point and structure explicit.

2. Create smooth transitions: put old information before new.

3. Use the paragraph's natural points of emphasis.

MAKE THE POINT AND STRUCTURE EXPLICIT

Before:

In the circumstances of this case, several factors are relevant to the issue of Zallea's liability. In this case, there simply were no general standards of steam quality -- that is, of the permissible levels of chemicals or corrodents -- upon which Zallea reasonably could have relied. The evidence does not support the conclusion that Zallea did have or should have had knowledge of the likelihood of the joint failures sufficient to justify imposing liability upon Zallea. The evidence instead supports a finding that WEPCO was in a position to have superior knowledge of the actual quality and contents of its steam, and to have expertise and access to knowledge concerning the steam in its pipes. Since there were no general industry standards for levels of chemicals or corrodents in light of which Zallea could have designed the expansion joints or issued warnings, and since WEPCO was in a better position to evaluate its own steam quality and chemical or corrodent levels, the loss of the still unexplained failures must fall upon WEPCO rather than Zallea.

After:

In the circumstances of this case, Zallea should not be found liable for two reasons. First, there simply were no general standards …. Second, the evidence supports the conclusion that WEPCO, not Zallea was in a better position ….

CREATING TRANSITIONS: PUT OLD INFORMATION BEFORE NEW

Before:

…. To effect a valid pledge of an intangible chose in action such as bank deposit, the pledgor must transfer possession of an "indispensable instrument" to the pledgee. Id. at 562; see Peoples Nat'l Bank of Washington v. United States, 777 F.2d 459, 461 (9th Cir. 1985).

Restatement of the Law, Security § 1 comment (e) defines an indispensable instrument as "formal written evidence of an interest in intangibles, so representing the intangible that the enjoyment, transfer or enforcement of the intangible depends upon possession of the instrument." See Annot. Pledge by Transfer of Instrument, 53 A.L.R.2d § 2 (1957). A passbook that is necessary to the control of the account has been held to be an indispensable instrument. Peoples Nat'l Bank, 777 F.2d at 461; Walton v. Piqua State Bank, 204 Kan. 741, 466 P.2d 316, 329 (1970). In Miller v. Wells Fargo, the corporation did not have a passbook account, but rather gained access to its account by telex key code. The bank argued that ….

In Duncan Box & Lumber Co. v. Applied Energies, Inc., 270 S.E.2d 140 (W. Va. 1980), the bank agreed to finance the purchase of land by a subdivider, Applied Energies, Inc. ….

After:

…. To effect a valid pledge of an intangible chose in action such as a bank deposit, the pledgor must transfer possession of an "indispensable instrument" to the pledge. Id. at 562; see Peoples National Bank of Washington v. United States, 777 F.2d 459, 461 (9th Cir. 1985).

"Indispensable instrument" is defined in Restatement of the Law, Security § 1 comment (e), as "formal written evidence of an interest in intangibles, so representing the intangible that the enjoyment, transfer or enforcement of the intangible depends upon possession of the instrument." See Annot. Pledge by Transfer of Instrument, 53 A.L.R.2d §2 (1957). Indispensable instruments have been held to include, for example, a passbook that is necessary to the control of the account. Peoples National Bank, 777 F.2d at 461; Walton v. Piqua State Bank, 204 Kan. 741, 466 P.2d 316, 329 (1970). On the other hand, they have been held not to include a telex key code. In Miller v. Wells Fargo, the corporation did not have a passbook account, but rather gained access to its account by telex key code. The bank argued that ….

The transfer of an indispensable instrument may not be necessary to effect a valid pledge, however, when an account has been set up by agreement between creditor and debtor to secure the debtor's obligations. In Duncan Box & Lumber Co. v. Applied Energies, Inc., 270 S.E.2d 140 (W. Va. 1980), the bank agreed to finance the purchase of land by a subdivider, Applied Energies, Inc. ….

OLD INFORMATION BEFORE NEW

Before:

Governmental immunity is the doctrine under which the sovereign, be it country, state, county or municipality, may not be sued without its consent. Osborn v. Bank of the United States, 22 U.S. 738 (1824). The purpose of the immunity of public officials is not directly to protect the sovereign, but to protect the public official while he performs his governmental function, and it is thus a more limited immunity than governmental immunity. Courts have generally extended less than absolute immunity for that reason. The distinction between discretionary acts and ministerial acts is the most commonly recognized limitation. The official is immune only when what he does while performing his lawful duties requires "personal deliberation, decision, and judgment." See Prosser, Law of Torts 132 (4th ed. 1971).

After:

Governmental immunity is the doctrine under which the sovereign, be it country, state, county or municipality, may not be sued without its consent. Osborn v. Bank of the United States, 22 U.S. 738 (1824). The immunity of public officials, in contrast, does not protect the sovereign directly, but only the public official while he performs his governmental function. For this reason, courts have generally extended less than absolute immunity. The most commonly recognized limitation arises from the distinction between discretionary and ministerial acts. Under this distinction, the official is immune only when what he does while performing his lawful duties requires "personal deliberation, decision, and judgment." See Prosser, Law of Torts 132 (4th ed. 1971).

OLD INFORMATION AS THEME

Before:

In January 1976, Plaintiff went to Dr. Jones for treatment involving the construction and placement of a three-tooth bridge, which Dr. Jones cemented in Plaintiff's mouth on May 12.

An associate of Dr. Jones also performed a root canal on a tooth at the same time. Dr. Jones then referred Plaintiff to Dr. Skillful, who performed an apicoectomy.

Plaintiff returned to Dr. Jones on at least two occasions complaining of discomfort and pain. On these visits Dr. Jones found the bridge to be secure.

In August 1976, Plaintiff also consulted Dr. Drill, who did root canal work on two teeth and placed a five-tooth bridge in Plaintiff's mouth after attempting to re-cement the three-tooth bridge, which he had found to be loose.

After:

In January 1976, Plaintiff went to Dr. Jones for treatment involving the construction and placement of a three-tooth bridge, which Dr. Jones cemented in Plaintiff's mouth on May 12.

During the completion of the bridge, Plaintiff had a root canal on a tooth by an associate of Dr. Jones. In addition, after the placement of the bridge, Plaintiff was referred by Dr. Jones to Dr. Skillful, who performed an apicoectomy.

After these procedures, Plaintiff returned to Dr. Jones on at least two occasions complaining of discomfort and pain. On these visits Dr. Jones found the bridge to be secure.

In August 1976, after the second of these visits, Plaintiff consulted Dr. Drill. He did root canal work on two teeth and placed a five-tooth bridge in Plaintiff's mouth after attempting to re-cement the three-tooth bridge, which he had found to be loose.

USE NATURAL POINTS OF EMPHASIS

Example #1:

Our logic is surrounded by a wall of paradox. Inside this boundary, logic resolves informational conflicts to our satisfaction; outside, it does not, leaving contradictions and absurdities. The difference seems to be between sense and nonsense, between logic and illogic. But perhaps this dichotomy is a bit too stark. Perhaps there exists another category between, on the one hand, those phenomena we happily accept because they can be explained by our logic and, on the other, those we comfortably reject because they are in direct conflict with logic. We would arrive at this remarkable middle category, then, by opening our minds to phenomena logic cannot explain. I will call this nonlogical mental process "faith."

72 Cal. L. Rev. 288, 318 (1984)

Example #2:

Now, while "humble pie" goes back to the French, "take it on the lam" is English in origin. Years ago, in England, "lamming" was a game played with dice and a large tube of ointment. Each player in turn threw dice and then skipped around the room until he hemorrhaged. If a person threw seven or under he would say the word "quintz" and proceed to twirl in a frenzy. If he threw over seven, he was forced to give every player a portion of his feathers and was given a good "lamming." Three "lammings" and a player was "kwirled" or declared a moral bankrupt. Gradually any game with feathers was called "lamming" and feathers became "lams." To "take it on the lam" meant to put on feathers and later, to escape, although the transition is unclear.

Woody Allen
"Slang Origins," in
Without Feathers

* * * * * *

Example #3:

In perpetuating a revolution, there are two requirements: someone or something to revolt against and someone to actually show up and do the revolting. Dress is usually casual and both parties may be flexible about time and place but if either faction fails to attend, the whole enterprise is likely to come off badly. In the Chinese Revolution of 1650 neither party showed up and the deposit on the hall was forfeited.

The people or parties revolted against are called the 'oppressors' and are easily recognized as they seem to be the ones having all the fun. The 'oppressors' generally get to wear suits, own land, and play their radios late at night without being yelled at. Their job is to maintain the 'status quo,' a condition where everything remains the same although they may be willing to paint every two years.

Woody Allen,
'A Brief, Yet Helpful, Guide
to Civil Disobedience,' in
Without Feathers

Example #4:

We must take September 15 as the culminating date. On this day the Luftwaffe, after two heavy attacks on the 14th, made its greatest concentrated effort in a resumed attack on London. It was one of the decisive battles of the war, and, like the Battle of Waterloo, it was on a Sunday. I was at Chequers. I had already on several occasions visited the headquarters of Number 11 Fighter Group in order to witness the conduct of an air battle, when not much happened. However, the weather on this day seemed suitable to the enemy and accordingly I drove over to Uxbridge and arrived at the Group Headquarters.

Winston Churchill,
History of the Second World War

EDITING EXERCISE #1

Assume that this paragraph comes from the middle of a memo sent to clients to discuss developments in takeover defenses. As an editor, your task is not, however, to rewrite it, but to give the author feedback that will enable him or her to return with a much better draft.

In the recent Unocal/Mesa takeover contest, Unocal foreclosed hostile bidders from calling special meetings by allowing only its own directors to call special meetings, prohibited action by shareholders by written consent and classified its board of directors. The board of directors then adopted an amendment to Unocal's by-laws which required notice at least 30 days prior to annual meetings of any shareholder nominations to the board and of any business shareholders proposed to bring before annual meetings. In a letter to shareholders 22 days before the meeting scheduled for April 29, 1985, Unocal announced its interpretation of the by-laws to the effect that if an annual meeting is adjourned it would determine whether a shareholder had satisfied the 30-day notice requirement by reference to the originally scheduled meeting date. The Delaware Court of Chancery rejected Mesa's challenge to the by-law amendments, but did conclude that "Unocal's failure to announce its interpretation of the by-laws until after the 30-day notice period had run was inequitable" and restrained Unocal from proceeding with that interpretation.

SENTENCES


Monday, January 25, 1993 ******
CALVIN AND HOBBES
I LIKE TO YERB WORDS.
WHAT?
I TAKE NOUNS AND ADJECTIVES AND USE THEM AS YERBS. REMEMBER WHEN "ACCESS" WAS A THING? NOW IT'S SOMETHING YOU DO. IT GOT YERBED.
YERBING WEIRDS LANGUAGE.
MAYBE WE CAN EVENTUALLY MAKE LANGUAGE A COMPLETE IMPEDIMENT TO UNDERSTANDING.

IMPLEMENTING PRINCIPLE 3: SENTENCE CHUNKS AND CORES

By the time we leave law school, all of us have heads stocked C overstuffed, perhaps C with advice about writing sentences:

- Prefer short sentences.
- Omit needless words.
- Use strong, active verbs; avoid the passive.
- Don't overuse adjectives and adverbs.
- Prefer simple words to fancy ones.

. . . and so on. Much of this advice is intended to help us fight off bad habits, especially habits fostered by reading long-winded, clumsy prose by other lawyers. But professional writers should aspire to something more than staying out of stylistic trouble C even to something more than simple clarity, as fundamental as that virtue is. They should write sentences that are sophisticated and flexible enough to convey the nuances of their thinking and to keep their readers awake. In other words, their sentences should sing a little

For writers who have assimilated the usual advice and still want to improve their style, the key lies in the second of the principles introduced at the start of the program: Readers absorb information best if they can absorb it in pieces. At the level of the sentence, this principle leads to this advice:

- Break longer sentences into **chunks**.
- Strengthen the words on which readers instinctively focus: the sentence's grammatical **core** (subject, verb and object).
- Organize the chunks to emphasize the most important information.

As the examples on the following pages will show, these principles form the bedrock of a style that is clear, direct, and forceful. They also lead to an even more important end: if intelligently used, they can transform your prose into a supple instrument for capturing and communicating the nuances of your thinking. This happy result comes about because the principles allow you, in a passage composed of many bits of information, to adjust the emphasis you give each bit. You can do this by deciding:

- what information goes into the grammatical core;
- what information goes into its own chunk, and whether that chunk is a big one (for example, an independent clause) or a small one (for example, a phrase);
- which chunks move to the beginning and end of the sentence, the spots of maximum emphasis; and
- whether the rhythm will encourage readers to speed up or slow down.

BREAK A LONGER SENTENCE INTO SHORTER CHUNKS

Before:

This case involves the novel issue of whether or not a minor is responsible for damages sustained by a restaurant in lost profits resulting from a liquor license suspension caused when the minor orally misrepresented her age to the owner of the restaurant who thereafter sold liquor to her.

After:

This case involves a novel issue: when a minor orally misrepresents her age to a restaurant owner who then sells liquor to her, and who as a result has his liquor license suspended, is the minor responsible for the damages sustained by the restaurant in lost profits?

or

In this case, a minor orally misrepresented her age to the owner of a restaurant. He then sold liquor to her, and as a result had his liquor license suspended. The issue raised is novel: is the minor responsible for the damages sustained by the restaurant in lost profits?

* * * * * *

Before:

Compensation for the California damage claimants remains a significant public policy concern counseling application of California law in a California forum.

After:

If California damage claimants are to receive adequate compensation, as public policy dictates they should, California law should be applied in a California forum.

or

Public policy dictates that California damage claimants should receive compensation that is adequate by the standards developed in the state's courts. To achieve this end, California law should be applied in a California forum.

USE THE STRUCTURE OF A SENTENCE TO CLARIFY ITS CONTENT

Before:

The implementation of the proposal would require Widget Corp. to breach existing contracts because it would have to change its source of raw material.

After:

To implement the proposal, Widget Corp. would have to change its source of raw material, and therefore to breach existing contracts.

or

The proposal would force Widget Corp. to change its source of raw material, and thus to breach existing contracts.

or

The proposal would force Widget Corp. to change its source of raw material. This would breach its existing contracts.

* * * * * *

The Hierarchy of "Chunks"

Independent clauses:

Jane is an overworked lawyer, but ….

Dependent clauses:

Although Jane is an overworked lawyer, ….

Prepositional phrases:

As an overworked lawyer, Jane ….

Modifying phrases and words:

Jane, an overworked lawyer, ….

Jane, overworked, ….

* * * * * *

Harrigan was the manager of the marina. She testified that the boat was delivered to the marina on January 7, but she did not see it there again after January 8.

Harrigan, the manager of the marina, testified that she last saw the boat on January 8, the day after it was delivered.

Harrigan was the manager of the marina. She testified that she last saw the boat on January 8, the day after it was delivered.

Harrigan, the manager of the marina, testified that the boat was delivered to the marina on January 7. She last saw it on January 8.

* * * * * *

Although ABC acknowledges that it did not respond to the discovery request, plaintiff also acknowledges that it has no proof that the request was properly delivered to ABC.

Although plaintiff acknowledges that it has no proof that its discovery request was properly delivered to ABC, ABC also acknowledges that it did not respond to the discovery request.

Chunking to add emphasis to the beginning of a dissent

MILLENDER; Brenda Millender; and William Johnson, Plaintiffs–Appellees,

v.

COUNTY OF LOS ANGELES; Robert J. Lawrence (292848); Curt Messerschmidt (283271), Defendants–Appellants,

CALLAHAN, Circuit Judge, with whom TALLMAN, Circuit Judge joins, dissenting:

Although the majority's opinion nicely lays out the law applicable to a determination of qualified immunity, my review of the law and the facts in this case require that I dissent. I address four matters. First, I take issue with the majority's determination that the warrant constitutionally could not provide for the search and seizure of firearms other than the sawed-off shotgun. Second, in reviewing the applicable case law, the majority fails to appreciate the factors courts have used to transform an abstract standard—did the officer reasonably rely on review by counsel and a magistrate—into a workable guide for a line officer. Third, I would find that the totality of the circumstances in this case compels a finding that the line officer reasonably relied on his supervisors, the district attorney, and the magistrate to determine the constitutional limits of the search warrant. Finally, I am concerned that the majority's parsing of the search warrant is likely to encourage uncertainty and needless litigation. I would grant the officer qualified immunity.

I

Our differing views on the warrant's provision for the search and seizure of firearms are revealed by our respective applications of *United States v. Spilotro*, 800 F.2d 959 (9th Cir.1986), which sets forth the framework for determining a warrant's sufficiency. There we held that "[i]n determining whether a description is sufficiently precise," we should concentrate on one or more of the following:

Suggested revision to *Millender* dissent opening:

Although the majority's opinion nicely lays out the law applicable to a determination of qualified immunity, my review of the law and the facts of this case require that I dissent. [Contrary to the majority's conclusion,] Qualified immunity for these arresting officers is here fully justified.

The majority's analysis contains four important missteps, each leading to the next. The result is an unnecessary and uncertain modification to the doctrine of qualified immunity, which will in turn lead to additional claims against the police.

First, despite the warrant's specific reference to a "sawed-off shotgun," this Circuit's caselaw establishes that the warrant could reasonably and constitutionally be interpreted to permit a search for and seizure of firearms other than the one weapon.

Second, both the Supreme Court and this Circuit have identified factors that transform the abstract standard emphasized by the majority – did the officer reasonably rely on review by counsel and a magistrate – into a workable guide that supports, rather than denies, qualified immunity in this case.

Third, based on these factors, the totality of the circumstances in this case – one involving the arrest of an evidently dangerous person – should compel a finding that the line officer reasonably relied on his superiors, the district attorney, and the magistrate to determine the constitutional limits of the search warrant.

Fourth, the majority's unnecessarily precise parsing of the warrant is likely to create uncertainty for the police and, as noted above, needless litigation against them.

BUT WHEN CHUNKING GOES AWRY . . . . .

From a set of CLE materials, with apparently a very non-traditional topic:

Corporate and finance practitioners often encounter puzzled looks when they try to describe what they do to lay persons, including their spouses.

From a state appellate opinion, where courtrooms are more interesting than usual:

Defendant Joe Smith was convicted of driving while intoxicated, contrary to [state statute] and other driving related offenses during a bench trial.

. . . .

During cross-examination of Officer Martinez, defense counsel introduced the video recording of Defendant's performance on the field sobriety tests, and Defendant himself admitted to consuming two beers when he took the stand.

STRENGTHENING THE CORE:
WHERE IS IT?

Before:

The District Court after evidentiary hearings last held in August 1977 found that the Department had failed to follow the procedures laid out in its own regulations.

After:

After evidentiary hearings last held in August 1977, the District Court found that the Department had failed to follow the procedures laid out in its own regulations.

* * * * * *

Before:

Thus, an interpretation that the proof of disability could be given at any time the Insured was still living would require ignoring clear and repeated language establishing a cut-off date for claiming a waiver of premium.

After:

Thus, to find that proof of disability could be given at any time the Insured was still living, this court would have to ignore clear and repeated language establishing a cut-off date for claiming a waiver of premium.

STRENGTHENING THE CORE:
WHAT DOES IT SAY?

Before:

The reason for there having been less utilization by corporations of funded programs than unfunded programs is ….

After:

Corporations used funded programs less often than unfunded programs because ….

* * * * * *

Before:

There is a tendency among novice litigators to use hyperbole in their briefs ….

After:

Novice litigators tend to use hyperbole in their briefs ….

ACTIVE VOICE vs. PASSIVE VOICE
ACTIONS vs. CONCEPTS

Example #1:

The union filed a complaint.

The complaint was filed by the union.

The complaint was filed.

Example #2:

Johnny tried to steal my marbles.

An attempt at stealing my marbles was made by Johnny.

Example #3:

The police investigated the incident.

The police conducted an investigation of the incident.

THE SYNTAX OF ACTION

Put the Main Action Into the Verb

Put the Main Actor Into the Subject

Actor	act	recipient
Man	bites	dog
Subject	verb	object

Before:

The failure of Megacorp to provide Interbank with useful information prevented its determination of the project's status.

After:

Because Megacorp failed to give Interbank useful information, it prevented the bank from determining the project's status.

Allocating the Responsibility

Because Megacorp failed to give Interbank useful information, it prevented the bank from determining the project's status.

or

Because Megacorp failed to give Interbank useful information, Interbank could not determine the project's status.

or

Because Interbank did not receive useful information from Megacorp, Interbank could not determine the project's status.

Hiding the Ball

Example #1:

The document was not produced in April as the result of an oversight by a legal assistant. As soon as we discovered the error, we promptly notified the plaintiff and produced the document.

* * * * * *

Example #2:

Of the four claims that went to the jury, the jury found in Wildenstein's favor on three: fraud and breach of express and implied warranties of title. The only claim on which a verdict was returned in Van Rijn's favor was breach of the implied warranty of merchantability.

Choosing the Actor

Example #1:

Before:

The primary motivation for United States depositors to place their funds with a branch outside the United States is to receive a higher rate of return.

After:

United States depositors place their funds with a branch outside the United States primarily because they receive a higher rate of return.

or

A branch outside the United States attracts funds from United States depositors primarily because it pays a higher rate of return.

* * * * * *

Example #2:

Version 1:

The use of § 502(d) against Merrill Lynch at the filing of the Objection would operate to severely penalize Merrill Lynch since it Claim is so great. Such a use would arbitrarily treat Merrill Lynch differently from other creditors of the Debtor, contrary to the intent of § 502(d), which is to assure an equality of distribution of the assets of the bankruptcy estate. Davis, 889 F.2d at 662.

Version 2:

Because Merrill Lynch's claim is so great, it would be severely penalized by the use of § 502(d) against it at the filing of the Objection. If this were to occur, Merrill Lynch would arbitrarily be singled out for different treatment than other creditors. Such a result would be contrary to the intent of § 502(d), which is to assure [an equality of distribution of the assets of the bankruptcy estate.] Davis, 889 F.2d at 662.

Version 3:

Section 502(d) is intended to assure an [equality of distribution of the assets of the bankruptcy estate]. Davis, 889 F.2d at 662. If § 502(d) were used against Merrill Lynch at the filing of the Objection, however, the result would be to penalize Merrill Lynch because of the size of its claim -- and thus to single it out for different treatment than other creditors. Section 502(d) is intended to prevent, not to promote, such unequal treatment.

Making a Concept an Actor

Equity came to the relief of the stockholder, who had no standing to bring civil action at law against faithless directors and managers. Equity, however, allowed him to step into the corporation's shoes and to seek in its right the restitution he could not demand in his own. It required him first to demand that the corporation vindicate its own rights, but when, as was usual, those who perpetrated the wrongs also were able to obstruct any remedy, equity would hear and adjudge the corporation's cause through its stockholder …….

Justice Jackson

BE CONCISE

Before:

Furthermore, 10b-7 prohibits anyone from stabilizing a security at a price higher than the current independent bid price for such security. It has never been litigated whether the current independent bid price is the price at the time of the writing of the option or at the time of the exercise of the option. A Rule 10b-7 defense would succeed only if the court interpreted the current independent bid price to be the price at the time of the writing of the option.

After:

Furthermore, 10b-7 prohibits anyone from stabilizing a security at a price higher than the current independent bid price. However, no court has yet determined whether this price is the price at the time of the option's writing or at the time of its exercise. A Rule 10b-7 defense would succeed only if the court chose the first interpretation.

EDITING EXERCISE #2

1. The failure of plaintiff to produce the relevant documents on time delayed defendant's realization of the importance of the issue until deposition scheduling was complete.

2. A creditor is required under California's one-action rule to foreclose upon collateral before proceeding against the debtor's unsecured assets when a debtor's obligation is secured by real property.

3. Does the Board of Directors of a public corporation registered in New York have the authority to rescind the sale of substantially all the assets of the corporation after the sale has been consummated pursuant to authorization by the shareholders of the selling corporation without their authorization of the recission?

4. Before the hearing for summary judgment, plaintiff's counsel stipulated that he had not served a notice of intent to file litigation against defendants. The trial court heard argument on May 9, 1989, and entered final summary judgment in favor of defendants which in essence was based on the applicability of Section 768.57 and plaintiff's failure to comply with the pre-filing notice requirements of the section.

Part III: Writing "Style"

STYLE: GRACE AND ENERGY THROUGH RHYTHM AND CHARACTER

So far, this program has focused on qualities of writing that should be much the same for all legal writers. But writing is unavoidably individual. Although we may want to believe that our prose is a cloak behind which we can hide, it inevitably reveals something about our attitudes and character. As a result, all writers should pay attention to what the classical rhetoricians called *ethos*: the image of a character, the persona that your writing conveys, whether you want it to or not.

RHYTHM

Example #1:

We must take September 15 as the culminating date. On this day the Luftwaffe, after two heavy attacks on the 14th, made its greatest concentrated effort in a resumed attack on London. It was one of the decisive battles of the war, and, like the Battle of Waterloo, it was on a Sunday. I was at Chequers. I had already on several occasions visited the headquarters of Number 11 Fighter Group in order to witness the conduct of an air battle, when not much happened. However, the weather on this day seemed suitable to the enemy and accordingly I drove over to Uxbridge and arrived at the Group Headquarters.

Winston Churchill

* * * * * *

Example #2:

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues.

Justice Cardozo

* * * * * *

Example #3:

Before:

The conflict, moreover, involves an important question of law on which a uniform nationwide rule is essential. For example, it would be intolerable for the minimum wage provisions to have different applications in different regions of the country. In the same way, it would also be intolerable for there to exist in some states but not others a judge-made exception to the priority of a secured creditor's perfected lien under the UCC. The continuing inconsistency on these matters could have serious economic consequences because creditors would be reluctant to finance businesses in regions where their liens may not enjoy true priority.

After:

Moreover, the conflict involves an important question of law on which a uniform nationwide rule is essential. It would be intolerable, for example, for the minimum wage provisions to be applied differently in different regions of the country. Similarly, it would be intolerable for courts in some states, but not in others, to grant exceptions to the priority of a secured creditor's perfected lien under the UCC. The inconsistency would do more than inconvenience specific creditors. In a regions where creditors are reluctant to finance businesses because their liens may not enjoy true priority, [the region's economic could suffer serious economic consequences].

CHARACTER: FORMALITY

Example #1A:

This case comes before the Court on the third intermediate accounting of the trust under the will of Jane F. Smith. On a prior accounting, the West Carolina Supreme Court held that a provision in a will leaving property to "issue" of another is presumed not to include the adopted child of the daughter of the testatrix. We are now asked to reconsider the question based on subsequent changes in the decisional law of this State. The case raises a substantial, if not altogether novel, question of the duty of a court to enforce a prior holding, the legal reasoning of which has been undermined by later rulings.

Example #1B:

In this malpractice lawsuit the issue on appeal is whether the trial judge properly granted the defendant's motion for summary judgment. The defendants filed a motion to dismiss because the complaint failed to state a claim on which relief could be granted. The defendants then filed four affidavits to support their motion and moved the court to treat the motion as one for summary judgment against them.

* * * * * *

Example #2:

1. Prior to plaintiff's purchase of the automobile, defendant's salesman provided him with information about its previous owner that subsequently proved to be false.

2. Before the plaintiff purchased the automobile, the defendant's salesman provided him with information about its previous owner that later proved to be false.

3. Before the plaintiff bought the car, the defendant's salesman gave him information about its previous owner that turned out to be false.

4. The sucker got stuck with the lemon because the salesman fed him some @#$!* about the guy who got rid of it.

* * * * * *

CHARACTER: DISTANCE

Before:

Dear Mr. Richards:

In reference to your case, please be advised that defendant has agreed to a settlement, the preliminary terms of which are set forth in the document enclosed herein. Prior to the completion of the remaining details of the agreement, this office must be in receipt of the following documentation:

1. A written estimate from Dr. Jones for the completion of therapy in regard to plaintiff's leg injury.

2. ….

After:

Dear Mr. Richards:

As we discussed yesterday, Trust Us Auto Sales has agreed to settle your suit against it. The terms are set forth in the enclosed document, which you should review carefully. I believe the terms are favorable, but I urge you to think them through carefully and to phone me if you have questions.

In order to complete the details of the agreement, I will need the following documents by next Thursday:

1. A written estimate from Dr. Jones for the completion of therapy for your injured leg.

2. ….

EDITING EXERCISE

SENTENCES -- REVISIONS

1. Because plaintiff failed to produce the relevant documents on time, it prevented the defendant from realizing the issue's importance until all depositions had been scheduled.

   Because plaintiff failed to produce the relevant documents on time, defendant did not realize the issue's importance until all depositions had been scheduled.

   Defendant did not realize . . . because plaintiff failed to . . . .

   Plaintiff masked the issue’s importance by failing to produce the relevant documents on time.

   Because the relevant documents were not produced on time, the issue's importance was obscured until all depositions had been scheduled.

2. Under California's one-action rule, when a debtor's obligation is secured by real property, the creditor must foreclose upon that collateral before proceeding against the debtor's unsecured assets.

   When a debtor's obligation is secured by real property, California's one-action rule requires the creditor to foreclose upon that collateral before proceeding against the debtor's unsecured assets.

   California's one-action rule requires the creditor to foreclose upon real-property collateral before proceeding against the debtor's unsecured assets.

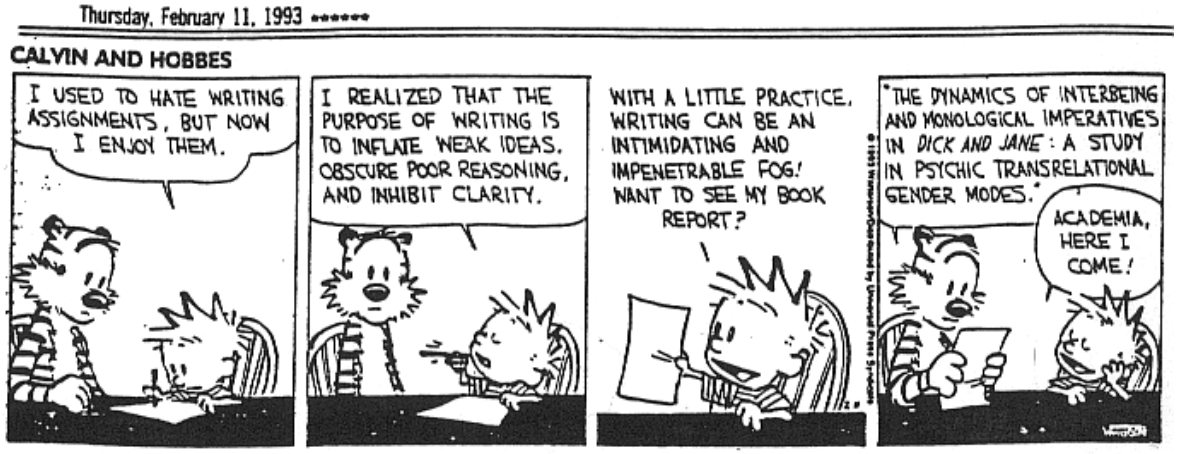
3. When the shareholders of a New York public corporation have authorized the Board of Directors to sell substantially all of the corporation's assets, and the sale has been consummated, may the board rescind the sale without authorization from the shareholders?

   After the shareholders of a New York public corporation have authorized the Board of Directors to sell substantially all of the corporation's assets, and the sale has been consummated, must the shareholders also authorize a rescission of the sale?

   After the sale of substantially all of a New York corporation's assets—a sale authorized by the shareholders—may the Board of Directors nevertheless rescind the sale without authorization from the shareholders?

4. Before the hearing for summary judgment, plaintiff's counsel stipulated that he had not served a notice of intent to file litigation against defendants. After hearing argument on May 9, 1989, the trial court entered final summary judgment. [In essence,] it held that Section 768.57 applied, and that plaintiff failed to comply with the section's notice requirements.

"Hereinafter" **is where judges go when they die.**



Organizing Clear Opinions:

Beyond Logic to Coherence and Character

By Timothy P. Terrell

I start from a premise with which I believe all judges (trial and appellate) would agree: that opinions—whatever else they might seek to accomplish—should at least strive to be "clear." But this merely initiates the debate: Clear about what'? The result? The reasoning? In other words, clear meaning "certain;" or clear meaning "credible"? And clear to whom? The litigants? The lawyers? Appellate courts? Posterity? Whatever your approach to these jurisprudential questions, the questions themselves demonstrate that clarity *in judging* is a serious enough challenge. But the situation is worse. Clarity *in writing about that judging* will be even more daunting.[1]

Unfortunately, judges consistently underestimate the difficulties they face in drafting their opinions. Clarity is often assumed to be a function of carefully chosen words and phrases, or a carefully chosen path of thought. These features, however, while certainly important, are only a small part of a much larger picture. To be understood properly, judicial clarity must be put into a context that contains (among others) two key dimensions that are regularly overlooked or underestimated because both come into play at a point when most writers do not even recognize that writing choices are being made. That point is the very beginning of the opinion, when the writer establishes, often unconsciously, the opinion's structure and its professional attitude.

Examining an opinion's organization reveals that clarity is not simply a function of logic, but requires attention to the separate psychological phenomenon of coherence. Any writer, including any judge, must understand that a document is not written for the writer. It is written for readers of various sorts. Hence, clarity is assessed not simply by the internal standards of the law, but by the perspectives brought to the

Illustration by Tim Lee

Many writers mistakenly assume that organization is synonymous simply with logic.

document by its human processors. This dimension will be developed further below.

The structure of an opinion is also relevant to the even more subtle dimension of professional attitude. No opinion ever seeks only to be clear. Examining its organization also therefore reveals implicit, but nevertheless very important, information about something much deeper: the writer's sense of the appropriate role of judges within both our system of law and our society more generally. This observation, however, may seem not only grandiose but too abstract to be meaningful. Yet a recent debate demonstrates its pertinence very nicely. In a recent volume of the *University of Chicago Law Review*, Judges Richard Posner[2] and Patricia Wald[3] engaged in a sharp exchange on the elements of judicial opinion writing. What began ostensibly as comments on drafting techniques and writing style quickly became a more fundamental debate about appropriate forms of judicial reasoning, the nature of the judicial role, and even the nature of law itself. While this article will not try to match the scope of their conversation, its second part will use their dialogue to link the uncontroversial idea of an opinion's clarity to the quite controversial and illusive stylistic dimension of the opinion's "character."

Author's Note: *I must emphasize that although this article is largely my own, it is not completely so. My co-author on the text noted in the first endnote, Stephen V. Armstrong, who has also co-authored other articles on legal writing with me, played an instrumental role in getting this particular effort off the ground. I would also like to thank Judge Ann Young for her thoughtful comments on earlier drafts. Neither can be blamed, however, for any defects the article will inevitably contain.*

Organizational Coherence

The problems that most often afflict judicial opinions are not the usual targets: verbosity, jargon, convoluted syntax. They are instead organizational problems of the special kind noted above, when choices are made unconsciously. The problems result from a dilemma that confronts all writers who set out to explain how they reached a reasoned conclusion.

Beyond Logic. In an analytical document, writers and readers share an implicit assumption: Although our minds might not be capacious and disciplined enough to "see" all of the analysis at one time, to look down on it as if we were seeing the grid of Manhattan laid out beneath us from the observation deck of the Empire State Building, nevertheless the logic in the document in fact exists "whole," like a geometric proof. This is not a proposition about the nature of logic, however, a morass into which I do not propose to venture. It is a statement about analytic writing generally, about the expectations that join writer and reader as they come together in a document that purports to capture a process of reasoning. A judicial opinion differs from a personal essay or a memoir because we expect that, if we wanted to, we could look back from the conclusion, draw the propositions that led to it into a visible structure, and test the solidity of this edifice.

But reading is temporal, not spatial. We are led to and through the edifice step by step. Sometimes, in fact, we are required to travel extensively through the grounds before we are even given a glimpse of the front door. And writers have choices about the paths they ask us to take, and about how much of a tour guide to be. Do they let the edifice unfold gradually so that we come to appreciate the elegance of its design like worshipful supplicants? Or do they give us a map at the start, like a fellow traveler, making it easier for us to find our way—although by doing so, rule out some of the pleasures (or pains) of the unexpected along the way?

Many writers mistakenly assume that organization is synonymous simply with logic: a clear organization results from logical thinking, a confusing one from murky thinking. But getting ideas in the correct order is only a necessary condition for a clear organization, not a sufficient one. Clarity also depends upon *coherent* organization, which comes instead from strategies that are founded on cognitive psychology.

The Psychology of Coherent Organization: Labels, Structure, and Purpose. Logic, Aristotle would insist, is a neutral, objective quality, an external standard that can be applied consistently to any and every argument, like mathematical theorems to a bridge design. It focuses entirely on the argument, not the arguers. Coherence, on the other hand, involves an inquiry into the arguers - the human *processors* of the syllogisms. The steps of the proof may be there, but do the readers see

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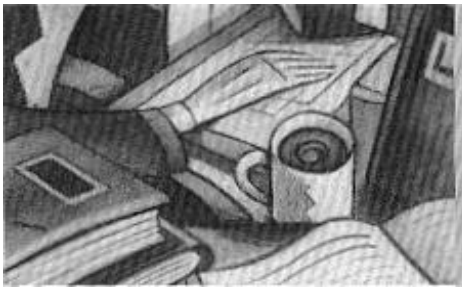


Choices about styles of writing actually reflect fundamental choices about styles of judging.

and appreciate them? And *when* do the readers see them? Immediately, or after they have reread the opinion half a dozen times? Cognitive psychology —the study of how the human mind processes information—teaches some straightforward lessons about the coherence of documents at the organizational level. To summarize those points very briefly[4], coherence is a function of three primary factors: labeling, structure, and purpose (or "point"). Each focuses—ever more acutely—the mind of *both* the reader and the writer. The reader is able to receive and process data more efficiently, and the writer wastes less and less effort in producing the desired message. Rather than overwhelm the reader with details and data, cognitive psychology tells us that difficult information can only be absorbed usefully if these three contextual factors are satisfied first.

Labeling simply tells the reader the general informational context of the document—for a judicial opinion, the areas or issues of law at stake. To return to our earlier metaphor, the reader now has some understanding of the edifice he or she will be viewing—bungalow, mansion, monument, and so on. This allows the reader to disengage those parts of his or her legal memory that are irrelevant, and fully engage those parts that are. The reader's mind is now not simply a passive recipient of information—and therefore easily distracted and impatient—but instead a more focused and active participant in a dialogue with the writer.

Structure engages the reader's mind even further by announcing the analytical steps he or she can anticipate. Now the reader knows not only what kind of edifice he or she will see, but the steps along the tour as well. If that journey is basically familiar, the reader is also more comfortable with, and confident in, the writer's ability to conclude the tour satisfactorily. If the journey is unfamiliar or controversial, at least the reader is better prepared to deal with the rigors of the trek across difficult terrain.

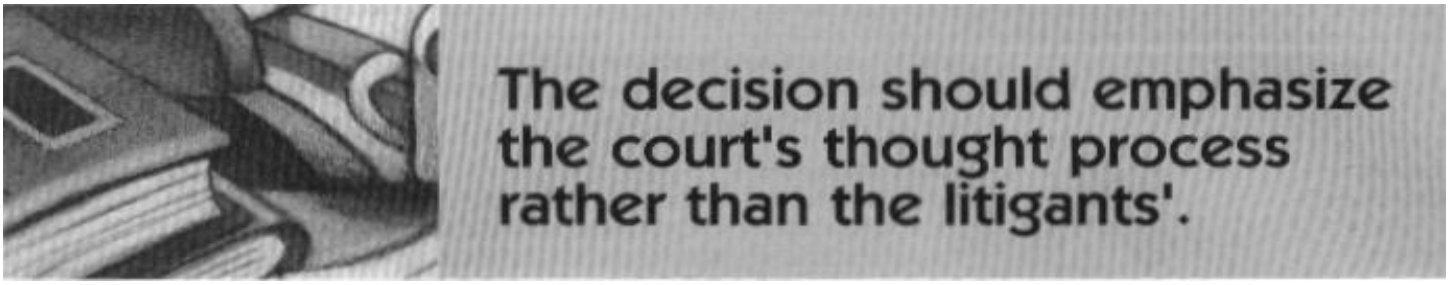
Purpose, or "point," focuses the reader's mind acutely. Now the reason for the journey—why we are where we are, and why the rest of the journey will be worthwhile—becomes evident. Now the reader has an identifiable, substantive job to do with the information the writer provides, and the reader's sense of connection with the writer and the project are more complete. This purpose of the reading endeavor can be presented either in the form of a question that the opinion will answer, or the answer itself that the opinion will defend.

Although this short article is certainly not the appropriate place to explore each of these factors in detail and demonstrate fully their relevance to improved introductions to judicial opinions, we can nevertheless illustrate the impact of these factors in a few examples. Each of the organizational openings below display all of the factors of coherence to one degree or another, and that variation itself emphasizes that there is no single, correct method of combining and reflecting these factors. Nevertheless, by stressing coherence, each presents the image of a confident judicial writer:

> Appellant, an injured worker, sued in district court to enforce a settlement of a claim before the Industrial Accident Board (IAB), and a judgment based on that settlement. The court dismissed the case because jurisdiction remained with the IAB. We reverse, finding the court has jurisdiction because the case before it was not an extension of the original claim, but instead arose from the wrongful refusal to fulfill a contract.
>
> * * *
>
> Torrance attempts to suppress evidence seized from a drawer in his bedroom by the state troopers who searched his parents' home, where he lived. They conducted the search after Torrance's father had signed a form permitting them "to search my home . . . in an attempt to locate my son . . . and to seize and take any letter, papers, materials or other property that they may require for use in their investigation:' The troopers did not clearly explain the form to the father, however, and stated explicitly that they were searching only for Torrance himself. The evidence they seized is therefore inadmissible.
>
> * * *
>
> This action arose from defendants' cancellation of plaintiffs' medical insurance. Plaintiffs sued in Euphoria Superior Court, alleging breach of contract, bad faith, unfair insurance practices, unfair trade practices, and intentional infliction of emotional distress. The case was removed by defendants to this court on the grounds of diversity. Defendants now move for summary judgment, arguing that all the claims relate to an employee benefit plan covered by ERISA, and thus that these state claims are preempted by Section 514 of ERISA. Plaintiffs contend that their insurance coverage was not an ERISA plan. Even if it were such a plan, they also contend, ERISA does not preempt their claims under the Euphoria Unfair Trade Practices Act and the Euphoria Unfair Insurance Practices Act.

Organizational Character

Clarity through coherence, however, is not the only organizational choice a judge faces. Even a writer who aspires to be only objective and impersonal has to recognize, and face up to, some trickier organizational choices—choices at the heart of the debate between Judges Posner and



Wald. Here the idea of "style" comes into play, but, as noted at the beginning of this article, not in a superficial sense. Instead, choices about styles of writing actually reflect fundamental choices about styles of judging,[5] choices that will not only shade or color an opinion, but perhaps overwhelm the reasoning it offers.

The complex concept of writing style can be defined adequately for present purposes, much as Judge Posner does, as the equivalent of the "voice" or "persona" of the writer.[6] More accurately, perhaps, style can be understood as the writer's projection to the reader of the writer's image of his or her professional *character*.[7] In this rhetorical sense, style has to do with the relationship of writer to reader, a relationship that can be, for example, authoritarian or collegial or deferential. Correspondingly, the organizational tone of an opinion can be one that depends for its legitimacy on autocratic claims to professional authority, or, less arrogantly, on invocations of reasoned discourse, or, even more familiarly, on appeals to simple humanity or fundamental values. As Judge Posner notes, however, these choices are not literary flourishes—they can in fact facilitate or retard the search for meaning in a judicial opinion.[8]

The two subsections that follow seek to put some flesh on this abstract debate. First, I will describe a few practical examples of opinion organization or organizational elements that reflect the writer's subtle messages or assumptions about appropriate judicial roles. Second, Judge Posner's analysis of style—particularly of Judge Wald's style—will be brought more directly into focus to allow his views on writing to provide possible information about *his* character.

Examples of Character in Organization. For judges, all writing choices are heavily freighted. Unlike an essayist, every choice by a judge is more than personal. It implicitly defines the writer's understanding of the judicial function. But it is also therefore always personal as well. Different judges will come to different conclusions about the nature of judicial decision making and about the appropriate judicial persona, and these conclusions should be reflected in how they write their opinions. These writing choices can also be variable rather than fixed. The choice the judge makes in these difficult areas may change depending on the case, for the style of reasoning and character that suits one case may not suit another.

The choices in opinion organization that seem most often to be handled unreflectively in the sense meant here are the three developed below—again, very briefly for the sake of the context of this article. Each is difficult to spot because each structure *can* produce an opinion that is logical, as opposed to chaotic, and basically clear to the reader, as opposed to nonsensical or impenetrable. But the opinion's logic and clarity will often be unnecessarily burdened and labored, and ultimately unsatisfactory, because these organizational choices are not fully under the writer's control.

Results: Finding versus reporting. Implicit in each of the examples presented in the previous section is the judicial writer's belief that the job of the judge is not to demonstrate personal professional angst in the form of a search through the law for an answer. Instead, the writer apparently believes that the opinion is a place to report a result and then *defend* it. That defense should of course be thorough, but note that its length and breadth will not be dictated by the actual series of steps—and missteps—the judge took to reach the analytical end. The presentation of reasoning will instead be a function of 20/20 *hindsight*, which reveals the steps *necessary* to the conclusion. The opinion in this latter form is usually much less chatty in tone, and perhaps even a bit austere, for the writer imagines himself or herself delivering information efficiently rather than discursively. The author's own struggle with the material is therefore far less relevant, while delivering the substantive "bottom line" seems much more appropriate for the early paragraphs of the opinion.

Foundations: Regurgitating versus sifting. A similar implicit choice will be made by every judge after whatever opening is presented. Opinions are always based on the application of law to facts, but now the questions become how many facts and how much law must be included in the decision. If the judge pays little attention to this important choice, the opinion is usually encumbered with loads of detail—every fact presented seems to find its way into the court's description of the background of the legal dispute, and every element of law that arose during argument or research is faithfully recited. Although the urge behind overinclusion is the defendable one of thoroughness, a truly controlled presentation is also *focused*. That impression requires a writer to sift the material of the document rather than simply reproduce all of it and then try to make sense of it all.

Reasoning: Reacting versus dominating. Again, closely related to the first two structural choices is a third into which judges will often lapse unconsciously. A quick, and therefore seductively attractive, way to organize any opinion is to let the *parties* supply its pieces and order. The judge, in

The writing style of the opinion matters quite directly to the adequacy of the enterprise.

other words, can simply react to the arguments presented rather than determine independently whether that structure makes the best sense in the larger scheme of things. Reasoning by reacting *could* be effective in certain circumstances, but more often it is a sign of judicial despair or fatigue. Some judges seem to believe that this form of organization is the only method for the court to demonstrate appropriate respect for the arguments of the litigants, carefully responding in turn to each side's points. But respect of this sort does not require the judge to concede the structure of his or her opinion to the parties. Respect is owed not just to the parties, but to the court as well. For a judge to demonstrate appropriate professional control of any case, the decision should emphasize the *court's* thought process rather than the litigants'. That thought process can indeed ultimately contain a response to each point raised by each party, if necessary, but the order and method of response should clearly be under the judge's control.

Each of the organizational non-strategies discussed above has an unfortunate implication for any opinion writer. At its core, unreflective structure suggests that the judge is a *victim* of the litigation process, suffering along with everyone else in the struggle to resolve the dispute. Although this egalitarian picture may often be accurate, and indeed to some judges attractive, I would argue to the contrary that the judge's more appropriate role is to *dominate* the opinion just the way any good trial judge dominates his or her courtroom. By this I do not mean aggressive authoritarianism—instead, the rule of law depends on respect for the law, which in turn necessarily entails respect for the work of judges. The kind of coherence in organization for which I have been arguing here generates, I believe, the kind of respect the law deserves.

Posner and Wald: Stance and Substance. When style *does* become conscious in judicial opinions, important issues concerning the judicial function rise to the surface, and occasionally provoke disagreements like the exchange between Judges Posner and Wald noted earlier. Their articles did not start out as a debate, however. They were each contributing to a small symposium on the general topic of opinion writing, with Judge Wald commenting primarily on the mechanics of producing opinions in a complex environment, and Judge Posner choosing instead to use the opportunity to delve more deeply into assessing the *worth* of various forms of judicial writing to the law itself. At the end of his analysis, however, Judge Posner used an opinion by Judge Wald[9] to illustrate what he believed to be an inadequate technique of judging, a technique that was not up to the analytical standards he believed our system of law deserved. Judge Wald reacted predictably to this rather harsh assessment—indeed, something of an ambush—by a fellow member of the bench, adding a somewhat heated reply to the symposium.

The essence of Judge Posner's criticism of opinions like the one of Judge Wald he chose to analyze is, first and foremost, that the writing style of the opinion matters quite directly to the adequacy of the enterprise. The "stance" of the judge, if you will, in terms of his or her implicit voice or character, necessarily impacts the *substance* of the decision, or the content of the judge's work that supports whatever stance is chosen. Judge Posner identified two fundamental analytical styles as characterizing the bulk of judicial opinions: what he termed "pure" and "impure" approaches.[10] By "pure" he meant traditional, doctrinal, generally unimaginative decisions that depended basically on the supposed neutrality and objectivity of the law for their legitimacy. Such opinions were often characterized, interestingly enough, by statements of the judge's conclusion at the beginning of the opinion rather than the end, an element of style that I earlier praised as promoting coherence and reflecting confidence. "Impure" decisions, in contrast, were more openly communicative about the writer's struggles through the relevant legal material, and much more willing to view theoretical perspectives on the law as part of that material.

Judge Posner strongly preferred the latter, more discursive and dramatic style, linking it to the deeper jurisprudential category of "pragmatism."[11] Impure judicial thinkers, he argued, were much more likely to pay serious attention to the consequences of their decisions in society. Pure thinkers, on the other hand, were probably jurisprudential "formalists,"[12] and thus given to logical, canonical, detached attitudes.

His criticism of Judge Wald's opinion, then, was that it was unnecessarily "pure" by being mired in the details of the holdings of prior cases. The reasoning should instead have searched more openly for the broader legal and social contexts that the issue implicated. Much of the precedent that occupied Judge Wald could then have been ignored as beside the real "point" of the case. Perhaps harshest of all, Judge Posner contended that approaches like Judge Wald's used words not to enable thought, but to substitute for it:[13]

I find both Posner's and Wald's perspectives on judging too extreme in their stated positions.

The pure style is an anodyne for thought. The impure style forces—well, invites—the writer to dig below the verbal surface to the doctrines that he is interpreting and applying. What he may find is merely his own emotions. . . . But if the judge is lucky, he may find, when he digs beneath the verbal surface of legal doctrine, the deep springs of the law.[14]

Judge Wald's response to Judge Posner's "impure pragmatism" was blunt, emphasizing the danger and arrogance implicit in his review of the work of other judges:

Judge Posner is criticizing a style of judging, not a style of writing, as if, in every opinion, every principle of law or interpretation were up for grabs, a happy hunting ground for the creative judge-explorer. He finds the simple marshaling of facts and their placement in a line of precedent unworthy of the talents of the truly intellectual judge. The incremental growth of the law through such opinions is apparently for lesser judges.[15]

Consistent with this harsh assessment of Posnerian ambition, Judge Wald identified the much more humble values of credibility and consistency as the foundation for the legitimacy of judging within the legal system.[16] Likewise, her sense of audience was quite different from Posner's. Rather than worry about academic perspectives, she would focus on "the litigants and lawyers . . . who look to . . . opinions for the law they must follow."[17] With them in mind, she rejected Judge Posner's discursive writing style that develops toward a conclusion rather than announcing it:

[O]pinions are more user-friendly if they state the outcome right off. They are not just "storytelling" exercises seeking to create dramatic tension. Real lives and fortunes are at stake.[18]

For Judge Wald, then, the relationship of stance and substance is apparently more arm's-length than it is for Judge Posner. While he would see a merging of the two in the best opinions, she would insist on more self--conscious separation of these elements, with the latter dominating the former.

The outcome of this debate, however, for present purposes can only be a stalemate. Both of these judicial perspectives can, in the hands of judges as capable as these two, yield decisions that are reached with "integrity," to borrow a description urged by the legal theorist Ronald Dworkin.[19] The point of this summary of the Posner-Wald debate is not to resolve it, but to return us to the opening theme of this article: demonstrating just how controversial and challenging the seemingly straightforward expectation of "clarity" in judicial opinions can actually be. Invoking the topic of "writing style" is now anything but superficial. Within it lurks fundamental substantive legal disagreement. For Judge Posner, the goal of the best judges is apparently to be "clearly deep" in every opinion, pushing legal analysis to its institutional limits. Judge Wald, on the other hand, would strive for "clear practical guidance" in her work, emphasizing the human rather than theoretical elements within the law. Neither is wrong.

But neither is necessarily right as well. I find both these perspectives on judging too extreme in their stated forms. Judge Posner's urge to be discursive in searching for the underground currents of the law strikes me as an approach that runs the danger of becoming self-indulgent unless it is carefully controlled. Judge Posner is not merely suggesting that judges show "their minds at work" on the page; instead, he seems to be endorsing a style that unabashedly proclaims "this is *my* mind at work."[20] It is a writing strategy that can slip easily and unconsciously into a professional egotism that would not, I believe, be consistent with our usual understanding of the rule of law.

Yet if this kind of style might lack a sense of judicial humility, the approach defended by Judge Wald seems to overlook the inevitable relevance of judicial character to a judge's opinion—not just to its substance, but also to the respect it will be given by others.[21] To be more oriented toward the practical "bottom line," rather than more forthrightly concerned with broader legal policy, is a judicial choice in each case, and indeed regarding each *part* of a case. And it is a choice not between two extremes, but among a range of possibilities framed by these extremes. The point here, again, is not that one model or the other is clearly and usually right or wrong, but that the character of the decision is a choice that must be confronted directly, not by default.

Conclusion

In the context of judicial opinions, clarity and style are not separate topics. Nor are they necessarily antagonists. At the "macro" level of documents, when basic organizational choices are being made, the two should actually serve and enhance each other. Coherent and confident writing helps make a legal analysis and its result seem inevitable,[22] rather than forced or strained. That sense of irresistibility serves our legal system well, even when the law is not as certain as we might like it to be.

Notes

[1] Much of the background and perspective on legal writing that is contained in this article can be found in S. ARMSTRONG & T. TERRELL, THINKING LIKE A WRITER: A LAWYER'S GUIDE TO WRITING AND EDITING (1992).

[2] R. Posner, *Judges' Writing Styles (And Do They Matter)?* 62 U. CHI. L. REV. 1421 (1995) [hereinafter *Writing Styles*].

[3] P. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371 (1995) [hereinafter *Rhetoric of Results*]; P. Wald, *A Reply to Judge Posner*, 62 U. CHI. L. REV. 1451 (1995) [hereinafter *Reply*].

[4] As noted earlier, a more complete discussion of these opinions is contained in THINKING LIKE A WRITER, *supra note* 1, at 3-1 to 3-28 & 10-14 to 10-22.

[5] See text accompanying note 14, *infra*.

[6] *Writing Styles*, *supra* note 2, at 1425.

[7] *See* THINKING LIKE A WRITER, *supra* note 1, at 8-5 through 8-10.

[8] *Writing Styles*, *supra* note 2, at 1424 & 1442.

[9] United States v. Morris, 977 F.2d 617 (D.C. Cir. 1992).

[10] *Writing Styles*, *supra* note 2, at 1426–32.

[11] *Id*. at 1432.

[12] *Id*.

[13] *Id*. at 1447.

[14] *Id*.

[15] *Reply*, *supra* note 3, at 1452–53.

[16] *Rhetoric of Results*, *supra* note 3, at 1373.

[17] *Reply*, *supra* note 3, at 1453.

[18] *Id*.

[19] R. DWORKIN, LAW'S EMPIRE 223–75 (1986).

[20] I do not mean to suggest that Judge Posner is endorsing a personal, cathartic style of presentation. He specifically notes the dangers and illegitimacy of such an approach to judging. *See Writing Styles*, *supra* note 2, at 1435. But one need not be emotional to be self-indulgent. One can certainly be carefully analytic and nevertheless revel in one's own acuteness.

[21] In her lead article for the symposium, Judge Wald has a full section devoted to "Style and Personality," but even this section does not delve into the issue of judicial character in the form developed here. *Rhetoric of Results*, *supra* note 3, at 1415–18.

[22] *Writing Styles*, *supra* note 2, at 1430.

EDITING EXERCISE #1—REVISION

Version A: In the recent Unocal/Mesa takeover contest, while the Delaware Court of Chancery reaffirmed a board of directors' authority to restrict access to the agenda of annual meetings, it held that a board may not do so unreasonably or inequitably.

Version B: In the recent Unocal/Mesa takeover contest, the Delaware Court of Chancery reaffirmed a board of directors' authority to restrict access to the agenda of annual meetings. [For the first time,] however, it held that a board may not do so unreasonably or inequitably.

Version C: In the recent Unocal/Mesa takeover contest, the Delaware Court of Chancery further defined the limits of a board's authority to restrict access to the agenda of annual meetings. Although it supported the board's right to require advance notice of an addition to the agenda, it rejected as inequitable the board's attempt to impose retroactively an interpretation of that requirement that blocked any additions to the agenda of an adjourned meeting.

During the contest, Unocal's board of directors adopted a series of four defensive measures, [only the last of which Mesa challenged in court]. In the first three, unchallenged steps, the board foreclosed hostile bidders from calling special meetings by allowing only Unocal's own directors to call them, prohibited action by shareholders by written consent, and classified the board. The board then took another [, more aggressive] step: it amended Unocal's by-laws to limit access to the agenda of an annual meeting by requiring that a shareholder give notice at least 30 days before the meeting of any proposal to nominate a candidate for the board or to raise any other business. This requirement became even more onerous later during the takeover contest, when Unocal's board announced a stringent interpretation of the amendment: If an annual meeting was adjourned, Unocal would determine whether a shareholder had satisfied the 30-day notice requirement by reference to the original meeting date, not the new date. This interpretation was announced in a letter mailed to shareholders 22 days before a scheduled meeting, thus preventing any change to the agenda no matter when the meeting was held.

Although the Court of Chancery upheld each of the defensive measures, including the notice requirement, it rejected Unocal's attempted use of it to control the agenda of the adjourned meeting: "Unocal's failure to announce its interpretation of the by-laws until after the 30-day notice period had run was inequitable."