

2015

Writing Reasoned Decisions and Opinions: A Guide for Novice, Experienced, and Foreign Judges

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Recommended Citation

S. I. Strong, *Writing Reasoned Decisions and Opinions: A Guide for Novice, Experienced, and Foreign Judges*, 2015 J. Disp. Resol. (2015)

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Writing Reasoned Decisions and Opinions: A Guide for Novice, Experienced, and Foreign Judges

S.I. STRONG*

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I. INTRODUCTION

Producing well-written reasoned judgments (a term that is used herein to denote both trial court decisions and appellate opinions) is the goal of all members of the bench.¹ Badly written rulings can have significant legal consequences for

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1. Technically, the term “judgment” refers to “the official pronouncement of the court” and “is distinguishable from a decision/opinion because it does not state the reasons for the decision.” J.J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK 40 (5th ed., 2007); *see also id.* at 69-71 (showing forms for judgments). The term “decision” typically refers to a writing produced by a trial judge, whereas the term “opinion” is used to describe the writing produced by an appellate judge. *See id.* at

both the parties, who may incur costs as a result of a need to appeal a poorly worded decision or opinion, and society as a whole, since a poorly drafted precedent may drive the law in an unanticipated and unfortunate direction or lead to increased litigation as individuals attempt to define the parameters of an ambiguous new ruling. As a result, helping judges write decisions and opinions that are coherent and clear would appear fundamentally important to the proper administration of justice.²

Good judicial writing is vital in common law countries like the United States, where the principle of *stare decisis* gives legal opinions the force of law.³ However, most common law countries, including the United States, do not have career judges who are given instruction in writing judicial rulings from the earliest days of their legal careers.⁴ Instead, most common law countries have inherited the English tradition of selecting judges from a pool of experienced lawyers who are considered competent to take up their judicial duties immediately upon ascending to the bench.⁵ However, the skills associated with judging are significantly different from those associated with advocacy, and new judges face a very steep learning curve.⁶ Nowhere is this more true than with respect to the task of learning to write well-reasoned decisions and opinions. As a result, many newly appointed judges find the “move from advocacy to decision, from marshalling and present-

32, 37. However, this Article will occasionally use the term “reasoned judgments” for convenience’s sake to refer to decisions and opinions that include both the reasoning and the final holding or disposition of the case. *See id.* at 43. This Article does not cover the form requirements for judgments, since those vary by jurisdiction. *See id.* at 44-49.

2. *See* LIVINGSTON ARMYTAGE, EDUCATING JUDGES: TOWARDS A NEW MODEL OF CONTINUING JUDICIAL LEARNING 30 (1996). This principle is true in a variety of jurisdictions. *See* Mark A. Summers, *The Surprising Acquittals in the Gotovina and Persić Cases: Is the ICTY Appeals Chamber a Trial Chamber in Sheep’s Clothing?*, 13 RICH. J. GLOBAL L. & BUS. 377, 383-84 (2014) (discussing the need for a reasoned decision in international criminal trials). *But see* Michael L. Wells, “Sociological Legitimacy” in *Supreme Court Opinion*, 64 WASH. & LEE L. REV. 1011, 1029 (2007) (“French practice belies the notion that well-reasoned opinions are in some sense necessary.”). Some authorities have suggested that judicial education should be considered part of a judge’s continuing ethical duty. *See* National Judicial Education Program, Testimony to the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct 15 (Apr. 2004) (“Judicial education is essential to judges’ ability to meet the obligations of Canon 3: A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.”), available at http://www.americanbar.org/content/dam/aba/migrated/judicialethics/resources/Comm_Code_HechtSchafran_0504ddt.authcheckdam.pdf.

3. *See* Colin Starger, *The Dialectic of the Stare Decisis Doctrine*, 33 IUS GENTIUM 19 (2013) (discussing *stare decisis* and precedent in the context of the U.S. Supreme Court).

4. Judges in civil law countries are given this sort of early specialized training. *See* Emily Kadens, *The Puzzle of Judicial Education: The Case of Chief Justice William de Grey*, 75 BROOK. L. REV. 143, 143-45 (2009); Charles H. Koch, Jr., *The Advantages of the Civil Law Judicial Design as the Model for Emerging Legal Systems*, 11 IND. J. GLOBAL LEGAL STUD. 139, 143 (2004). Some proposals have been made in the United States regarding the development of a form of pre-appointment training, although that approach is also voluntary in nature. *See* ABA, Standing Committee on Judicial Independence, Report to the House of Delegates, Recommendation No. 113 (“[T]he American Bar Association urges state, local, territorial bar associations, and the highest court of each state to establish, for those who have an interest in serving in the judiciary, a voluntary pre-selection/election program designed to provide individuals with a better appreciation of the role of the judiciary.”), <http://www.americanbar.org/content/dam/aba/migrated/leadership/2009/midyear/recommendations/113.authcheckdam.pdf> (last visited Aug 6, 2015).

5. *See* Kadens, *supra* note 4, at 143-45; Koch, *supra* note 4, at 143.

6. *See* Kadens, *supra* note 4, at 143.

ing evidence to fact-finding and synthesizing,” to be extremely challenging.⁷ Indeed, U.S. Supreme Court Justice Hugo Black, one of the most influential writers to ever grace the bench, once said that “the most difficult thing about coming on to the Court was learning to write.”⁸

This is not to say that new judges are entirely without resources. Judicial education opportunities abound at both the public,⁹ private,¹⁰ national¹¹ and international levels,¹² with numerous providers offering instruction in judicial writing. However, the current approach to judicial education faces several practical problems.¹³

First, it is not clear how many judges take up the opportunity to study judicial writing, since the decision of whether and to what extent to seek judicial education is entirely optional in many jurisdictions.¹⁴ Given the punishing caseloads that currently exist in both state and federal courts,¹⁵ as well as the often overwhelming number of new skills that new judges need to master immediately upon taking

7. Jeffrey A. Van Datta, *The Decline and Fall of the American Judicial Opinion, Part I: Back to the Future From the Roberts Court to Learned Hand – Context and Congruence*, 12 BARRY L. REV. 53, 55 (2009) [hereinafter Van Datta 1].

8. WILLIAM DOMNARSKI, IN THE OPINION OF THE COURT 36 (1997) (citation omitted); see also Frank B. Cross, *The Ideology of Supreme Court Opinions and Citations*, 97 IOWA L. REV. 693, 742 (2012). Justice Black had not served as a judge prior to joining the Supreme Court bench.

9. For example, the Federal Judicial Center is the research and educational arm of the U.S. federal judiciary. See FEDERAL JUDICIAL CTR., fjc.gov (last visited June 1, 2015) [hereinafter FJC website].

10. Private institutions include non-profit entities and academic institutions as well as for-profit centers. For example, the National Judicial College is a Nevada-based non-profit originally created by the American Bar Association to educate judges nationwide and is now one of the leading sources of judicial education in the United States, particularly for U.S. state court judges. See National Judicial College, <http://www.judges.org> (last visited June 1, 2015) [hereinafter NJC website]. Duke Law School offers a master’s degree program for federal, state and foreign judges. See Duke Law Center for Judicial Studies, <http://law.duke.edu/judicialstudies/degree/curriculum>, (last visited June 1, 2015) [hereinafter Duke website]. Some questions have been raised about privately funded forms of judicial education. See Center for Public Integrity, Corporations, Pro-Business Nonprofits Foot Bill for Judicial Seminars (May 27, 2014) (“Conservative foundations, multinational oil companies and a prescription drug makers were the most frequent sponsors of more than 100 expense-paid educational seminars attended by federal judges over a 4 ½ year period.”), <http://www.publicintegrity.org/2013/03/28/12368/corporations-pro-business-nonprofits-foot-bill-judicial-seminars> (last visited June 1, 2015).

11. The FJC website includes a listing of other judicial education centers in the United States. See FJC Website, *supra* note 9, at http://www.fjc.gov/ijr/home.nsf/page/jud_ed_us.

12. See *id.* at http://www.fjc.gov/ijr/home.nsf/page/jud_ed_intl (listing various foreign and international judicial education institutes).

13. Formalized means of judicial education also face a number of philosophical challenges in common law countries. See ARMYTAGE, *supra* note 2, at 29-40 (noting that common law countries only began to offer formalized means of judicial education in the mid-1960s and that the issue is still extremely polarized).

14. For example, there is no requirement that federal judges attend new judge orientations held by the FJC (although most do). Furthermore, there is no continuing judicial education requirement for federal judges. Some states have mandatory judicial education requirements, which may include mandatory classes in judicial writing, but those issues are addressed at the local level. However, “[m]andatory judicial education is a vexed question. Many judges find it insulting and strenuously oppose it.” National Judicial Education Program, *supra* note 2, at 15; see also ARMYTAGE, *supra* note 2, at 29-40.

15. Many observers believe that the judicial branch is in crisis. For example, filings in federal district court have risen 28 percent in the last 20 years, although the number of judges has grown by only 4 percent. See Judge Information Center, *As Workloads Rise in Federal Courts, Judge Counts Remain Flat* (Oct. 14, 2014), available at <http://trac.syr.edu/tracreports/judge/364/>.

the bench,¹⁶ it is perhaps understandable that writing is put on the back burner, particularly since many judges may feel that after decades of work as practicing attorneys, they are already competent writers.¹⁷ However, new judges may not appreciate the extent to which judicial writing differs from other forms of communication.¹⁸

Second, judicial education programs face several significant structural challenges, particularly when it comes to courses on judicial writing. For example, most judicial education centers only ask judges to act as faculty, based on the fact that most judges prefer to be taught by other judges.¹⁹ This practice can result in a number of self-reinforcing behaviors as judges emphasize issues that they consider to be important with little input from external or empirical sources.²⁰ Additional problems may arise because most judges are not especially qualified to teach writing, despite their experience on the bench.²¹ As a result, many judicial writing seminars end up focusing on personal anecdotes or basic writing techniques that do not address the deeper challenge of producing well-reasoned judgments.²²

These problems suggest that there is a critical need for further assistance regarding judicial writing techniques.²³ Furthermore, it would appear that the judi-

16. For example, a new judge must learn how to control his or her courtroom and manage massive dockets while also staying on top of changes in the substantive law. See FJC website, *supra* note 9 (listing programs); NJC website, *supra* note 10 (listing programs); Duke website, *supra* note 10 (listing programs). The FJC's public website lists only a small number of programs. Federal judges can access additional programming options through the federal judiciary's intranet.

17. Of course, it is possible that new judges suffer from the Lake Wobegone Effect with respect to their writing skills. See A Prairie Home Companion, The Lake Wobegone Effect (noting that all the children in Lake Wobegone are above average), http://prairiehome.org/2013/04/the_lake_wobegone_effect (last visited Aug. 3, 2015).

18. See Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 503-06 (2013).

19. Thus, the International Judicial Relations Committee of the U.S. Judicial Conference often sends federal judges abroad to participate in judicial education efforts. See FJC, COMMITTEE ON INTERNATIONAL JUDICIAL RELATIONS: A RESOURCE FOR THE JUDICIARIES OF OTHER NATIONS, available at [http://www.fjc.gov/public/pdf.nsf/lookup/IJR00012.pdf/\\$file/IJR00012.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/IJR00012.pdf/$file/IJR00012.pdf). Many of the delegations sent by U.S. Agency for International Development (USAID) also include judges. See Gary A. Hengstler, *Training Court Personnel Overseas*, COURTS TODAY MAG. (May/June 2006). Although staff members with expertise in a particular subject matter may provide outlines to judges serving as faculty, those materials are generally not considered mandatory, leaving the faculty free to structure their courses in any way they see fit.

20. See Oona A. Hathaway, *Path Dependence in the Law; The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 628-29 (2001).

21. Many people cling to the belief that good writing cannot be taught, either because writing is an innate skill or because the range of opinions about what constitutes good writing is too diverse to support a single standardized treatment. See S.I. STRONG, HOW TO WRITE LAW EXAMS AND ESSAYS 1-2 (4th ed. 2014) [hereinafter STRONG, HOW TO WRITE]. While it is certainly true that good writing, including good judicial writing, can vary a great deal in terms of form, tone and style, that does not mean that it is impossible to identify certain common features that exist in all good legal decisions and opinions. See LOUISE MAILHOT & JAMES D. CARNWATH, DECISIONS, DECISIONS . . . A HANDBOOK FOR JUDICIAL WRITING 100 (1998); see also DOMNARSKI, *supra* note 8, at 55-74, 90-115.

22. This type of approach is evident in various articles discussing judicial writing. See Gerald Lebovits, *A Pox on Vox Pop*, N.Y. STATE B. J. 64 (July/Aug. 2004); Gerald Lebovits, *Ethical Judicial Writing: Part II*, N.Y. STATE B. J. 64 (Jan. 2007); Beverly B. Martin, *Another Judge's Views on Writing Judicial Opinions*, 51 DUQUESNE L. REV. 41 (2013); Richard A. Posner, *Legal Writing Today*, 8 SCRIBES J. LEGAL WRITING 35 (2001-2002); Douglas O. Tice, Jr., *Reflections on Opinion Writing and Publishing: Part I*, AM. BANKR. INST. J. 46 (Mar. 2007).

23. See ARMYTAGE, *supra* note 2, at 67 ("Once the need for judicial education is accepted, it is important to assess the nature of that need . . .").

cial community would derive a significant benefit from information provided in published form, since that avoids the cost and time associated with in-person seminars.²⁴ Written guides may be particularly appropriate, given that “[j]udges are generally autonomous [as learners], entirely self-directed, and exhibit an intensely short-term problem-orientation in their preferred learning practices.”²⁵

This Article attempts to fill that need by providing both experienced and novice judges with a structured and content-based method of writing fully reasoned decisions and opinions. Although the current discussion is aimed primarily at judges sitting in U.S. state and federal courts, there are several other groups who can benefit from this analysis.

The first such group involves judges and others who are participating in judicial outreach efforts. Over the last few years, an increasing number of public and private organizations such as the American Bar Association (ABA) and the U.S. Agency for International Development (USAID) have implemented programs that seek to bolster the international rule of law through education.²⁶ These programs strive to provide judges in countries with struggling judicial systems with information about alternative practices that could be suitable for adoption in those other nations.²⁷ One popular area of discussion involves reasoned judgments.²⁸ As a result, those who develop and serve as faculty on judicial outreach programs can

24. *See id.* at 152.

25. *Id.* at 149.

26. *See* A.B.A., Rule of Law Initiative (ROLI), http://www.americanbar.org/advocacy/rule_of_law.html (last visited Aug. 3, 2015) [hereinafter ABA ROLI]; USAID: Serbia, Judicial Reform, http://www.jrga.org/index.php?option=com_k2&view=item&layout=item&id=65&Itemid=28&lang=en (last visited Aug. 3, 2015). There can be some problems with transparency, since the USAID in particular tends to contract with for-profit, private organizations who conduct the educational programs. *See* USAID: Kazakhstan, Judicial Education Project (KJEP), Year One Annual Report (Oct. 1, 2009–Sept. 30, 2010) (noting the program was administered by a private contractor known as Chemonics), available at http://pdf.usaid.gov/pdf_docs/PDACU795.pdf; *see also* Chemonics International Inc., <http://www.chemonics.com/Pages/Home.aspx> (last visited Aug. 3, 2015).

27. *See* ABA ROLI, *supra* note 26.

28. Many of the countries that are involved in judicial outreach activities follow the civil law tradition, which does not rely on precedent in the same way that common law countries do. *See* ABA ROLI, *supra* note 26 (noting jurisdictions where ROLI is active); USAID: Serbia, *supra* note 26; *see also* JANE S. GINSBURG, LEGAL METHODS 66, 69–70 (rev. 2d ed. 2004) (“The common law has its source in previous court decisions. The main traditional source of the common law is therefore not legislation but cases In civil law countries, cases are simply not a source of law – at least not in theory Civil Law jurists tend to see the civil code as an all-encompassing document”). Nevertheless, many of the foreign judges are interested in learning more about reasoned judgments, since many civil law countries have begun to rely more heavily on case law as a form of authority, thereby increasing the need for well-reasoned judgments in those jurisdictions. *See* David W. Louidsell, *Procedure and Democracy*, 35 TEX. L. REV. 892, 894 (1957) (book review) (discussing how judges in different countries, including the United States, Mexico and Italy, have presented judgments of the court); Mariana Pargendler, *The Rise and Decline of Legal Families*, 60 AM. J. COMP. L. 1043, 1073 (2012); Allen Shoenberger, *Change in the European Civil Law Systems: Infiltration of the Anglo-American Case Law System of Precedent Into the Civil Law System*, 55 LOY. L. REV. 5, 5 (2009) (attributing this trend to the influence of the European Court of Justice and the European Court of Human Rights). For an example of a contemporary civil law judgment that relies on judicial precedent, see *Empresa Colombiana de Vías Férreas (Ferrovías) v. Drummond Ltd.*, 24 Oct. 2003—Consejo de Estado, Sala de lo Contencioso Administrativo, Sección Tercera [Council of State, Administrative Chamber, Third Section], No. 25.25, ¶ 8, *aff’d*, 22 Apr. 2004, No. 24.261, ¶ 25, in XXIX Y.B. COMM. ARB. 643 (Albert Jan van den Berg ed., 2004).

benefit from a concise and practically oriented discussion of reasoned judgments.²⁹

The second group of persons who may appreciate information regarding reasoned judgments involves judicial law clerks who have been asked to write the first draft of a legal decision or opinion.³⁰ Although the process of writing a ruling under the direction of a judge is somewhat different than the process of writing a decision or opinion on one's own behalf, there are nevertheless sufficient similarities to make this Article of interest to clerks.³¹

The third group of persons who may benefit from this Article involves arbitrators who are asked to produce fully reasoned awards. Fully reasoned awards are now standard in a number of types of arbitration³² and optional in several others,³³ which makes it necessary for arbitrators to understand how to draft such documents. Although various arbitral institutions around the world offer programs on how to write reasoned awards, such training is largely optional, just as it is in the judicial context.³⁴ Since a fully reasoned arbitral award is in many ways analogous to a fully reasoned judicial decision,³⁵ arbitrators can benefit from the principles identified in the current discussion.

The primary focus of this Article is on providing practical advice on how to write a reasoned decision or opinion (Section IV). However, experts in education theory have found that adult learners do best when they understand why certain

29. This Article occasionally refers to differences between common law and civil law systems so as to help participants in various judicial outreach initiatives (such as those organized by the ABA or USAID) understand the rationales underlying current U.S. practice and procedure. However, these matters may be of interest to U.S. judges as well, since comparative analysis often provides a better understanding of one's own legal system.

30. See *infra* notes 122-31 and accompanying text.

31. See LAW CLERK HANDBOOK: A HANDBOOK FOR LAW CLERKS TO FEDERAL JUDGES 10, 86, 94-98 (2007), available at <http://www.fjc.gov> [hereinafter FJC Law Clerk Handbook].

32. Reasoned awards are nearly universal in international commercial arbitration and investment arbitration. See International Centre for Settlement of Investment Disputes, Rules of Procedure for Arbitration Proceedings (Arbitration Rules), art. 47, available at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF.htm>; International Chamber of Commerce (ICC) Arbitration Rules, art. 31, available at <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/ICC-Rules-of-Arbitration>; S.I. STRONG, INTERNATIONAL COMMERCIAL ARBITRATION: A GUIDE FOR U.S. JUDGES 22 (2012), available at <http://www.fjc.gov> [hereinafter STRONG, ICA]; Tai-Heng Cheng & Robert Trisotto, *Reasons and Reasoning in Investment Treaty Arbitration*, 32 SUFFOLK TRANSNAT'L L. REV. 409, 409 (2009); W. Laurence Craig, *The Arbitrator's Mission and the Application of Law in International Commercial Arbitration*, 21 AM. REV. INT'L L. 243, 283 (2010).

33. Reasoned awards are often used in domestic forms of commercial arbitration on the request of the parties. See American Arbitration Association (AAA), Commercial Arbitration Rules and Mediation Procedures, rule R-46(b), available at https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103.

34. See, e.g., Chartered Institute of Arbitrators, <https://www.ciarb.org> (last visited Aug. 6, 2015) (offering courses in award writing); American Arbitration Association, Course Calendar, <https://www.aaau.org/courses> (last visited Aug. 8, 2015) (offering courses in award writing); see also Thomas J. Brener et al., *Awards and Substantive Interlocutory Arbitral Decisions*, in COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION 225, 237-39 (James M. Gatis et al., eds., 2014); Daniel L. FitzMaurice & Maureen O'Connor, *Preparing a Reasoned Award*, 14 ARIAS U.S. Q. (2007), available at http://www.daypitney.com/news/docs/dp_1987.pdf.

35. Although the definition of a fully reasoned arbitral award is evolving, some standards do exist. See *Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469, 473-74 (5th Cir. 2012); *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 844-46 (11th Cir. 2011); see also S.I. Strong, *Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Dichotomy*, 37 MICH. J. INT'L L. __ (forthcoming 2016).

information is being presented,³⁶ so the discussion of how to write reasoned judgments will be preceded by a brief section on why such judgments are necessary or useful (Section III). This Article also considers what a reasoned decision or opinion actually is as a preliminary matter (Section II), since it is impossible to write such a document without a true appreciation for what is entailed in a well-reasoned ruling.

Before beginning, it is helpful to note a few basic points. First, reasoned judgments can vary a great deal in terms of form, tone and style.³⁷ As a result, this Article does not suggest a single, formulaic model of judicial writing that should be followed in all cases, since the best writing occurs when the author is true to his or her own voice. However, those who seek to improve their writing often find it helpful to read a variety of types of good writing in order to develop a better appreciation of the effectiveness of certain writing techniques. Although good judicial writing can be found in many places, those seeking a quick and easy compilation should consider reviewing the annual list of exemplary judicial writing compiled by the editors of *The Green Bag Almanac & Reader*.³⁸ The decisions and opinions contained on those lists are not only inspirational, they are also highly educational for anyone wishing to improve his or her own writing.

36. According to Malcolm Knowles, one of the leading theorists of adult education, the strategies for teaching adult learners (described as andragogy as opposed to pedagogy, the teaching of children) should be based on six different principles.

- Reason for Learning. Adults need to know why they need to learn something prior to learning it.
- Adult Self-Concept. Children see themselves as dependent on the instructor's will. In contrast, adults have an independent self-concept that allows them to direct their own learning. Instructors, therefore, have the responsibility to help adults move from dependency on the instructor to increased self-directedness.
- Experience. Unlike children, adults have a vast reservoir of experience that can be used as a platform for experiential learning. Effective learning can be accomplished through discussion or problem-solving exercises that allow adults to draw on their life experiences.
- Readiness to Learn. Adults more readily learn when they believe the information will assist them in dealing with real-life tasks or problems. Thus, their education should be organized around life application categories.
- Orientation to Learning. Children perceive education as the learning of subjects (or subject-centered) with no immediate application. Adults perceive education as a way of obtaining knowledge that can be used immediately to resolve problems (problem-centered).
- Motivation for Learning. The most potent motivators for adult learning are internal.

Joni Larson, *The Intersection of Andragogy and Distance Education: Handing Over the Reins of Learning to Better Prepare Students for the Practice of Law*, 9 T.M. COOLEY J. PRAC. & CLINICAL L. 117, 123-24 (2007); see also MALCOLM S. KNOWLES, *THE MODERN PRACTICE OF ADULT EDUCATION: FROM PEDAGOGY TO ANDRAGOGY* 45-49 (1980). These principles have been successfully applied in the context of judicial education. See ARMYTAGE, *supra* note 2, at 106-11, 127-30.

37. See MAILHOT & CARNWATH, *supra* note 21, at 100; see also DOMNARSKI, *supra* note 8, at 55-74, 90-115. A variety of judicial styles have been identified, including the imperial style, see *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), the literary style, see *Public Utils. Comm'n v. Pollack*, 343 U.S. 451, 466-67 (1952) (Frankfurter, J.), the methodological style, see *Bodum USA, Inc. v. La Cafatiere, Inc.*, 621 F.3d 624, 638-40 (7th Cir. 2010) (Wood, J., concurring), and the colloquial style, see *Schatz v. RSLC*, 669 F.3d 50, 52-55 (1st Cir. 2012) (Thompson, J.). Other judges "defy classification." MAILHOT & CARNWATH, *supra* note 21, at 105 (discussing the Lord Denning); see also DOMNARSKI, *supra* note 8, at 116-55 (discussing Judge Richard Posner).

38. See *The Green Bag Almanac & Reader, Exemplary Legal Writing*, http://www.greenbag.org/green_bag_press/almanacs/almanacs.html; see also DOMNARSKI, *supra* note 8, at 97-98; *supra* note 37 (listing noteworthy legal opinions).

Second, in the interest of brevity, this Article does not address certain issues that are logically but tangentially related to reasoned judgments. For example, this Article does not discuss whether a particular decision or opinion should be written or oral³⁹ or whether a particular ruling should be published.⁴⁰ Furthermore, this Article does not address basic rules of good writing or elements of style. Although all of these matters are important, they are covered in detail elsewhere and need not be discussed herein.⁴¹

II. WHAT CONSTITUTES A REASONED DECISION OR OPINION

The first matter to consider involves the question of what constitutes a reasoned decision or opinion.⁴² Most lawyers can recite the standard definition of a reasoned ruling as one that includes “findings of fact and conclusions of law based upon the evidence as a whole . . . [and] clearly and concisely states and explains the rationale for the decisions so that all can determine why and how a particular result was reached.”⁴³ However, this definition only goes so far, particularly for those seeking to write such a ruling, since finding “the appropriate methodology for distinguishing questions of fact from questions of law [is], to say the least, elusive.”⁴⁴ Indeed, “the practical truth [is] that the decision to label an issue a ‘question of law,’ a ‘question of fact,’ or a ‘mixed question of law and fact’ is sometimes as much a matter of allocation as it is of analysis.”⁴⁵

The difficulties associated with defining a reasoned judgment can lead some people to focus on various external attributes as a means of distinguishing a reasoned judgment from other types of written rulings. However, that approach is problematic, since principles of judicial independence preclude the use of a single, standard format for reasoned judgments. Furthermore, various differences arise

39. This issue arises most frequently in courts of first instance. See GEORGE, *supra* note 1, at 143-45, 550.

40. See *id.* at 322-26, 364-66.

41. See *id.* at 553-70; Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J. L. REF. 119 (1994). Adherence to the rules of style is particularly important in the law, since legal decisions have been known to turn on the precise placement of a comma. See *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 449 (3d Cir. 2003) (construing an international convention). Some good manuals concerning general principles of standard and legal writing include THE CHICAGO MANUAL OF STYLE (2010); ALASTAIR FOWLER, HOW TO WRITE (2007); BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE (2002); BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES (2013); BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE (2006); ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES (2008); S.I. STRONG & BRAD DESNOYER, HOW TO WRITE BETTER LAW EXAMS: THE IRAC SYSTEM DEFINED AND EXPLAINED ch. 8 (2015); WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE (1999).

42. This is a difficult concept to describe in the abstract, and it may be easier to point to specific examples of good reasoned judgments. For example, many people believe that *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), is an excellent example of a well-reasoned judgment. See Sumi Cho, *From Massive Resistance, to Passive Resistance, to Righteous Resistance: Understanding the Culture Wars From Brown to Grutter*, 7 U. PA. J. CONST. L. 809, 820 (2005); see also The Green Bag Almanac & Reader, *supra* note 38 (listing well-written judicial rulings on an annual basis).

43. 77 PA. STAT. ANN. § 834 (West 2013). Although this definition arises in the context of the statutory duties of a workers’ compensation board, the principles appear to apply in other situations as well.

44. *Miller v. Fenton*, 474 U.S. 104, 113-14 (1985) (citations omitted).

45. *Id.* (citation omitted).

according to whether the ruling was made by a trial court or an appellate court.⁴⁶ As a result, external criteria are largely useless as definitional tools.

Instead, the best way to define a reasoned judgment is through a functional analysis that looks at how the opinion operates within the legal system.⁴⁷ As it turns out, reasoned judgments arise in a limited category of cases that require a precedential ruling that is binding on more than the parties themselves, which suggests that the form and content of reasoned judgments are largely driven by the demands of the common law legal method.⁴⁸ However, the common law has not always required written judgments,⁴⁹ nor has the principle of precedent always been defined in the same way as it currently is.⁵⁰ As a result, there appear to be other reasons why a reasoned judgment may be useful or necessary. These issues are taken up in the following section.

III. WHY REASONED JUDGMENTS ARE NECESSARY OR USEFUL

Judges trained in common law countries like the United States may think it unnecessary to consider why a judicial system should use reasoned judgments, since such rulings have long been considered structurally necessary as a result of the role that judicial pronouncements play in the common law legal tradition. However, close analysis of this issue provides a number of structural and non-structural reasons why judges should write fully reasoned judgments.⁵¹ Interestingly, a number of these rationales provide useful insights into how those rulings can and should be written.

A. Structural Rationales for Reasoned Judgments

The best known rationale for reasoned judgments indicates that such rulings “serve as a statement of the necessary reasoning (the ‘*ratio decidendi*’) for courts bound to adhere to precedent under *stare decisis*.”⁵² The importance of *stare decisis* in the common law legal tradition means that courts must be clear when

46. See GEORGE, *supra* note 1, at 32, 37.

47. Functionalism overcomes superficial differences, including those relating to the purported common law-civil law divide. See Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 339, 342, 357 (Mathias Reiman & Reinhard Zimmerman eds., 2006).

48. See BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 150-52, 164-65 (1949); GEORGE, *supra* note 1, at 32-34; Ruggero J. Aldisert et al., *Opinion Writing and Opinion Readers*, 31 CARDOZO L. REV. 1, 8-9 (2009); see also *infra* notes 134-35 and accompanying text.

49. In the early days of the common law, judgments “were regularly preserved only in the memory of the suitors.” Sir Frederick Pollock, *English Law Before the Norman Conquest*, 14 L. Q. REV. 291, 292 (1898), as cited in READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW 50 (Roscoe Pound & Theodore F.T. Plucknett eds., 1927).

50. Indeed, it was not until the late nineteenth century that courts began to impose upon themselves a strict duty to follow previous case law. See KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 260 (Tony Weir trans., 3d ed. 1998).

51. This phenomenon suggests that reasoned judgments could be usefully adopted even in jurisdictions that do not adhere to the common law legal tradition. In fact, many commentators believe that many of the distinctions between the common law and civil law are eroding. See *supra* note 28 and accompanying text.

52. FitzMaurice & O’Connor, *supra* note 34.

identifying the factual and legal basis of a particular decision.⁵³ As a result, judges in the United States and other common law countries are frequently required to write reasoned judgments.

Although the principle of *stare decisis* is well-settled, opinions vary as to the particular matters that are to be considered precedential. Indeed, “[w]hat facts or statements actually constitute precedent is the subject of much scholarly debate: at one extreme, some scholars only give precedential weight to the critical facts of the case; at another extreme, some scholars give precedential weight to any judicial statement; other scholars provide for a mix of facts and statements.”⁵⁴ Judges demonstrate a similar range of opinions regarding the precedential value of earlier rulings. For example, when determining whether it is bound by an earlier decision, a court considers not merely the “reason and spirit of cases” but also “the letter of particular precedents.” This includes not only the rule announced, but also the facts giving rise to the dispute, other rules considered and rejected and the views expressed in response to any dissent or concurrence. Thus, when crafting binding authority, the precise language employed is often crucial to the contours and scope of the rule announced.⁵⁵

The individualized nature of the interpretative process suggests that judges must be extremely careful in how they write reasoned judgments. Thus, Judge Alex Kozinski has stated:

In writing an opinion, the court must be careful to recite all facts that are relevant to its ruling, while omitting facts that it considers irrelevant. Omitting relevant facts will make the ruling unintelligible to those not already familiar with the case; including inconsequential facts can provide a spurious basis for distinguishing the case in the future. The rule of decision cannot simply be announced, it must be selected after due consideration of the relevant legal and policy considerations. Where more than one rule could be followed—which is often the case—the court must explain why it is selecting one and rejecting the others. Moreover, the rule must be phrased with precision and with due regard to how it will be applied in future cases. A judge drafting a precedential opinion must not only consider the facts of the immediate case, but must also envision the countless permutations of facts that might arise in the universe of future cases.

53. *Stare decisis* is the principle that subsequent courts must adhere to the legal conclusions established in earlier judgments rendered by courts whose decisions are binding upon the ruling court. “*Stare decisis* reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right.” *National Aeronautics & Space Admin. v. Nelson*, 131 S. Ct. 746, 766 (2011) (citation omitted). Normally, such an approach is preferable “because it promotes the evenhanded, predictable, and consistent development of legal principles.” *Id.* However, *stare decisis* is not absolute. Within the same level of courts,

precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error. “Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.”

Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 362-63 (2010) (citations omitted); see also CARDOZO, *supra* note 48, 150-52, 158; GEORGE, *supra* note 1, at 305-11.

54. Kevin D. Klagge, Case Comment, *Garcia v. Texas*, 131 S. Ct. 2866 (2011), 35 SUFFOLK TRANSNAT’L L. REV. 233, 236 n.16 (2012) (discussing sources).

55. See *Hart v. Massanari*, 266 F.3d 1155, 1170-71 (9th Cir. 2001) (citations and footnotes omitted).

Modern opinions generally call for the most precise drafting and re-drafting to ensure that the rule announced sweeps neither too broadly nor too narrowly, and that it does not collide with other binding precedent that bears on the issue. Writing a precedential opinion, thus, involves much more than deciding who wins and who loses in a particular case. It is a solemn judicial act that sets the course of the law for hundreds or thousands of litigants and potential litigants. When properly done, it is an exacting and extremely time-consuming task.⁵⁶

As important as precedent is in the common law legal method, *stare decisis* is not the only structural reason for writing fully reasoned judgments. A second structural rationale involves the role that reasoned judgments play in the appellate process. Reasoned decisions provide critical information as to why the trial court decided as it did and therefore to help appellate courts determine whether a lower court decision should be upheld.⁵⁷ While the need for the lower court's rationale may not be necessary in situations when the appellate court considers issues *de novo*, judges in trial and intermediate appellate courts typically do not know whether and to what extent a particular matter will be appealed and what the relevant standard of review may be.⁵⁸ Therefore, it is best for lower courts to err on the side of caution and provide a fully reasoned analysis for higher courts to consider.

B. Non-Structural Rationales for Reasoned Judgments

The importance of the various structural rationales for reasoned judgments suggests that judges should always be aware of how a reasoned ruling may be interpreted and used by judges and lawyers in the future. However, there are also a number of non-structural rationales supporting the use of reasoned decisions and opinions. Not only do these rationales apply equally in both common law and civil law countries, they also provide useful information on how a judge can improve his or her writing.

56. *Id.* at 1176-77 (citation omitted).

57. See GEORGE, *supra* note 1, at 26. Providing all of the relevant factual data and outlining each step of the legal analysis allows an appellate court to consider the propriety of the decision-making process below in a comprehensive and principled manner. See *id.* Traditionally, appellate judges in civil law countries have not had the same need as appellate judges in common law countries for a full factual analysis in the lower court because the civil law legal tradition is deductive rather than inductive. See S.I. STRONG ET AL., *COMPARATIVE LAW FOR BILINGUAL LAWYERS: WORKING ACROSS THE ENGLISH-SPANISH DIVIDE* ch. 3 (anticipated 2016) (noting that whereas “the civil law . . . uses deductive reasoning to move from general principles of law to particular outcomes in specific cases, the common law uses analogical or inductive reasoning to generate general principles of law as a result of legal conclusions generated in large numbers of individual disputes”); Julie Bédard, *Transsystemic Teaching of Law at McGill: “Radical Changes, Old and New Hats,”* 27 *QUEEN’S L. J.* 237, 269-70 (2001). However, the situation may be changing as some civil law jurisdictions begin to adopt a modified case law method. See Shoenberger, *supra* note 28, at 5.

58. Although appellate courts in the United States have long considered a significant number of legal issues on a *de novo* basis, recent decisions from the U.S. Supreme Court have permitted, if not required, *de novo* analysis of certain mixed questions of law and fact. See Russell M. Coombs, *A Third Parallel Primrose Path: The Supreme Court’s Repeated, Unexplained, and Still Growing Regulation of State Courts’ Criminal Appeals*, 2005 *MICH. ST. L. REV.* 541, 547-48.

First and perhaps most importantly, use of reasoned judgments improves the decision-making process, thereby improving the quality of the decision itself.⁵⁹ As Judge Richard Posner has noted, “[r]easoning that seemed sound when ‘in the head’ may seem half-baked when written down, especially since the written form of an argument encourages some degree of critical detachment in the writer, who in reading what he [or she] has written will be wondering how an audience would react.”⁶⁰ By encouraging judges to articulate their reasons for following a particular course of action, reasoned judgments help “rationalize the . . . process,” “safeguard against arbitrary decisions,” “prevent consideration of improper and irrelevant factors,” “minimize the risk of reliance upon inaccurate information,” and “attain[] . . . institutional objective[s] of dispensing equal and impartial justice” while simultaneously “demonstrat[ing] to society that these goals are being met.”⁶¹

Second, reasoned judgments provide various benefits to society at large. For example, “[r]equiring a trial court to provide a reasoned basis for the . . . [outcome] imposed may enhance the court’s legitimacy as perceived by judges themselves and participants in the . . . justice system.”⁶² Although this rationale may initially seem to be most relevant to countries with weak or struggling judiciaries, respect for the U.S. judiciary appears to have decreased in recent years. While most of the criticism has been aimed at the U.S. Supreme Court, which is increasingly seen as operating in a highly politicized manner,⁶³ concerns are now also being raised about state courts⁶⁴ and lower federal courts.⁶⁵ One of the ways to offset any negative perceptions that may currently exist about the judicial branch would be to increase the number of well-written and well-reasoned judgments that were produced in state and federal courts.

Third, reasoned judgments may be easier to enforce internationally, since foreign courts can see that the judgment was reached in a logical and legally justifiable manner.⁶⁶ Globalization has resulted in an ever-increasing amount of litiga-

59. See GEORGE, *supra* note 1, at 27; Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1302 (2008).

60. Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1447-48 (1995).

61. FitzMaurice & O’Connor, *supra* note 34, at n.19 (discussing *Commonwealth v. Riggins*, 474 Pa. 115, 377 A.2d 140, 129-31 (1977)).

62. *Id.*; see also GEORGE, *supra* note 1, at 26.

63. See Barry Friedman, *Why Are Americans Losing Trust in the Supreme Court?*, THE NATION (June 18, 2012), <http://www.thenation.com/article/168463/why-are-americans-losing-trust-supreme-court#>; David Paul Kuhn, *The Incredible Polarization and Politicization of the Supreme Court*, THE ATLANTIC (Nov. 6, 2013), <http://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/>; Eric Segall, *The Supreme Court Puts Its Legitimacy At Risk*, CNN (May 12, 2014), <http://www.cnn.com/2014/05/12/opinion/segall-supreme-court-political/>.

64. Much of the concern at the state level focuses on the method by which judges are appointed or elected. See David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 266, 315 (2008); Clifford W. Taylor, *Merit Selection: Choosing Judges on Their Politics Under the Veil of a Disarming Name*, 32 HARV. J. L. & PUB. POL’Y 97, 101 (2009). However, those concerns could be offset if those judges were seen as capable of producing well-reasoned judgments.

65. See Pema Levy, *With Judicial Nominations Held Up, Justice Comes Slowly*, NEWSWEEK (July 21, 2014), <http://www.newsweek.com/judicial-nominations-held-justice-comes-slowly-260029>.

66. There is no widespread multilateral treaty on the recognition and enforcement of civil judgments outside the European Union, meaning many jurisdictions must rely on international comity when considering a foreign judgment. See S.I. Strong, *Recognition and Enforcement of Foreign Judgments*

tion involving foreign parties, which means that more judgments will be subject to international enforcement procedures in the coming years.⁶⁷ As a result, judges around the world are perhaps under an increased duty to demonstrate the propriety of their rulings so as to promote international enforceability of judgments.⁶⁸

Fourth, reasoned judgments can act as persuasive authority in other courts, even if those rulings are not formally binding in those other jurisdictions.⁶⁹ Judges in the United States are well versed in this kind of comparative analysis, at least with respect to decisions and opinions rendered by sister courts in the United States.⁷⁰ However, persuasive authority can also operate internationally. Indeed, a number of courts, including those in England, Canada, Australia and New Zealand, routinely consider foreign legal sources, including those from the United States, when analyzing novel points of law.⁷¹ Although U.S. courts are often less inclined to look at foreign sources, some judges have been known to consult foreign or international law even in legal fields considered uniquely domestic, such as constitutional law.⁷² Some legal specialties, such as commercial law, derive particular benefits from international consistency.⁷³

in *U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. 45, 51-52 (2014) [hereinafter Strong, *Recognition*].

67. *See id.* at 46-48.

68. Arbitrators are well-versed in this particular practice, since they are often taught to “protect the award” through judicious drafting. *See* American Arbitration Association, *Writing Arbitration Awards: A Guide for Arbitrators* (April 23, 2014), <https://www.aaau.org/media/20549/writing%20arbitration%20awards%20-%20materials.pdf>; Edna Sussman, *Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them*, XI REVISTA BRASILEIRA DE ARBITRAGEM 76, 83 (2014); *see also* Jose Maria Alonso Puig, *Deliberation and Drafting Awards in International Arbitration*, in LIBER AMICORUM BERNARDO CREMADES 131, 144-58 (Miguel Ángel Fernández-Ballesteros & David Arias eds. 2010); Marcel Fontaine, *The ICC Arbitral Process – Part IV: The Award – Drafting the Award – A Perspective from a Civil Law Jurist*, 5 ICC BULL. 30 (1994); Humphrey Lloyd, *Writing Awards – A Common Lawyer’s Perspective*, 5 ICC BULL. 38 (1994). Although some countries look at to the procedural fairness associated with an individual judgment, other countries consider the fairness of a country’s judicial system on a systemic level. *See* RONALD A. BRAND, *RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS* 13, 21-20 (2012), available at <http://www.fjc.gov>; Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe*, 40 GEO. WASH. INT’L L. REV. 173, 227-30 (2008); Strong, *Recognition*, *supra* note 66, at 70-76 (discussing U.S. system). Routine use of reasoned judgments may also alleviate fears about systemic ills that extend beyond the dispute in question.

69. *See* STRONG, *HOW TO WRITE*, *supra* note 21, at 63.

70. *See* Mary Garvey Allegro, *A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions*, 70 TENN. L. REV. 605, 610 (2003) (“[F]ederal courts routinely consider and review the decisions of their sister courts when faced with federal law issues of first impression in their jurisdiction.”); Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 OKLA. L. REV. 55, 75-76 (2009).

71. *See* STRONG ET AL., *supra* note 57, ch. 5.

72. *See* Hart v. Massanari, 266 F.3d 1155, 1170-71 (9th Cir. 2001); Rex D. Glensy, *Which Countries Count? Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT’L L. 357, 358-60 (2005); S.I. Strong, *Religious Rights in Historical, Theoretical and International Context: Hobby Lobby as a Jurisprudential Anomaly?* 48 VAND. J. TRANSNAT’L L. 813, 817 (2015) (noting the usefulness of comparative analysis in the area of constitutional law).

73. *See* STRONG, ICA, *supra* note 32, at 16, 21, 23, 93. Thus, the United Nations Commission on International Trade Law (UNCITRAL) has put together a publicly accessible electronic database including case law on UNCITRAL texts (CLOUT). *See* UNCITRAL, CLOUT, http://www.uncitral.org/uncitral/en/case_law.html. Although “[t]he purpose of the system is to promote international awareness of the legal texts formulated by the Commission and to facilitate uniform interpretation and application of those texts,” the database also provides very useful comparative data regarding the various styles of judicial writing. *Id.*

Not every judge will find each of the preceding rationales equally persuasive. However, this brief analysis provides a strong foundation for the use of reasoned judgments, even in cases where *stare decisis* may not apply. Agreeing that reasoned judgments are beneficial is only the first step; the more important issue is how to write such documents.

IV. HOW TO WRITE REASONED JUDGMENTS

Writing a reasoned judgment is a difficult and time-consuming task.⁷⁴ However, both the process and the quality of writing can be greatly assisted by a deeper understanding of certain structural issues affecting both the shape and the content of the ruling. Therefore, this section considers issues relevant to the source of the judgment (i.e., whether the judgment comes from a trial court or an appellate court) and the method of writing the judgment (i.e., whether the judgment is written by a single person or a panel) before discussing a framework for drafting a reasoned judgment.

A. *Issues Relating to the Source of the Reasoned Judgment*

Although decisions produced by trial courts are in many ways analogous to opinions produced by appellate courts, some differences nevertheless exist, primarily as a result of the different functions of the two types of rulings.⁷⁵ These distinctions are outlined below.

1. *Trial court decisions*

“[M]ost judicial writing seminars hold up appellate opinions as the exemplars of ‘good judicial writing,’” thereby leaving many “[i]mportant questions about the role of trial court judges as opinion writers” unexplored.⁷⁶ As it turns out, trial court judges face a number of challenges not visited upon appellate court judges. For example, the trial court judge does not find the facts and evidence readily organized and the evidence logically sifted. The trial court opinion must create a coherent narrative from the raw source material—the evidence (witness testimony, depositions, exhibits, reports, demonstrative evidence) introduced at trial. The trial court is thus able to indulge less artistry (and sometimes license approaching manipulation) in the order and emphasis of presentation than appellate courts enjoy.⁷⁷

When drafting a reasoned decision, a trial court judge should aim to include a full discussion of “the nature of the case, the issues, the facts, the law applicable to the facts, and the legal reasoning applied to resolve the controversy.”⁷⁸ This type of content is necessary because the trial court decision “is the authoritative answer

74. See *Hart*, 266 F.3d at 1176-77.

75. See *GEORGE*, *supra* note 1, at 25.

76. *Van Datta 1*, *supra* note 7, at 54-55.

77. *Id.* at 56.

78. *GEORGE*, *supra* note 1, at 32-33.

to the questions raised by the litigation . . . [and] should explain the reasons upon which the judgment is to rest.”⁷⁹

Trial courts have a unique perspective on the factual record in a particular case and therefore have a duty to report findings of fact accurately and completely,⁸⁰ particularly with respect to witness credibility.⁸¹ Trial courts also have a responsibility to organize the factual record in such a way as to facilitate subsequent review by higher courts, even if most or all of the key documents will subsequently be made available to the appellate court.⁸²

When writing a reasoned decision, a trial judge must adopt an approach that minimizes the possibility of appeal.⁸³ Badly written opinions (whether they are confusing, illogical or simply unsupported by legal or factual authority) may not only increase the possibility the decision will be overturned, they may make the parties more inclined to appeal a decision.⁸⁴ Even if the litigation involves an issue on which an appeal is likely (due to its novel nature, for example), a well-written trial court decision can facilitate the appeals process by limiting the range of disputable issues. Since an appellate court can dispose of a narrowly tailored appeal more easily than one that is broadly framed, the trial court might well be said to have a duty to write a well-reasoned judgment as a matter of judicial efficiency.⁸⁵

Some questions can arise as to whether a trial judge should rule in the alternative.⁸⁶ On the one hand, providing an alternative decision can be confusing and hence inefficient to the extent that parties and judges who read the decision are not able to discern the precise basis on which the holding is founded.⁸⁷ On the other hand, reasoning in the alternative can also be said to increase efficiency, since an

79. *Id.*

80. Some countries allow facts to be introduced at the appellate level. See Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 609 (2009). Although that practice is not currently followed in the United States as part of the standard appeals process, some commentators support a change in the current system. See *id.* at 609-11.

81. Notably, not every jurisdiction values oral testimony as much as the United States does. For example, civil law legal systems consider documentary evidence to be more reliable than oral testimony and therefore more important to the determination of a dispute. See Yves-Marie Morissette, *Evidence and the Civil Law Tradition in Thirty Minutes Flat*, 18 CAN. CRIM. L. REV. 309, 317 (2014).

82. See Van Detta 1, *supra* note 7, at 76.

83. Arbitrators are also taught to adopt this type of defensive writing. See *supra* note 68 (noting that arbitrators are taught to protect the award from subsequent review).

84. For example, a plaintiff who believes that he or she has not been fully “heard” at trial (a phenomenon that could be directly affected by the quality or content of the written decision) might appeal, even if the chance of prevailing on appeal seems relatively low. See Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, 38 J. LEGAL STUD. 121, 126 (2009).

85. Judicial efficiency is a core concern in a number of jurisdictions. See Council of Europe, European Commission for the Efficiency of Justice, http://www.coe.int/T/dghl/cooperation/cepej/default_en.asp (last visited Jan. 17, 2015); North Carolina General Assembly, Legislative Research Commission, Committee on Judicial Efficiency and Effective Administration of Justice, Report to the 2014 Session of the 2013 General Assembly of North Carolina (Apr. 2014), available at <http://ncleg.net/Library/studies/2014/lrc2014judicial.pdf>.

86. “An alternative ground used to support a decision is not dictum.” GEORGE, *supra* note 1, at 331.

87. Avoidance of confusion is another reason why judges do not always outline the entire basis for their decision. See Konrad Schiermann, *A Response to the Judge As Comparativist*, 80 TULANE L. REV. 281, 287-90 (2005).

appellate court may uphold the decision on the alternative rationale, thereby avoiding the need to remand the case for rehearing.⁸⁸

2. Appellate court opinions

Appellate courts (a term that encompasses both intermediate courts and courts of final resort) fulfill a different function than trial courts and therefore require a different type of written ruling.⁸⁹ Generally, an appellate “opinion provides a succinct statement of the facts with the major emphasis placed upon the law. The reasons should be set forth clearly so that the disposition is easily understandable.”⁹⁰

When drafting reasoned opinions, appellate judges must keep several goals in minds. The first, of course, is the need to act justly, not only an individual level but also on a societal level.⁹¹ Appellate courts—particularly those of final recourse—have an obligation to achieve an outcome that is not only appropriate in the dispute at bar (justice *in personam*) but also in any similar cases that may arise in the future (justice *in rem*).⁹² Although this duty may be most apparent in common law jurisdictions as a result of the common law’s ability to develop legal principles through judicial precedent,⁹³ courts in civil law systems also strive towards consistency in their jurisprudence, particularly with respect to judgments from higher courts, and therefore must keep both individual and societal needs in mind when writing appellate opinions.⁹⁴

Appellate courts in the United States review lower court decisions for three reasons: (1) to correct the lower court; (2) to allow for the progressive development of the law; and (3) to ensure the uniformity of the law.⁹⁵ While the question of whether to render a fully reasoned opinion in any particular case is a matter of judicial discretion,⁹⁶ some commentators have suggested that reasoned opinions are most needed in cases involving the progressive development of the law.⁹⁷

88. The term “holding” is used to describe the outcome of a trial court decision, whereas the term “disposition” is used to describe the outcome of an appellate court proceeding. See GEORGE, *supra* note 1, at 37.

89. See *id.* at 257.

90. *Id.* at 33.

91. See Aldisert et al., *supra* note 48, at 36 (noting judges need to focus on “more than justice in personam, a consideration for the peculiar rights of the parties before their court; there must also be justice in rem, fidelity to what has been decided in the past as a guide to setting the course for the future”).

92. See GEORGE, *supra* note 1, at 275; Aldisert et al., *supra* note 48, at 14.

93. Appellate courts in the United States review lower court decisions for three reasons: (1) to correct the lower court; (2) to allow for the progressive development of the law; and (3) to ensure the uniformity of the law. See Aldisert et al., *supra* note 48, at 12. Some people believe that the role of the common law is diminishing in the United States, particularly in U.S. federal courts, where courts are primarily bound by statutory or constitutional law. See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 5-7 (1982); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16-17 (Amy Gutmann ed., 1997).

94. See PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 70 (3d edn. 2007).

95. See Aldisert et al., *supra* note 48, at 12.

96. See GEORGE, *supra* note 1, at 143-45, 550.

97. See *id.* at 276; Aldisert et al., *supra* note 48, at 12.

Fully reasoned appellate opinions contain a number of features that are also seen in trial court decisions, as discussed further below.⁹⁸ However, appellate court judges have a heightened duty to include a detailed description of the procedural history of the case so as to establish both the standard and propriety of appellate review.⁹⁹

Like trial courts, intermediate appellate courts need to consider whether to rule in the alternative.¹⁰⁰ The issues at the appellate level are the same as at first instance, with judges needing to balance questions of efficiency against the possibility of confusion.¹⁰¹ Courts of last resort should avoid alternate holdings, since such rulings cannot be justified on the basis of efficiency and the likelihood of confusion is high.¹⁰²

Appellate courts also need to consider whether and to what extent to allow dissenting and concurring judgments. Some jurisdictions prohibit the use of individual opinions on the grounds the court should speak with one voice, while other jurisdictions allow judges to write individual opinions without even trying to obtain a single majority opinion.¹⁰³ The preference in most U.S. jurisdictions is for a single majority opinion, although individual opinions are allowed if consensus cannot be reached.¹⁰⁴ Thus, a judge may write a dissenting opinion if he or she cannot join the majority opinion as a matter of judicial integrity.¹⁰⁵ A concurring opinion may be appropriate if a judge agrees with the outcome reached by the majority but arrives at that result through different analytical means.¹⁰⁶

Some people oppose the use of individual opinions because such opinions are said to threaten the legitimacy of both the court and the law by demonstrating a

98. See *infra* notes 132-270 and accompanying text.

99. This duty to include the procedural history extends to trial judges who are temporarily acting in an appellate capacity. See W. Cory Haller & Karen E. Robertson, *Untangling Federal Administrative Appeals Practice in the District of Colorado*, 42 COLO. LAW. 31 (March 2013) (noting that U.S. district courts take on quasi-appellate jurisdiction when reviewing decisions of a federal administrative agency), available at http://www.cod.uscourts.gov/Portals/0/Documents/Judges/JLK/jlk_CH-KR-AP-docket-article-03-2013-Colo-Lawyer.pdf; see also United States Courts, *The Appeals Process*, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/TheAppealsProcess.aspx>. District courts also act in a quasi-appellate manner when reviewing decisions by a magistrate judge, although the standard of review differs depending on the manner in which the matter was referred to the magistrate. See 28 U.S.C. § 636(b)(1)(A) (2014); Sunil R. Harjani, *Dispositive or Non-Dispositive? The Applicable Standard of Review of a Magistrate Judge's Decision*, 17 CBA REC. 40, 40-41 (Sept. 2003).

100. See *supra* notes 86-88 and accompanying text.

101. See *supra* notes 86-88 and accompanying text.

102. GEORGE, *supra* note 1, at 37, 331.

103. See Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1189 (1992) (discussing the use of individual opinions in English courts); Vlad Perju, *Reason and Authority in the European Court of Justice*, 49 VA. J. INT'L L. 307, 309 (2009) (discussing the need for a single opinion in the European Court of Justice).

104. See GEORGE, *supra* note 1, at 281. Of course, judicial practices can change over time. Thus, the United States Supreme Court at one time strongly disfavored the use of dissenting and concurring opinions, although such opinions are now a common occurrence. See DOMNARSKI, *supra* note 8, at 32, 59, 71-74; WILLIAM D. POPKIN, *EVOLUTION OF THE JUDICIAL OPINION: INSTITUTIONAL AND INDIVIDUAL STYLES* (2007). Chief Justice John Marshall began the tradition of offering a single majority opinion in most U.S. Supreme Court cases. See DOMNARSKI, *supra* note 8, at 32.

105. See GEORGE, *supra* note 1, at 282, 326-30.

106. See *id.*; see also SUPREME COURT OF OHIO, *WRITING MANUAL: A GUIDE TO CITATIONS, STYLE AND JUDICIAL OPINION WRITING* 153-54 (2012) (noting various types of concurrences), available at <http://www.supremecourt.ohio.gov/ROD/manual.pdf>.

lack of unanimity among the members of the court.¹⁰⁷ However, others believe that a well-written dissent or concurrence can increase the legitimacy of the law, particularly in cases where the majority decision is later overruled or abrogated, since the dissent or concurrence demonstrates longstanding judicial support for the “new” interpretation of the relevant principle.¹⁰⁸

Appellate judges also need to be aware of the possibility of “strategic” dissents in jurisdictions where a dissent at the intermediate appellate level automatically triggers review of the case by the highest court in that jurisdiction.¹⁰⁹ In those cases, it is particularly important that both the majority and the dissenting opinions be well-written, since the scope for appeal to the high court may be set by the parameters of the dissenting opinion rather than by the parties, as would be true in situations where the highest court accepts an appeal on a discretionary basis.¹¹⁰

Some courts view dissents as problematic because they diminish collegiality among members of the court.¹¹¹ However, other courts consider a well-written dissent as advancing the legal debate, so long as the dissent is written in a respectful manner.¹¹² Thus, sarcasm and *ad hominem* attacks should play no role in a dissent.¹¹³

B. Issues Relating to the Process of Writing A Reasoned Judgment

How a reasoned judgment is written can have a significant effect on its content and style. As a rule, trial judges have more flexibility than appellate judges in this regard, since trial judges work alone and have only their own consciences to consider. Because appellate courts involve multiple judges or justices, the drafting process often includes a certain amount of compromise and negotiation.¹¹⁴

Every appellate court approaches the process of writing judgments differently.¹¹⁵ Sometimes, writing assignments are known from the very beginning, while

107. See GEORGE, *supra* note 1, at 329.

108. See *id.*; compare *Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan.*, 347 U.S. 686 (1954), with *Plessy v. Ferguson*, 163 U.S. 537 (1896); see also Linda Przybyszewski, Book Review, *The Dilemma of Judicial Biography or Who Cares Who is the Great Appellate Judge? Gerald Gunther on Learned Hand*, 21 L. & SOC. INQUIRY 135, 153, 156 (1996).

109. See, e.g., N.C. GEN. STAT. § 7A-30 (2014); Justice Robert Orr, *What Exactly is a “Substantial Constitutional Question” for Purposes of Appeal to the North Carolina Supreme Court?* 33 CAMPBELL L. REV. 211, 211 (2011) (noting that in North Carolina appeal to the state supreme court exists as of right if the intermediate appellate court is not unanimous and on a discretionary basis if the intermediate appellate court is unanimous).

110. See Orr, *supra* note 109, at 211.

111. See GEORGE, *supra* note 1, at 329.

112. See *id.* at 281.

113. See *id.* Empirical studies have suggested that the most sarcastic member of the U.S. federal bench is Justice Antonin Scalia. See Debra Cassens Weiss, *Scalia Tops Law Prof’s Sarcasm Index*, ABA L.J. (Jan. 20, 2015), available at http://www.abajournal.com/news/article/scalia_tops_law_prof_sarcasm_index. Observers have suggested that “such heavy use of sarcasm can demean the court, and . . . arguably demonstrates Justice Scalia’s lack of respect for the legal opinions of his colleagues.” *Id.* (quoting Professor Richard Hansen, the author of the study).

114. See Aldisert et al., *supra* note 48, at 12-14 (discussing how the deliberations process affects how an opinion is written); Tom Cobb & Sarah Kaltsounis, *Real Collaborative Context: Opinion Writing and the Appellate Process*, 5 J. ASS’N LEGAL WRITING DIRECTORS 156, 158-63 (2008).

115. See DOMNARSKI, *supra* note 8, at 32-34 (discussing the process at the U.S. Supreme Court); Daniel J. Bussell, *Opinions First - Argument Afterward*, 61 UCLA L. REV. 1194, 1196-97 (2014) (discussing the California Supreme Court’s unusual approach of writing opinions before hearing oral

at other times the primary author is not identified until after the hearing.¹¹⁶ In either case,

[t]he writing judge has the responsibility of drafting the proposed opinion, which may be adopted by the other members of the panel and which ultimately speaks for the court. The writing judge . . . does not have the luxury of writing independently, but should approach the opinion-writing task so that it will reflect the collective mind of the collegial body that makes up the panel.¹¹⁷

After the first draft is circulated, members of the court continue their deliberations by parsing through the language of the draft.¹¹⁸ Ideally, judges who disagree with portions of the draft opinion should not only identify the grounds for disagreement but should also “[o]ffer alternative solutions for the writing judge to consider.”¹¹⁹ This process is critically important, since the opinion must reflect the views of a majority of the court.¹²⁰ If the judges can reach only a narrow consensus, then the resulting opinion will have to be equally narrow.¹²¹

One issue that is becoming increasingly important in both trial and appellate courts involves the role of law clerks in writing reasoned judgments.¹²² Judges in the United States have long used law clerks to help draft opinions, and the practice appears to be spreading to other jurisdictions.¹²³ Commentators have expressed a variety of concerns about the extensive use of law clerks in U.S. courts, noting (among other things) the way in which the use of law clerks has affected the style of written decisions and opinions.¹²⁴ The first change involved the number and

argument); Goodwin Liu, *How the California Supreme Court Really Works: A Reply to Professor Bussell*, 61 UCLA L. REV. 1246, 1250-58 (2014) (rebutting allegations about the California Supreme Court).

116. See DOMNARSKI, *supra* note 8, at 122-23.

117. GEORGE, *supra* note 1, at 279.

118. See Aldisert et al., *supra* note 48, at 12-14.

119. GEORGE, *supra* note 1, at 281. Criticism should also be limited to matters of substance rather than style. See *id.* at 282.

120. See Aldisert et al., *supra* note 48, at 14.

121. See *id.* Authorship of the final opinion can be attributed to one individual or to the court (or a majority of the court) as a whole. Per curiam opinions fall into the latter category. See GEORGE, *supra* note 1, at 323. However, per curiam opinions of the U.S. Supreme Court are often accompanied by individual opinions. See *id.*

122. The concept of a judicial law clerk varies by jurisdiction. In the United States, a law clerk is a very recent law school graduate, perhaps with no professional experience. In other jurisdictions, a law clerk is much more senior attorney or a trainee judge. See David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545, 1546 (2009) (discussing law clerks in Japan); Franziska Weber, *‘Hanse Law School’ – A Promising Example of Transnational Legal Education? An Alumna’s Perspective*, 10 GERMAN L.J. 969, 971 (2009) (discussing German *Rechtsreferendar*).

123. See Mathilde Cohen, *Ex Ante Versus Ex Post Deliberations: Two Models of Judicial Deliberations in Courts of Last Resort*, 62 AM. J. COMP. L. 951, 972 (2014) (discussing use of law clerks in the European Court of Justice); Gerald Lebovits et al., *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, part VIII (2008); see also William J. Knudsen, Jr., *Soundoff*, ARIZ. ATT’Y 6 (July/Aug. 2006) (noting the practice of law clerks writing first drafts for U.S. judges occurred as early as 1956). For more on the history of law clerks in the United States, particularly at the U.S. Supreme Court, see Paul R. Baier, *The Law Clerks: Profile of an Institution*, 26 VAND. L. REV. 1125, 1129-32 (1973).

124. See DOMNARSKI, *supra* note 8, at 66. For more on the propriety of using law clerks as primary authors, see *id.* at 42-45; RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 139-59 (1996); Stephen J. Choi & G. Mita Gulati, *Which Judges Write Their Opinions (And Should We*

style of footnotes, which were initially all that law clerks were asked to draft.¹²⁵ However, as clerks became more extensively involved in the writing process, observers began to notice that an increasing number of reasoned decisions and opinions were taking on the characteristics of a law review article, which is the type of writing with which U.S. law clerks are most familiar.¹²⁶

The current practice in the United States is for clerks to write the first draft of a reasoned decision or opinion, although some judges have refused to relinquish that task.¹²⁷ Editing someone else's work is obviously a very different task than writing the first draft oneself and one that judges should take seriously.¹²⁸

This Article does not discuss how best to instruct a clerk in the process of drafting an opinion,¹²⁹ nor does this discussion consider the intricacies of editing one's own or others' work,¹³⁰ although both issues are of great importance to the production of well-reasoned judgments. Fortunately, there are numerous resources available on these important subjects for those who are interested in learning more.¹³¹

While it is important to recognize issues relating to authorship, such matters ultimately do not affect the core characteristics of a well-reasoned judgment.

Care? 32 FLA. ST. U. L. REV. 1077, 1078 (2005); David Crump, *Law Clerks: Their Roles and Relationships with Their Judges*, 69 JUDICATURE 236, 238 (1986); Sally J. Kenney, *Puppeteers or Agents? What Lazarus's Closed Chambers Adds to Our Understanding of Law Clerks at the U.S. Supreme Court*, 25 LAW & SOC. INQUIRY 185, 200-06 (2000); J. Daniel Mahoney, *Law Clerks: For Better or for Worse?*, 54 BROOK. L. REV. 321, 332-34, 338-44 (1988); David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 GEO. J. LEGAL ETHICS 509, 555-67 (2001); Mark C. Miller, *Law Clerks and Their Influence at the Supreme Court: Comments on Recent Works by Peppers and Ward*, 39 L. & SOC. INQUIRY 741, 741-55 (2014).

125. See DOMNARSKI, *supra* note 8, at 66.

126. See *id.* at 66, 94.

127. For example, Judge Richard Posner is said to write his opinions singlehandedly. See *id.* at 122.

128. For more on editing judicial writing, see FEDERAL JUDICIAL CENTER, JUDICIAL WRITING MANUAL: A POCKET GUIDE FOR JUDGES 25-26 (2013) [hereinafter FJC MANUAL], available at [http://www.fjc.gov/public/pdf.nsf/lookup/judicial-writing-manual-2d-fjc-2013.pdf/\\$file/judicial-writing-manual-2d-fjc-2013.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/judicial-writing-manual-2d-fjc-2013.pdf/$file/judicial-writing-manual-2d-fjc-2013.pdf); MAILHOT & CARNWATH, *supra* note 21, at 84.

129. There are a variety of resources available to discuss best practices on internal operating procedures. See Federal Judicial Center, <http://www.fjc.gov>; National Center for State Courts, <http://www.ncsc.org/>; State Justice Institute, <http://www.sji.gov/>. Various universities and training institutions also offer programs for improving judicial practices. For example, Duke University Law School offers an LL.M. degree in judicial studies while the Judicial Studies Institute at the University of Puerto Rico offers a bilingual course for judges from both the common law and civil law traditions.

130. For more on editing judicial writing, see FJC MANUAL, *supra* note 128, at 25-26; MAILHOT & CARNWATH, *supra* note 21, at 84.

131. See CALVERT G. CHIPCHASE, FEDERAL DISTRICT COURT: LAW CLERK HANDBOOK (2007); MARY L. DUNNEWOLD ET AL., JUDICIAL CLERKSHIPS: A PRACTICAL GUIDE (2010); FJC MANUAL, *supra* note 128, at 25-26; GEORGE, *supra* note 1, at 285-88, 723-27; FJC LAW CLERK HANDBOOK, *supra* note 31; JOSEPH L. LEMON, JR., FEDERAL APPELLATE COURT: LAW CLERK HANDBOOK (2007); MAILHOT & CARNWATH, *supra* note 21, at 84; ALIZA MILNER, JUDICIAL CLERKSHIPS: LEGAL METHODS IN MOTION (2011); JENNIFER SHEPPARD, IN CHAMBERS: A GUIDE FOR JUDICIAL CLERKS AND EXTERNS (2012); Frederick G. Hamley, *Sample Instructions to Law Clerks*, 26 VAND. L. REV. 1241 (1973); Richard B. Klein, *Opinion Writing Assistance Involving Law Clerks: What I Tell Them*, 34 JUDGES J. 33 (Summer 1995); Gerald Lebovits & Lucero Ramirez Hidalgo, *Advice to Law Clerks: How to Draft Your First Judicial Opinion*, 36 WESTCHESTER B.J. 29 (Spring-Summer 2009); Lebovits et al. *supra* note 123, at 237; Jennifer Sheppard, *The "Write" Way: A Judicial Clerk's Guide to Writing for the Court*, 38 U. BALT. L. REV. 73 (2008); George Rose Smith, *A Primer of Opinion Writing for Law Clerks*, 26 VAND. L. REV. 1203 (1973); Eugene A. Wright, *Observations of an Appellate Judge: The Use of Law Clerks*, 26 VAND. L. REV. 1179 (1973); see also Ruth C. Vance, *Judicial Opinion Writing: An Annotated Bibliography*, 17 LEGAL WRITING 197, 204-31 (2011) (annotating the above titles).

Regardless of who writes the document or how the process is managed, the elements of good judicial writing remain the same. The following sub-section therefore discusses the framework of a well-reasoned decision or opinion, including core considerations relating to scope, audience and structure.

C. Issues Relating to the Framework for Reasoned Judgments

1. Scope

The process of drafting a reasoned judgment begins by considering questions of scope.¹³² Not every dispute merits a fully reasoned judgment, and judges must learn to differentiate between those matters that deserve a detailed legal analysis and those that do not.¹³³

In *The Nature of the Judicial Process*, Justice Benjamin Cardozo suggests that there are three different categories of cases that can result in a judicial ruling.¹³⁴

The first category, the majority of the docket, is comprised of those cases where “[t]he law and its application alike are plain.” Such cases “could not, with semblance of reason, be decided in any way but one. Such cases are predestined, so to speak, to affirmance without opinion.” To publish an opinion in such cases would contribute nothing new to the body of law or to the reader. These cases do not merit even a non-precedential opinion. Instead, a plain judgment order or citation to the district court opinion in the appendix is sufficient.

Cardozo’s second category of cases, a “considerable percentage” of the docket, is comprised of those cases where “the rule of law is certain, and the application alone doubtful.” In such cases,

[a] complicated record must be dissected, the narratives of witnesses, more or less incoherent and unintelligible, must be analyzed, to determine whether a given situation comes within one district or another upon the chart of rights and wrongs. . . . Often these cases . . . provoke difference of opinion among judges. Jurisprudence remains untouched, however, regardless of the outcome.

132. See FJC MANUAL, *supra* note 128, at 3-7.

133. See GEORGE, *supra* note 1, at 276; Aldisert et al., *supra* note 48, at 12. Another factor that may influence the writing process involves the possibility of publication. However, many questions relating to publication arise as a matter of local law and practice and are therefore outside the scope of this Article. See FJC MANUAL, *supra* note 128, at 6-7.

134. See CARDOZO, *supra* note 48, at 164-65; Aldisert et al., *supra* note 48, at 8. Some authorities suggest there are four categories of cases: where the facts and law are both clear; where the facts are clear but the law is not; where the law is clear but the facts are not; and where the law and facts are both disputed. See GEORGE, *supra* note 1, at 240 (describing the ease with which each of these cases can be considered). Although Justice Cardozo’s analysis focuses on appellate opinions, trial court judges can also benefit from this type of categorization.

It is in this second category that a non-precedential opinion is legitimate. The rule of law is settled, and the only question is whether the facts come within the rule. Such fact-oriented opinions do not add to our jurisprudence and thus do not require publication.

It is only in Cardozo's third and final category where an opinion for publication should be written. "The final category . . . is comprised of cases 'where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law.' . . . From such cases, each modestly articulating a narrow rule, emerge the principles that form the backbone of a court's jurisprudence and warrant [a] full-length, signed published opinion."¹³⁵

This taxonomy of judicial disputes helps explain the character of different judicial rulings.¹³⁶ Summary orders (also known as summary judgment orders) are used in Justice Cardozo's first category of cases and usually run no more than a single page in length.¹³⁷ Although a summary order may include a brief statement of the findings of fact and conclusions of law, it provides little or no explanation of why the court reached the outcome that it did.¹³⁸

Memoranda opinions are used in Cardozo's second category of cases.¹³⁹ These documents, which are not considered precedential, are nevertheless slightly more fulsome than summary orders and therefore provide at least some description of how the court arrived at its decision.¹⁴⁰ However, memoranda opinions do not qualify as fully reasoned judgments because they do not include either a detailed discussion of the facts¹⁴¹ or a comprehensive explanation of the legal rationales underlying the decision.¹⁴²

Both of these types of documents can be contrasted with fully reasoned opinions and decisions, which are generated by Justice Cardozo's third category of cases, i.e., "where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law."¹⁴³ Although Justice Cardozo believed that these types of cases arose relatively infrequently, he was writing prior to the adoption of various procedural rules promoting early settlement of civil litigation and the advent of alternative

135. Aldisert et al., *supra* note 48, at 8-9 (quoting CARDOZO, *supra* note 48, at 164-65); *see also* GEORGE, *supra* note 1, at 32-34 (discussing types of judicial writings).

136. *See supra* note 47 and accompanying text (discussing the need for a functional analysis to determine what constitutes a reasoned judgment).

137. *See* CARDOZO, *supra* note 48, at 164; Aldisert et al., *supra* note 48, at 10-11.

138. *See* FJC MANUAL, *supra* note 128, app. B.

139. *See* CARDOZO, *supra* note 48, at 164; *see also* Aldisert et al., *supra* note 48, at 8, 11. Per curiam opinions fall slightly above the category of disputes that can be decided by memoranda opinions. *See id.* at 9 (noting per curiam decisions are used "when the rule of law and its application to relatively simple facts are clear, or where the law has been made clear by an appellate decision" and discussing various circumstances in which such opinions are proper); *see also* GEORGE, *supra* note 1, at 282-83, 322-24 (defining per curiam decisions).

140. *See* FJC MANUAL, *supra* note 128, app. A; GEORGE, *supra* note 1, at 325-26; Aldisert et al., *supra* note 48, at 11.

141. *See* Aldisert et al., *supra* note 48, at 11.

142. *See* FJC MANUAL, *supra* note 128, app. A; GEORGE, *supra* note 1, at 325-26; Aldisert et al., *supra* note 48, at 11.

143. CARDOZO, *supra* note 48, at 165; *see also* Aldisert et al., *supra* note 48, at 8-9. This definition of a fully reasoned judgment is akin to a fully reasoned award in the arbitral context, particularly in international commercial arbitration and investment arbitration. *See* STRONG, ICA, *supra* note 32, at 22.

dispute resolution.¹⁴⁴ As a result, the percentage of cases needed a reasoned judgment may be higher now than in Justice Cardozo's time, since the only disputes that currently make their way to final disposition by a court are those that are too difficult to settle as either a legal or factual matter.¹⁴⁵

The scope of the facts and law in contention define the focus of the reasoned judgment. For example, matters that are factually complex require courts, by necessity, to summarize and analyze factual issues in more depth. Disputes that turn on novel issues of law require courts to spend more time on both the governing law as well as the underlying policies that drive the law in a particular direction.

Novice judges can find it difficult to differentiate between a factual finding and a legal conclusion.¹⁴⁶ "Findings of fact may be defined as those facts which are deduced from the evidence and which are found by the judge to be essential to the judgment rendered in the case."¹⁴⁷ Conclusions of law, on the other hand, "are drawn by the judge through the exercise of her [or her] legal judgment from those facts he [or she] has found previously as the trier of fact."¹⁴⁸

The inductive nature of common law analysis requires judges in the United States to give due consideration to the factual basis of any legal claim that is made.¹⁴⁹ Reasoned decisions and opinions must therefore provide a sufficient level of factual detail to identify the boundaries and context of the legal ruling so that parties can determine going forward whether their behavior falls into the category of conduct being regulated.¹⁵⁰ Factual analyses can also help demonstrate why a particular outcome is appropriate as a matter of policy.

Although the scope of a judicial opinion is heavily affected by factual considerations, legal issues are equally important. "If the issue has been thoroughly discussed in prior opinions, the judge need not trace the origins of the law or elab-

144. See CARDOZO, *supra* note 48, at 165; Aldisert et al., *supra* note 48, at 8; Jeffrey M. Stempel, *Reflections on Judicial ADR and the Multi-door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 10 OHIO ST. J. ON DISPUTE RESOL. 297, 312, 319-23 (1996). Justice Cardozo passed away in 1938, the same year that the Federal Rules of Civil Procedure were adopted.

145. See Stempel, *supra* note 144, at 319-23; S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 WASH. U. J. L. & POL'Y 11, 17-18 (2014).

146. See *Miller v. Fenton*, 474 U.S. 104, 113-14 (1985) ("[T]he appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive," and acknowledging "the practical truth that the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis." (citations omitted)); see also GEORGE, *supra* note 1, at 235-38 (including examples).

147. GEORGE, *supra* note 1, at 188 (noting findings of fact are "a form of judicial inquiry").

148. *Id.* at 189 (noting "[w]hen the judge considers the facts and draws the legal conclusion . . . [the statement] becomes a conclusion of law").

149. See STRONG ET AL., *supra* note 57, ch. 3; see also *supra* note 57 and accompanying text. The common law has been said to place

its faith in experience rather than in abstractions. It is a frame of mind which prefers to go forward cautiously on the basis of experience from this case or that case to the next case, as justice in each case seems to require, instead of seeking to refer everything back to supposed universals. It is a frame of mind which is not ambitious to deduce the decision for the case in hand from a proposition formulated universally It is the . . . habit of dealing with things as they arise instead of anticipating them by abstract universal formulas.

Roscoe Pound, *What Is the Common Law*, in THE FUTURE OF THE COMMON LAW 3, 18 (1937), as quoted in ZWEIGERT & KÖTZ, *supra* note 50, at 259.

150. See STRONG ET AL., *supra* note 57, ch. 3.

orate on its interpretation.”¹⁵¹ If, however, the case involves a legal issue that is less well-developed or a rule that will be modified or extended, then

[t]he judge should discuss and analyze the precedents in the area, the new direction the law is taking, and the effect of the decision on existing law. Even if it appears that the litigants do not need a detailed statement of the facts, the opinion should present sufficient facts to define for other readers the precedent it creates and to delineate its boundaries. The relevant precedents—and the relevant policies—should be analyzed in sufficient detail to establish the rationale for the holding.¹⁵²

Finally, a well-reasoned judgment needs to weigh the conflicts involved in the dispute thoughtfully and disinterestedly (thereby demonstrating the reasonableness of the decision) while also demonstrating how fair and long-lasting the resolution of the conflict will be (thereby demonstrating the logic of the decision).¹⁵³ Although this is a challenging goal, it is one to which all reasoned decisions and opinions should nevertheless aspire.

2. Audience

Knowing one’s audience is one of the fundamental rules of good writing, regardless of context.¹⁵⁴ Because “[t]he basic purpose of a judicial opinion is to tell participants in the lawsuit why the court acted the way it did,”¹⁵⁵ conventional wisdom suggests that judges should direct their statements to the parties, and, in cases that are being heard on appeal, to the court whose judgment is under review.¹⁵⁶

This advice is absolutely true, as far as it goes. Certainly the litigants must be able to understand the decision, since they “have an all-pervasive interest” in the outcome of the dispute.¹⁵⁷ However, reasoned decisions and opinions are read by many different people and for many different purposes. Judges must therefore consider whether and to what extent they are also writing for the bar, the legislature, the media, other judges (including both future judges and in some cases other members of an appellate panel) and/or lay members of the public.¹⁵⁸ Appellate courts must also think about “the effect the opinion will have on itself as an institution charged with responsibilities for setting precedent and for defining law.”¹⁵⁹

151. FJC MANUAL, *supra* note 128, at 4.

152. *Id.* at 4-5.

153. This test has been attributed to Roscoe Pound of Harvard and Harry Jones of Columbia. See Aldisert et al., *supra* note 48, at 20.

154. See Jeffrey A. Van Detta, *The Decline and Fall of the American Judicial Opinion, Part II: Back to the Future From the Roberts Court to Learned Hand – Segmentation, Audience, and the Opportunity of Justice Sotomayor*, 13 BARRY L. REV. 29, 34 (2009) [hereinafter Van Detta 2].

155. Aldisert et al., *supra* note 48, at 17.

156. *See id.*

157. *Id.*

158. See FJC MANUAL, *supra* note 128, at 5-6; DOMNARSKI, *supra* note 8, at 94-95; GEORGE, *supra* note 1, at 148-50; MAILHOT & CARNWATH, *supra* note 21, at 11; Aldisert et al., *supra* note 48, at 15-16, 19-20; Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 813-14 (1961).

159. Aldisert et al., *supra* note 48, at 17.

Writing for such a diverse audience can be challenging. However, experts have suggested that “[t]he mark of a well-written opinion is that it is comprehensible to an intelligent layperson,” since that standard will meet the needs of all possible audience members.¹⁶⁰ As a result, decisions and opinions must be “clear, logical, unambiguous, and free of” legal jargon¹⁶¹ while also reflecting consistency and coherence with existing legal authorities.¹⁶² Although a judge must always be true to his or her own beliefs, “[o]pinions should not . . . be turned into briefs or vehicles for advocacy.”¹⁶³

3. Structure

As important as questions of scope and audience may be, the real challenge involves structure. Without a good structure, a writer cannot hope to persuade or even inform his or her reader.¹⁶⁴

Perhaps the most often-used and well-regarded structural framework for reasoned decisions and opinions is based on the classical principles of Greco-Roman rhetoric.¹⁶⁵ Although ancient theories of communication may initially appear irrelevant in the twenty-first century, the benefits of this approach have been well-documented.¹⁶⁶

This model includes five different sections that are each set off by a header.¹⁶⁷ Although the content of each section varies somewhat according to whether the ruling is from a trial court or an appellate court, the core elements remain the same.¹⁶⁸ The five sections include:

- an opening paragraph or orientation (*exordium*);
- a summary of the issues to be discussed (*divisio*);
- a recitation of material adjudicative facts (*narratio*);
- an analysis of the legal issues (*confirmatio a. confutatio*); and
- a conclusion (*peroratio*).¹⁶⁹

160. FJC MANUAL, *supra* note 128, at 6.

161. Aldisert et al., *supra* note 48, at 18.

162. *See id.* (discussing principles initially set forth by Professor Neil MacCormick of the University of Edinburgh).

163. FJC MANUAL, *supra* note 128, at 5.

164. *See* STRONG & DESNOYER, *supra* note 41, ch. 1.

165. *See* RUGGERO J. ALDISERT, OPINION WRITING 77-82 (2d ed. 2009); FJC MANUAL, *supra* note 128, at 13; GEORGE, *supra* note 1, at 291-304; MAILHOT & CARNWATH, *supra* note 21, at 37-38; EDWARD D. RE, APPELLATE OPINION WRITING 11 (1975), available at <http://www.fjc.gov>; SUPREME COURT OF OHIO, *supra* note 106, at 129-30 (providing an outline of a judgment), available at <http://www.supremecourt.ohio.gov/ROD/manual.pdf>; Aldisert et al., *supra* note 48, at 24; George Rose Smith, *A Primer of Opinion Writing, for Four New Judges*, 21 ARK. L. REV. 197, 204 (1967).

166. This sort of segmentation is said to promote better understanding of the material. *See* Van Detta 2, *supra* note 154, at 32.

167. *See* STRONG & DESNOYER, *supra* note 41, ch. 3.

168. *See* GEORGE, *supra* note 1, at 161-84, 275-84. For example, an appellate court would need to discuss the decision below, whereas a trial court would not.

169. *See* Aldisert et al., *supra* note 48, at 24; *see also* ALDISERT, *supra* note 165, at 77-82; FJC MANUAL, *supra* note 128, at 13; GEORGE, *supra* note 1, at 291-304; MAILHOT & CARNWATH, *supra* note 21, at 37-38; RE, *supra* note 165, at 11; SUPREME COURT OF OHIO, *supra* note 106, at 129-30; Smith, *supra* note 165, at 204.

This model does not include headnotes and syllabi, since those features are not considered authoritative in many jurisdictions.¹⁷⁰ However, some experts have suggested that judges who sit in jurisdictions that consider the syllabus be the authoritative statement of the holding of the case should write their own headnotes and syllabi.¹⁷¹

i. Orientation

Experts agree that every well-reasoned decision or opinion should begin with an opening or orientation section that puts the legal and factual discussion into context and lets the reader know what is to come.¹⁷² Although substance is more important than style, a good orientation paragraph should nevertheless attempt to “pique the opinion reader’s interest with its language.”¹⁷³

Even though the orientation section is only one or two paragraphs long, it serves two important purposes. First, this section describes the structure of the discussion so as to give readers a roadmap of where the author is going.¹⁷⁴ Second, a good orientation paragraph provides readers with sufficient information to know whether they should continue reading.¹⁷⁵ The most common consumers of reasoned judgments (typically lawyers and other judges) are often pressed for time and need to know immediately whether a decision or opinion is relevant to the issue they are researching.¹⁷⁶ As a result, all of the critical information about the case should appear in the orientation section.¹⁷⁷

One way to approach an orientation section is by reference to the six questions posed by journalists: who, what, when, where, why and how.¹⁷⁸ “Who” is perhaps the easiest of the questions to answer, since it simply requires the judge to identify the litigants and, if the case is being heard on appeal, who prevailed in the lower court.¹⁷⁹

170. See Gregory Aubuchon, *A Forensic Economist’s Guide to Reading Legal Decisions*, 16 J. LEGAL ECON. 71, 76 (Oct. 2009).

171. See Smith, *supra* note 165, at 204. See also GEORGE, *supra* note 1, at 177, 179; SUPREME COURT OF OHIO, *supra* note 106, at 131 (noting the principle cited in the syllabus will control if a conflict exists between the syllabus and the text of the judgment itself); Gerald Lebovits, *The Third Series: A Review*, 77 N.Y. STATE BAR J. 30, 32 (Mar./Apr. 2005) (noting the statutory duty to include headnotes of some decisions in New York) [hereinafter Lebovits, *Review*].

172. See Aldisert et al., *supra* note 48, at 24-25. Some commentators refer to this section as “the nature of the action.” GEORGE, *supra* note 1, at 162.

173. Aldisert et al., *supra* note 48, at 27.

174. Judges in common law countries should be familiar with this type of orientation from their years in practice. See STRONG, HOW TO WRITE, *supra* note 21, at 180-81 (discussing executive summaries); see also *supra* notes 4-5 and accompanying text (noting common law judges are usually experienced practitioners).

175. See Aldisert et al., *supra* note 48, at 25.

176. See *id.*

177. For examples of both good and bad orientation paragraphs, see Smith, *supra* note 165, at 205 (citing his own opinions in *Johnson v. Smith*, 219 S.W.2d 926 (Ark. 1949), *McClure Ins. Agency v. Hudson*, 377 S.W.2d 814 (Ark. 1964), *Garner v. Amsler*, 377 S.W.2d 872 (Ark. 1964), and *Dereuisseaux v. Bell*, 378 S.W.2d 208 (Ark. 1964)). For advice specific to appellate judges, see RE, *supra* note 165, at 14; Smith, *supra* note 165, at 204.

178. See GEORGE, *supra* note 1, at 12; Smith, *supra* note 165, at 204. This technique is appropriate for both appellate and trial court judges. See GEORGE, *supra* note 1, at 12; Smith, *supra* note 165, at 204.

179. See Aldisert et al., *supra* note 48, at 26.

“What” is also relatively straightforward. Here, the judge merely needs to identify the particular area of law that is addressed in the judgment and outline the specific legal issues at stake.¹⁸⁰ Thus, a judge might indicate that the case involved a claim in negligence and that the primary issue in contention involved whether the defendant owed a legal duty to the plaintiff.¹⁸¹

“When” is important in both trial-level and appellate courts, although the question may be framed in a slightly different manner, depending on the context.¹⁸² In trial courts, “when” would likely refer to the timing of the legal injury so as to establish whether the case was being brought in a timely manner and/or to ascertain the scope of any possible damages.¹⁸³ In appellate courts, the question of “when” might refer to whether the appeal was raised within the proper period of time.¹⁸⁴

“Where” can relate to a variety of issues.¹⁸⁵ For example, an appellate court might need to establish where the appeal is coming from so as to demonstrate that appellate jurisdiction exists.¹⁸⁶ Trial judges may also frame the question of “where” as jurisdictional in nature, since courts are often only competent to hear matters that arise within their own particular territory.¹⁸⁷ Although jurisdictional issues can be considered in response to a “where” question, there is no need to characterize jurisdictional matters in that particular light. However, judges should always indicate the basis for the court’s jurisdiction over the matter at bar, regardless of how they frame the issue.¹⁸⁸

The next question relates to “why” a matter has been brought to the court’s attention. Sometimes, this issue will have already been answered as a result of the “who,” “what,” “when,” or “where” analyses.¹⁸⁹ However, a judge should raise this matter independently if it has not already been addressed, since the question of “why is this matter being brought before this court at this time” is fundamental to every litigation.¹⁹⁰

“How” is primarily a procedural question relating to the way the issue reached the court.¹⁹¹ Thus, a trial court judge may wish to indicate whether a decision relates to a matter that was raised on motion or following a full trial.¹⁹²

180. *See id.*

181. The tort of negligence typically requires the plaintiff to establish the existence of a legal duty, breach of that duty, legal causation, factual causation and damages. *See* *Detraz v. Lee*, 950 So.2d 557, 562 (La. 2007); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §6, cmt. b. Only some of these issues will be in doubt in any particular case. *See* STRONG, HOW TO WRITE, *supra* note 21, at 39.

182. *See* GEORGE, *supra* note 1, at 12; Smith, *supra* note 165, at 204.

183. *See* GEORGE, *supra* note 1, at 12; Smith, *supra* note 165, at 204.

184. *See* Aldisert et al., *supra* note 48, at 26.

185. *See* GEORGE, *supra* note 1, at 12; Smith, *supra* note 165, at 204.

186. *See* Aldisert et al., *supra* note 48, at 26.

187. *See* *Pennoyer v. Neff*, 95 U.S. 714 (1877). The issue is occasionally framed in terms of venue rather than jurisdiction. *See, e.g.*, FED. R. CRIM. P. 18. Of course, there are times when a court accepts jurisdiction over an extraterritorial act. *See* Dan E. Stigall, *International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law*, 35 HASTINGS INT’L & COMP. L. REV. 323, 324-25 (2012).

188. *See* Aldisert et al., *supra* note 48, at 27. When discussing this issue, appellate courts should address not only their own jurisdiction, but also that of the trial court. *See id.* at 28.

189. *See* GEORGE, *supra* note 1, at 12; Smith, *supra* note 165, at 204.

190. *See* GEORGE, *supra* note 1, at 12; Smith, *supra* note 165, at 204.

191. *See* GEORGE, *supra* note 1, at 12; Smith, *supra* note 165, at 204.

192. *See* Aldisert et al., *supra* note 48, at 26.

Similarly, an appellate court may wish to indicate whether the dispute was heard as of right or as a matter of discretion.¹⁹³ In either case, it is important to know how the matter reached the court.

The “how” paragraph can also be interpreted as indicating how the court has decided to rule. While some judges believe that withholding the result until the end of the decision or opinion increases the reader’s anticipation, there is little to be gained by not indicating the outcome in the orientation paragraph, since most readers who do not find the holding in the orientation paragraph simply turn to the end of the document to find out how the case was decided.¹⁹⁴ In fact, numerous authorities suggest that the orientation paragraph should include a reference to the holding or disposition “as a guide to the intelligent reading of the opinion” or decision.¹⁹⁵ When announcing the outcome of the dispute, judges should avoid using the passive tense or other indirect language (such as “I believe”), since such language “dilute[s] the vigor which should characterize the result.”¹⁹⁶

A clear reference to the outcome of the case may be particularly important in “splintered” decisions, where a claim is denied in part and granted in part.¹⁹⁷ Plurality decisions offer similar opportunities for confusion, which suggest a heightened need for well-written orientation paragraphs.¹⁹⁸ Although the orientation section is comprehensive in scope, it should be very brief.¹⁹⁹ In fact,

[t]he simplest form of preview statement sets forth the legal issue and the answer to it in the most concise form possible. The following opening paragraph is a classic: “We are called upon to determine whether “attempted assault” is a crime in the state of California. We conclude that it is not.”²⁰⁰

Learning to write a good orientation section takes practice, and even experienced judges spend considerable time getting the wording just right.²⁰¹ However, the benefits of a clear, concise opening justify the time spent on drafting.

ii. Summary of legal issues

The second section of a reasoned decision or opinion involves a summary of the various legal issues that will be discussed in the body of the document.²⁰² This

193. See GEORGE, *supra* note 1, at 12; Smith, *supra* note 165, at 204.

194. See GEORGE, *supra* note 1, at 301 (discussing views of Judge Richard Posner and Judge Patricia Wald); MAILHOT & CARNWATH, *supra* note 21, at 53.

195. Aldisert et al., *supra* note 48, at 27 (quoting B.E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS § 57, at 93 (1977)). The term “holding” is used to describe the outcome of a trial court decision, whereas the term “disposition” refers to the outcome of an appellate court proceeding. See GEORGE, *supra* note 1, at 37.

196. MAILHOT & CARNWATH, *supra* note 21, at 54.

197. See SUPREME COURT OF OHIO, *supra* note 106, at 150 (containing example).

198. See Robin Kundis Craig, *Agencies Interpreting Courts Interpreting Statutes: The Deference Conundrum of a Divided Supreme Court*, 61 EMORY L. J. 1, 7-10 (2011) (discussing the difficulties associated with plurality opinions); Justin Marceau, *Plurality Decisions: Upward-Flowing Precedent and Acoustic Separation*, 45 CONN. L. REV. 933, 935-37 (2013) (same).

199. See Aldisert et al., *supra* note 48, at 26.

200. *Id.* at 27 (quoting *In re James M.*, 9 Cal. 3d 517, 519 (1973)). This approach is similar to that used in legal practice. See STRONG, HOW TO WRITE, *supra* note 21, at 105.

201. See Aldisert et al., *supra* note 48, at 26.

section focuses exclusively on legal issues, since factual issues are considered separately.²⁰³

Some writers worry about discussing legal issues outside their factual context, thinking that such an analysis is too academic and treatise-like.²⁰⁴ However, the goal in this subsection is not to discuss the law in a vacuum, but rather to provide a clear analysis of the legal dispute that will ultimately be informed by the material adjudicative facts.²⁰⁵ This technique not only brings the discussion of legal concerns down to a manageable size, it helps the reader better understand the materiality of the facts that are presented later in the decision or opinion.²⁰⁶ “The effect is like reading a review of a movie before seeing it, so that one knows what to look for in the theater.”²⁰⁷

Some disputes present more than one legal issue.²⁰⁸ However, this situation is not unduly problematic, since there are a number of ways of handling these types of complex matters.²⁰⁹ Some judges present all of the potential legal issues in a single summary paragraph, while other judges split up the various issues and introduce them in separate paragraphs under topic sentences introducing individual sub-issues.²¹⁰ Either technique is fine, so long as the approach is clear to the reader.

When discussing legal issues, it is usually not necessary to address everything raised by counsel in detail, since it is the court, not the parties, who control the scope and content of a legal ruling.²¹¹ While it is important to address any claim, defense, error or objection that has been properly raised or preserved on appeal, some concerns do not merit lengthy analysis and can be handled in a relatively succinct manner.²¹²

Although trial judges and appellate judges can usually approach the summary of legal issues in a relatively similar manner, appellate judges do need to be sure

202. *See id.* at 28.

203. An issue can be defined as “a point in dispute between two or more parties. In an appeal, an issue may take the form of a separate and discrete question of law or fact, or a combination of both.” BLACK’S LAW DICTIONARY (2009). Strictly separating the legal and factual analysis is a skill that is first taught in law school. *See* STRONG, HOW TO WRITE, *supra* note 21, at 53-97; STRONG & DESNOYER, *supra* note 41, chs. 4-5.

204. *See* STRONG, HOW TO WRITE, *supra* note 21, at 69, 81.

205. *See* Aldisert et al., *supra* note 48, at 28. Adjudicative facts are those that are adduced through evidence at trial. *See* FED. R. EVID. 201, advisory committee note (a).

206. *See* Aldisert et al., *supra* note 48, at 28.

207. *Id.*

208. *See* STRONG, HOW TO WRITE, *supra* note 21, at 42-43 (discussing cases with multiple causes of action and/or multiple party pairings).

209. *See* Aldisert et al., *supra* note 48, at 28.

210. *See id.* at 28-29.

211. *See* GEORGE, *supra* note 1, at 167; Aldisert et al., *supra* note 48, at 29; *see also* MAILHOT & CARNWATH, *supra* note 21, at 51 (noting “if the plaintiff is in favour of a proposition the reader can usually infer the defendant is against it”). Some jurisdictions, most notably England, follow different practices. *See* STRONG, HOW TO WRITE, *supra* note 21, at 21-22 (noting that English judges often include detailed summaries of the arguments of counsel and of the courts below); *see also* Lebovits, *Review*, *supra* note 171, at 32 (discussing the statutory duty in New York to include counsel’s arguments in the judicial report).

212. *See* GEORGE, *supra* note 1, at 295; Aldisert et al., *supra* note 48, at 29. Thus, a court does not need to give equal weight to every item mentioned in a written decision or opinion. *See* DOMNARSKI, *supra* note 8, at 94 (noting both district and appellate court practice); Aldisert et al., *supra* note 48, at 29.

to include a separate paragraph describing the appropriate standard of review.²¹³ That standard is usually determined by reference to the matter under review, with the three most frequently used standards—clear error, abuse of discretion and plenary (*de novo*) review—typically relating to evidentiary, discretionary and legal matters, respectively.²¹⁴

iii. Statement of facts

A well-written factual analysis is critical to a well-reasoned decision or opinion, since the judge needs to demonstrate and discuss the interaction between the law and the facts.²¹⁵ Therefore, a judge must include all the relevant facts, although he or she must simultaneously take care to avoid introducing any unnecessary facts, since additional elements not only slow the reader down but may cause confusion about the scope and future applicability of the legal principle enunciated in the judgment.²¹⁶ As a result, “[o]nly material, adjudicative facts should be set forth in the opinion” or decision.²¹⁷

To determine what facts are material, judges look to the substantive law.²¹⁸ Only “facts that might affect the outcome of the suit under the governing law” can be considered material.²¹⁹ Focusing on facts “that are truly essential as opposed to those that are decorative and adventitious” allows the “conclusion . . . to follow so naturally and inevitably as almost to prove itself.”²²⁰

213. See Aldisert et al., *supra* note 48, at 30-31. Appellate courts can accept review on a variety of matters, including “review of the sufficiency of the evidence to meet the required burden of persuasion at the trial level; review of the exercise of discretion; and plenary review of the choice, interpretation, and application of the controlling legal precepts.” *Id.* at 30.

214. See *id.* at 30. Notably, the standard of review differs from the scope of review. See GEORGE, *supra* note 1, at 297.

215. See ALDISERT, *supra* note 165, at 136 (noting a well-reasoned judgment “requires an identification of resemblances [between the facts of two cases], which we may call positive analogies, and differences, which we may call negative analogies”). Although this technique is most important in common law jurisdictions, where the principle of *stare decisis* requires similar cases to be treated in a similar manner, other jurisdictions also have an interest in ensuring the predictability of the law. See Aldisert et al., *supra* note 48, at 31-32; *supra* note 94 and accompanying text. Civil law lawyers often find the concept of common law reasoning very difficult to grasp, although there may be an increased acceptance of the case law method in a number of civil law countries. See Helena Whalen-Bridge, *The Reluctant Comparativist: Teaching Common Law Reasoning to Civil Law Students and the Future of Comparative Legal Skills*, 58 J. LEGAL EDUC. 364, 365-66 (2008); Shoenberger, *supra* note 28, at 5.

216. See Aldisert et al., *supra* note 48, at 31.

217. *Id.*

218. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (considering materiality in the context of a motion for summary judgment). Different jurisdictions may adopt different definitions as to the materiality of a certain issue. See *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010), Brief of the International Chamber of Commerce et al. as Amicus Curiae in Support of Respondents, at 24 (noting the different definitions of materiality under U.S. and Swiss law).

219. *Liberty Lobby*, 477 U.S. at 248 (considering materiality in the context of a motion for summary judgment); see also *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006); *Willis v. Roche Biomedical Labs., Inc.*, 61 F.3d 313, 315 (5th Cir. 1995); *Buirkle v. Hanover Ins. Co.*, 832 F. Supp. 2d 469, 471-73, 489 (D. Mass. 1993); *People v. White*, 308 N.W.2d 128, 131-32 (Mich. 1981); ALDISERT, *supra* note 165, at 137. For examples from both U.S. and English law, see *id.* at 139-40 (discussing *Rylands v. Fletcher*, (1868) L.R. 3 H.L. 330 (HL), and *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

220. Aldisert et al., *supra* note 48, at 31-32 (quoting Benjamin N. Cardozo, *Law and Literature*, 14 YALE L.J. 705 (1925)); see also ALDISERT, *supra* note 165, at 138-40. In some ways, the task of deciding what constitutes a material versus non-material fact is not as difficult as it seems, since a judge has been considering those issues throughout the proceedings. See GEORGE, *supra* note 1, at 232 (noting

When summarizing the facts, judges must ensure the accuracy of each individual element.²²¹ “While the author may interpret the law liberally or strictly, he [or she] must not take this kind of liberty with the facts.”²²² Experts suggest pulling the facts from the record itself rather than adopting the proposed findings of facts submitted by one of the parties, both to minimize error and to avoid claims that the judge has not exercised the requisite amount of independent judgment when reviewing the facts.²²³

When describing the material facts, a judge needs to do more than simply recount the evidence.²²⁴ Instead, the decision or opinion must “set out express findings of fact showing how the judge reasoned from the evidentiary facts to the ultimate fact” that decides a particular legal issue.²²⁵ While it is often best to state the facts chronologically, some matters are better served by another type of organizational structure.²²⁶

If witness testimony is discussed, the court of first instance should address issues of credibility.²²⁷ However, the judge does not need to list all of the witnesses who have appeared.²²⁸ Instead, it is sufficient to “identify the undisputed facts and make findings of those in dispute, all within the rubric of pertinence. It is important to make findings of credibility when establishing the probative force of a witness’ testimony, and to give reasons.”²²⁹

Some authorities believe that the summary of the facts should precede the summary of the legal issues, although there is no consensus on that point.²³⁰ Ultimately, the order of the various sections is a matter of individual preference.²³¹ However, most experts suggest writing the summary of the issues before writing the summary of the facts so as to avoid including immaterial factual information in the summary of the facts.²³² Sections can be rearranged later, during the editing process.²³³

“[t]he judge’s definition of what is and is not [legally] at issue . . . determines the evidence to be presented and limits what will be heard” at trial).

221. See Aldisert et al., *supra* note 48, at 33.

222. GEORGE, *supra* note 1, at 164.

223. See *United States v. El Paso Nat. Gas Co.*, 376 U.S. 651, 656-57 (1964); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 184-85 (1944); *Bright v. Westmoreland Cnty.*, 380 F.3d 729, 731-32 (3d Cir. 2004); GEORGE, *supra* note 1, at 187. Commentators have cautioned against “judicial plagiarism,” which occurs when a judge does not give proper credit for a particular statement or proposition. See *id.* at 707-27.

224. See GEORGE, *supra* note 1, at 194-95. The description of facts is as important on appeal as in the first instance. See MAILHOT & CARNWATH, *supra* note 21, at 49.

225. GEORGE, *supra* note 1, at 195 (discussing an example). “The judge must formulate the ultimate or conclusionary fact by scrutinizing the evidentiary facts.” *Id.*

226. See MAILHOT & CARNWATH, *supra* note 21, at 48.

227. See *id.* at 50.

228. See *id.*

229. *Id.*

230. See Aldisert et al., *supra* note 48, at 24. One expert suggests that “[f]acts should be stated in the past tense” while “[p]ropositions of law should be stated in the present tense,” but that does not appear to be a hard and fast rule. GEORGE, *supra* note 1, at 163.

231. See Aldisert et al., *supra* note 48, at 28, 33.

232. See MAILHOT & CARNWATH, *supra* note 21, at 45-47; Aldisert et al., *supra* note 48, at 28.

233. See Aldisert et al., *supra* note 48, at 28, 33. Editing is as important as writing. See MAILHOT & CARNWATH, *supra* note 21, at 84 (suggesting judges revise their draft texts somewhere between three and eight times).

iv. Analysis of the legal issues

The fourth section constitutes the core of a reasoned decision or opinion.²³⁴ This section provides a detailed analysis of the legal issues and presents the rationale for reaching the outcome in question.²³⁵

There are a variety of ways to organize this section. For example, if there is one issue dispositive of the dispute, then it is often best to begin with that issue.²³⁶ If there is no single issue that controls the outcome, then a judge may follow the order set forth by counsel or begin with either the easiest or the most difficult of the outstanding issues, whichever seems best.²³⁷ Regardless of the order adopted, “[t]here is but one obligation: to correctly describe the arguments in support of each party’s position on each issue, and to give clear reasons justifying the result.”²³⁸

Reasoned judgments differ from written advocacy in several key ways.²³⁹ For example, reasoned decisions and opinions

[r]esemble a form of justification. . . . [J]udges are not required to convince, but rather to make themselves understood. They must therefore express their reasons in a fashion that will carry with them the support of the majority of the readers. The losing parties may never be convinced their cause was wrong but they are entitled to know why they lost and how the judge reached that result.²⁴⁰

Judicial analyses should therefore be both thoughtful and neutral so as to give both the parties and society as a whole reason to trust in the integrity of the system.²⁴¹ Furthermore, judges should be very careful about adopting any proposed conclusions of law submitted by a party, since that may cause doubts about whether the judge considered the case fully and independently.²⁴² Functionally,

[j]udges must decide all the issues in a case on the basis of general principles that have legal relevance; the principles must be ones the judges would be willing to apply to the other situations that they reach; and the

234. See Aldisert et al., *supra* note 48, at 34.

235. *See id.*

236. See MAILHOT & CARNWATH, *supra* note 21, at 51.

237. *See id.*

238. *Id.*; see also GEORGE, *supra* note 1, at 172 (noting each issue discussed requires a separate conclusion); MAILHOT & CARNWATH, *supra* note 21, at 52 (noting “reasons are the foundation of the result, a form of justification”); Aldisert et al., *supra* note 48, at 34.

239. MAILHOT & CARNWATH, *supra* note 21, at 52.

240. *Id.*; see also ALDISERT, *supra* note 165, at 157-66 (discussing inductive and deductive reasoning).

241. See Aldisert et al., *supra* note 48, at 34 (indicating court opinions should “do[] substantial justice in the case,” impose “justice between the parties” and “maintain the integrity of the ‘body of the law’ for future litigants”). Appellate judges may also need to discuss any concurring or dissenting opinions. While some authors address their colleagues’ concerns in the body of the judgment (a step that may be necessary if the analysis of the dissent or concurrence is quite long), it is also possible to address these matters in the footnotes.

242. See GEORGE, *supra* note 1, at 187-88. However, when drafting the conclusions of law, it may be necessary to refer to the losing party’s argument, either to demonstrate why that approach was not adopted or to show that that particular matter was considered.

opinion justifying the decision should contain a full statement of those principles.²⁴³

Although “[t]he legal conclusion should cover each of the legal elements required to decide the case,”²⁴⁴ the goal is not to “state the law [as] fully and comprehensively . . . as might be expected in writing a law review” or “to resolve unasked questions or legal issues not yet in dispute.”²⁴⁵ Indeed, it is generally considered “improper for the judge to state more in a decision/opinion than is necessary or to resolve or attempt to resolve future problems.”²⁴⁶ While some courts (such as the court of last resort) might be inclined to suggest how the law might develop in the future, such statements are technically made *obiter dicta* and can cause significant problems in the lower courts.²⁴⁷

When undertaking a legal analysis, a judge faces three possible scenarios. First, after “identify[ing] the flash point of the conflict,” the judge may find him or herself required to “choose among competing legal precepts to determine which should control.”²⁴⁸ Once the controlling principle of law is determined, that principle must then be interpreted and applied to the facts of the case.²⁴⁹

Second, the judge may not have any difficulties identifying which of several competing principles controls the issue but may nevertheless need to decide how

243. Kent Greenawalt, *The Enduring Significance of Legal Principles*, 78 COLUM. L. REV. 982, 990 (1978); see also Aldisert et al., *supra* note 48, at 36.

244. GEORGE, *supra* note 1, at 195.

245. *Id.* at 13. Although conclusions of law focus on legal principles, they “should not be a recitation of the case [or statutory] authorities, but rather their specific application to the precise issues raised by the case.” *Id.* at 195; see also STRONG & DESNOYER, *supra* note 41, ch. 5. Instead, “[i]n drawing a legal conclusion it is important to identify the factual elements necessary to support that conclusion.” GEORGE, *supra* note 1, at 234. Furthermore, a conclusion of law needs to be clear and concise. Thus, one expert has suggested a conclusion of law should consist of

1. A single statement;
2. with legal significance;
3. supported by those facts previously found;
4. articulating the law applicable on an issue or element necessary to determine a disputed principle of law;
5. used along with other conclusions of law to determine the rights of the parties.

Id. at 231-32.

246. GEORGE, *supra* note 1, at 13; see also *id.* at 233-34 (discussing the advantages and disadvantages of so-called “lecturing” decisions).

247. See *Rogers v. Tennessee*, 532 U.S. 451 (2001) (demonstrating the difficulties associated in determining whether a particular aspect of a previous decision reflected *dicta* or the Court’s *ratio decidendi*); see also GEORGE, *supra* note 1, at 331; Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 955-56 (2005).

248. Aldisert et al., *supra* note 48, at 35. Judges in this situation may need to identify a controlling principle of law from a series of cases. See *id.* As a result, the court must study the various cases, which each announce “a specific rule of law attached to a detailed set of facts.” *Id.* That inquiry may allow the court “to ‘find’ or create a broader legal precept attached to a broad set of facts.” *Id.*; see also GEORGE, *supra* note 1, at 349-68; DEBORAH B. MCGREGOR & CYNTHIA M. ADAMS, *THE INTERNATIONAL LAWYER’S GUIDE TO LEGAL ANALYSIS AND COMMUNICATION IN THE UNITED STATES* 142-91 (2008). Although this process may appear problematic to lawyers trained in the civil law tradition, Justice Cardozo has explained how the common law method complies with certain notions of natural law and is indeed consistent with certain readings of the civil law approach to statutory interpretation. See CARDOZO, *supra* note 48, at 142-45 (citing FRANÇOIS GÉNY, *MÉTHODE D’INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF*, vol. II (1919)).

249. See Aldisert et al., *supra* note 48, at 35.

to interpret that principle.²⁵⁰ This type of concern arises most frequently in cases involving statutory construction.²⁵¹ In this situation, the judge does not need to discuss other potential legal principles at length but can focus only on the interpretation of the law and the application of that law to the facts.²⁵²

Third, the judge may be faced with disputes that are primarily factual in nature. In this category of cases, the judge only needs to focus on the application of the governing law (as chosen and interpreted) to the facts that have been established by the finder of facts.²⁵³

As helpful as it is to distinguish between different types of cases, judges must do more than apply the law mechanistically.²⁵⁴ Instead, reasoned judgments must “weigh the case for and against given rulings.”²⁵⁵ Although some of the elements that go into a reasoned judgment require a value judgment, judges “must not rely on value judgments to the exclusion of reasoned analysis.”²⁵⁶

One question that is often raised involves the extent to which judges may conduct independent research.²⁵⁷ A number of courts have indicated that

[a] competent judge is not so naive to believe that briefs will always summarize the relevant facts and the applicable law in an accurate fashion. A competent judge uses the briefs as a starting line and not the finish line for his or her own independent research. Not only does a good judge confirm that the authorities cited actually support the legal propositions in the briefs, a good judge also makes sure that the authorities continue to represent a correct statement of the law. A member of the bench who fails to independently develop his or her own legal rationale does so at his or her own peril and the peril of the litigants.²⁵⁸

Other authorities suggest precisely the opposite, based on the fact that independent judicial research denies the parties of “the opportunity for cross-examination, rebuttal, or the introduction of further testimony.”²⁵⁹ However, commentators have concluded that “the prerogative of the judge to search the case law independently and to consult legal treatises is soundly entrenched, presumably to promote uniformity and accuracy in legal interpretation.”²⁶⁰

The situation is much more unsettled when it comes to independent factual research.²⁶¹ Not only do surveys of state appellate judges suggest that the bench is sharply divided on this issue, but “the rules governing independent research are

250. *See id.*

251. *See id.* U.S. law has become increasingly codified. *See CALABRESI, supra* note 93, at 5-7.

252. *See Aldisert et al., supra* note 48, at 35.

253. *See id.*

254. *See id.* at 36.

255. *Id.*

256. *Id.* at 37.

257. Some authorities suggest that “[w]hile the briefs prepared by the parties will be useful, there is no substitute for independent research.” GEORGE, *supra* note 1, at 199.

258. *Camacho v. Trimble Irrevocable Tr.*, 756 N.W.2d 596, 298-99 (Wisc. Ct. App. 2008); *see also Hampton v. Wyant*, 296 F.3d 560, 564-65 (7th Cir. 2002).

259. Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L.J. 1263, 1296 (2007) (noting that “[a] few judges and commentators have advocated against” independent legal research).

260. *Id.*

261. *See id.* at 1297.

astonishingly unclear.”²⁶² Thus, commentators suggest that judges should conduct *sua sponte* research into factual matters very rarely and only in the interests of justice.²⁶³ As a practical matter, a judge who has discovered a factual issue of relevance should strongly consider asking the parties to provide written submissions concerning that issue so as to avoid the possibility of a subsequent appeal.²⁶⁴

v. *Holding or disposition*

The final section of a reasoned judgment involves the holding or disposition of the case.²⁶⁵ This section usually constitutes “a single paragraph or sentence at the end of the decision” and “is that portion of the decision that ultimately will be incorporated into the judgment.”²⁶⁶

The content of this section differs somewhat depending on the type of court involved. For example, trial courts should be sure to address all of the outstanding claims and defenses so as not to leave a gap that must later be remedied.²⁶⁷ Appellate courts should also take care to identify clearly which aspects of the lower court decision have been affirmed, reversed, vacated and remanded or modified, but should also indicate what obligations, if any, the court of first instance has with respect to the case at bar.²⁶⁸

If a judge has not specifically discussed all of the issues presented in a civil dispute, then he or she should consider making a global statement indicating that all matters not explicitly addressed have been considered and determined to be without merit.²⁶⁹ If the dispute is criminal in nature, then it may be better for the judge to specify each issue that has been denied, even if the decision or award does not discuss that matter in detail.²⁷⁰

V. CONCLUSION

As the preceding discussion suggests, writing a well-reasoned judgment is a difficult and time-consuming task.²⁷¹ Although the process may seem particularly daunting to those who are new to the bench, many experienced judges also struggle to convey their thoughts in a concise but coherent manner.

Ideally, every judge would be able to take advantage of one or more in-person seminars involving judicial writing.²⁷² Although the need for assistance is perhaps

262. *Id.* at 1267. This practice has been opposed by both courts and commentators. See *Hernandez v. State*, 116 S.W.3d 26, 32 (Tx. Ct. Crim. App. 2003) (Keller, P.J., concurring); GEORGE, *supra* note 1, at 276.

263. See GEORGE, *supra* note 1, at 276.

264. See *supra* notes 68, 83 and accompanying text (discussing the need to protect the decision or opinion from appeal).

265. See Aldisert et al., *supra* note 48, at 24.

266. GEORGE, *supra* note 1, at 176; see also *supra* note 1.

267. See GEORGE, *supra* note 1, at 302-04 (discussing the types of opinions that should accompany the various types of dispositions); Aldisert et al., *supra* note 48, at 38. This task can be particularly difficult in a splintered opinion. See SUPREME COURT OF OHIO, *supra* note 106, at 150 (containing example).

268. See GEORGE, *supra* note 1, at 302-04; Aldisert et al., *supra* note 48, at 38.

269. See Aldisert et al., *supra* note 48, at 38.

270. See *id.*

271. See *Hart v. Massanari*, 266 F.3d 1155, 1176-77 (9th Cir. 2001).

272. See *supra* notes 9-12 and accompanying text.

most urgent when judges first take the bench, more experienced judges would also benefit from this sort of instruction, since they now have some first-hand experience with the difficulties associated with writing a reasoned decision or opinion. The problem, of course, is that many judges find it hard to make the time to attend in-person seminars, particularly given expanding workloads and decreasing budgets.²⁷³ For those people, a published guide on writing well-reasoned judicial decisions and opinions may be the best way to trigger new ways of thinking about judicial writing.

This Article has attempted to provide judges with precisely that type of assistance.²⁷⁴ Hopefully there will be more such efforts in the future, since a well-educated judiciary is critical to a well-functioning society.²⁷⁵

273. Judicial spending has been under threat for years. See American Bar Association, Federal Court Funding, http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_judiciary/federal-court-funding.html (last visited Jan. 23, 2015). Concerns have been raised that interest groups are stepping into the breach created by the lack of funding for judicial education. See Center for Public Integrity, *supra* note 10.

274. Further resources are available on this subject. For example, in addition to the sources discussed herein, interested persons can consider materials identified in Vance, *supra* note 131, at 197. See also A.B.A., Appellate Judges Conference, Judicial Administration Division, JUDICIAL OPINION WRITING MANUAL (1991), available at [http://www.fjc.gov/public/pdf.nsf/lookup/judicial-writing-manual-2d-fjc-2013.pdf/\\$file/judicial-writing-manual-2d-fjc-2013.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/judicial-writing-manual-2d-fjc-2013.pdf/$file/judicial-writing-manual-2d-fjc-2013.pdf); LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES (1993); Samuel A. Alito, Jr. et al., Panel Remarks, *The Second Conversation with Justice Samuel A. Alito, Jr.: Lawyering and the Craft of Judicial Opinion Writing*, 37 PEPP. L. REV. 33 (2009); Richard B. Cappalli, *Improving Appellate Opinions*, 83 JUDICATURE 286 (May/June 2000); Elizabeth Ahlgren Francis, *The Elements of Ordered Opinion Writing*, 38 JUDGES J. 8 (Spring 1999); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Joseph Kimble, *First Things First: The Lost Art of Summarizing*, 38 CT. REV. 30 (Summer 2001); Douglas K. Norman, *An Outline for Appellate Opinion Writing*, 39 JUDGES J. 26 (Summer 2000); Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455 (1995); Timothy P. Terrell, *Organizing Clear Opinions: Beyond Logic to Coherence and Character*, 38 JUDGES J. 4 (Spring 1999); Patricia M. Wald, *A Reply to Judge Posner*, 62 U. CHI. L. REV. 1451 (1995); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writing*, 62 U. CHI. L. REV. 1371 (1995); Nancy A. Wanderer, *Writing Better Opinions: Communicating with Candor, Clarity, and Style*, 54 ME. L. REV. 47 (2002); James Boyd White, *What's an Opinion for?* 62 U. CHI. L. REV. 1363 (1995); Charles R. Wilson, *How Opinions Are Developed in the United States Court of Appeals of the Eleventh Circuit*, 32 STETSON L. REV. 247 (2003). The Supreme Court of Ohio has provided a line-by-line critique by of several different types of reasoned judgments that may be particularly useful to judges seeking to improve their writing. See SUPREME COURT OF OHIO, *supra* note 106, at 132-48.

275. See S.I. Strong, *Judicial Education and Regulatory Capture: Does the Current System of Educating Judges Promote a Well-Functioning Judiciary and Adequately Serve the Public Interest?*, 2015 J. DISP. RESOL. 1, 4; see also *supra* notes 3, 52-55 and accompanying text.