2018

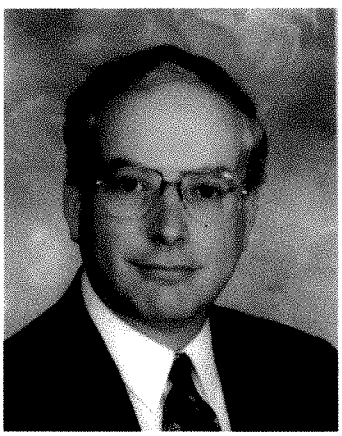
Judges and Their Editors

Douglas E. Abrams
University of Missouri School of Law, abramsd@missouri.edu

JUDGES AND THEIR EDITORS

DOUGLAS E. ABRAMS[1]

JUDGE HUGH R. JONES SERVED ON THE NEW YORK COURT OF APPEALS FROM 1973 UNTIL HE REACHED THE MANDATORY RETIREMENT AGE OF 70 IN 1984. WHEN HE DIED IN 2001, THE *NEW YORK TIMES* PRAISED HIM AS "AN INTELLECTUAL LEADER OF THE STATE'S HIGHEST COURT AND ONE OF ITS BEST WRITERS."[2]



Douglas E. Abrams

A colleague later reminisced that Judge Jones' "beautifully crafted opinions stand out in the New York Reports as models of scholarship, clarity of thought, and lucid graceful wordsmanship."[3] The opinions were "clear, crisp, powerful writings," Chief Judge Judith S. Kaye certified, "not a spare or careless word in them."[4]

I began my career as one of Judge Jones' law clerks more than 40 years ago. This article shares the judge's enduring lessons about the constructive role that editing from law clerks, and sometimes from other inner court staff, can play in preparing an opinion's preliminary drafts. These lessons, taught during my two-year appointment, can influence not only judges who have access to these human resources, but also other legal writers who value constructive editing from colleagues in their law offices.

In opinion writing, a judge's editorial process balances three forces that this article explores below. The first – ethical constraints expressed in the Model Code of Judicial Conduct – is unique to judging. But the second and third forces are common to all legal writing – pride of authorship (the writer's emotional attachment to what the writer has already put on paper); and personal and professional modesty (the writer's capacity to restrain this pride and carefully weigh editors' input during a writing's gestation).

The First Force: Ethical Constraints

The adversary system of civil and criminal justice constricts the small circle of editors a judge may consult *ex parte* in opinion writing. The ABA Model Code of Judicial Conduct (Missouri Supreme Court Rule 2) permits a judge to "consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter."[5]

The Model Code's enumeration of permissible editors includes the judge's in-chambers law clerks, central staff law clerks who worked on the case, and other confidential inner court officials who share responsibilities for shepherding opinions to the official or unofficial reports. Depending on the court system, these officials hold such titles as the legal counsel to the court, the clerk of the court, or the staff attorney.

Subject to the Model Code mandate recited above, a judge who consults with any of these inner staff members or officials need not give parties the advance notice and reasonable opportunity to be heard that the Model Code requires where a judge ventures outside the court to "obtain the written advice of a disinterested expert on the law."[6]

Judges follow no single prescribed path in opinion writing. As Judge Jones did, trial and appellate judges may write the first draft before assigning their law clerk to refine, cite check, and verify. After providing initial direction about the anticipated analysis and outcome, other judges may assign the clerk to write some or all of the first draft for the judge's review and revision.

Regardless of the chosen path, the opinion becomes solely the judge's early in the journey to publication. Law clerks then may edit before the judge issues the opinion or, in an appellate court, circulate a draft to the court's other judges for input, editorial or otherwise. The appellate court's conferencing and deliberation provide opportunities for further refinement.

The author of a legal document's first draft can sometimes retain significant influence over the final product's tone and substance. In recent years, commentators have debated whether law clerks who write first drafts of opinions in high-profile cases, particularly in the United States Supreme Court, sometimes exercise unwarranted influence over their judges' decision making or written expression.[7]

We need not enter this debate because properly confined, third-person editing of draft opinions does not delegate decision making authority. The Model Code commands that in civil and criminal cases alike, judges retain "responsibility personally

to decide the matter" presented to the court.[8] The command means that when they discharge this personal responsibility, judges preparing opinions may weigh editing by permissible subordinates, but without ceding the judicial role.

The Second Force: Pride of Authorship

Writing is a craft, and excellence depends on the writer's pride in the work ultimately displayed. "[F]ierce pride of authorship," says Judge Bruce M. Selya of the U.S. Court of Appeals for the 1st Circuit, "is, on balance, a good thing. It is the pride of the craftsman."[9]

Pride of authorship unrestrained by personal and professional modesty, however, can stiffen the writer's resistance to, or even close the mind to, editorial input from others. For judges and other legal writers, restraining pride of authorship means acknowledging that, as Justice Louis D. Brandeis said, "there is no such thing as good writing. There is only good rewriting."[10]

"Good rewriting" usually begins with the writer's own editing of early drafts, but also ideally extends to rigorous editing by others who critique drafts for style and substance with a fresh perspective, and perhaps also with new or different ideas. Skilled third-party editing can improve the draft of any legal writing.

The Third Force: Modesty

Thanks to a sense of self that left him comfortable with his capacities, Judge Jones sought and welcomed editing of his draft majority, concurring, and dissenting opinions from one or more members of the discrete group enumerated in the Model Code.

A judge's willingness to solicit and weigh editorial input may not come naturally, however, because judging in the federal or state courts is not an assured predicate for the personal and professional modesty that encourages this willingness. The United States rejected monarchy when the Framers drafted the Constitution in 1787, nearly a decade before George Washington began a tradition by voluntarily relinquishing the nation's highest office in a peaceful transition of power. Judges, however, have retained some trappings of royalty that constitution or custom generally deny to legislative and executive officeholders.

Courts today are still frequently called "supreme" or "superior," honorifics that even presidents cannot claim. Everyone in the courtroom rises when judges enter and ascend to their elevated benches. Judges ordinarily appear in robes rather than conventional business attire. Lawyers, parties, and witnesses address judges as "Your Honor" in the courtroom, and even longtime friends and acquaintances sometimes hesitate to call judges by their first names in public or private. Judges typically hold office for life, or for a lengthy term of years unavailable to other elected or appointed officials.

But that is not all. To the undoubted envy of writers whose inboxes often carry a steady stream of rejection letters, official and unofficial reporters normally publish every opinion that judges submit, whether polished by editors or not. Even so-called "unpublished" opinions are routinely published in their entirety, at least online.[11]

Immodesty born of these daily reminders of high station may intrude on opinion writing. Like other legal writers, judges remain free to avoid editors altogether, or else to ignore editors' suggestions. Judge Jones wisely did neither.

Editors in Chambers

Judge Jones' balancing of pride of authorship and modesty began with his two law clerks. Before he circulated a draft majority, concurring, or dissenting opinion to the court's other six judges, the three of us would gather around a conference table for an hour or more to parse every paragraph the judge had written, often line-by-line. Scrutiny ranged from tenor and tone to substance and persuasion.[12]

Judge Jones recognized that robust editing in chambers could help avoid later pitfalls because judicial opinions, like most other published legal writing, may ultimately face a "hostile audience" that "will do its best to find the weaknesses in the prose, even perhaps to find ways of turning the words against their intended meaning."[13] Careful editing can sometimes identify a majority opinion's latent weaknesses and probe its potential ramifications, even before advocates seek to distinguish the precedent to fit their clients' cause in later cases. Concurrences and especially dissents often appeal to the reason or consciences of future judges and courts; careful editing can help by sharpening the opinion's logic and persuasiveness.

The playing field for judge and clerk is not level unless the judge makes it level. In judicial chambers and law offices alike, editors may initially feel reticent to challenge a writer who holds a superior position. Nods of approval may appear the safer course. Because the Model Code of Judicial Conduct constricts a judge's team of editors, reticence in chambers squanders valuable opportunities for pre-publication honing from candid interchange.

We clerks knew that Judge Jones had the final say, but we also knew that he valued our participation because he gracefully accepted both praise and criticism. One clerk's articulated concern gave him pause about something he had written, but the judge also followed an informal "Rule of Two": Where both clerks expressed similar concern, he paid particularly close attention to how later readers might react. Even when he rejected an editorial suggestion and explained why, the clerks knew that he respected us as colleagues, though less experienced than he.[14] His name, not ours, would appear atop his signed opinions.

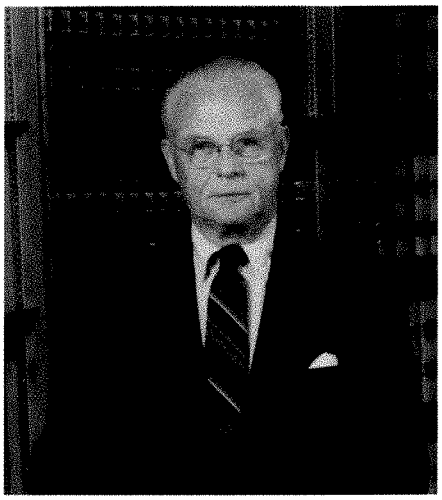
In-chambers editorial collaboration did not necessarily end with the two law clerks. In those days before spell-check and other perceived electronic shortcuts, Judge Jones also welcomed his administrative assistant's occasional suggestions concerning spelling, grammar, and syntax that caught her trained eye as she typed the drafts. The New York Reports never identified her input, but we in chambers respected its value.[15]

"[M]y responsibility to the Court as an institution," Judge Jones once wrote, "commands the subordination of my personal interests."[16] By word and deed, he remained true to this responsibility by encouraging editorial give-and-take to help assure that the published reporters would unveil the most polished opinions possible. His openness to editorial contribution served both the Court of Appeals and the fabric of New York law.

Inner Court Staff and Officials

By the time an opinion reaches the legal counsel to the court or a similar inner court staff or official, the disposition has usually been determined. Judges and their law clerks have read the briefs

and other submissions, and the parties have had opportunity for oral argument permitted by court rules. Where appropriate, the judge and the law clerks have confidentially discussed the likely disposition before drafting the opinion. In a trial court, the judge has reached a decision and committed it to writing. In a collegial appellate court, the judge may have received input during the drafting stage from one or more other judges of the court or panel. The court or panel has prepared majority, concurring, and dissenting opinions for conferencing, deliberation, and editing.



Judge Hugh R. Jones

Judge Jones remained receptive to inner court staff or officials who, at the 11th hour, occasionally raised questions about possible errors in spelling, grammar, or syntax. These officials are normally the last persons to examine the opinion before its public unveiling, and such errors can embarrass the court if they find their way into the advance sheets or today's computerized databases, even if subject to swift correction once they are noticed.

If a judge believes that the circumstance warrants, input from an inner court staff or official might sometimes also extend to substance because often these public servants are lawyers with a rich understanding of the court. From career service, they may hold a keen institutional memory helpful to judges, and to the in-chambers law clerks who may serve appointments for only a year or two.

Inner court staff or officials might flag an opinion's passage that seems at odds with the ebb and flow of the court's prior decision making. They might even recall, however vaguely, a prior decision or other source of law that has eluded the parties, *amici*, and the judges or their law clerks.

Achieving the Balance

Judge Jones' reputation for intellect and exemplary writing did not depend on editing from his law clerks, or from anyone else in the court's inner circle. We law clerks made residual contributions to style and substance, but the judge's draft opinions were already paragons before they reached our desks. He simply wanted editing because experience in private practice and public service had taught him that any draft can stand improvement.[17]

Judge Jones' capacity to balance pride of authorship with personal and professional modesty provides a compass for trial and appellate judges, and for other legal writers. The judicial compass is grounded in *stare decisis*, which ensures that influential opinions often outlive the tenures of the judges who wrote them. Published opinions speak first to the lawyers and parties who are immediately before the court. But the roles of binding or persuasive precedent can extend the audience to future courts, lawyers, litigants, and researchers, and sometimes to lay persons when the decision concerns matters of social import.[18]

When a judge encourages and carefully weighs editorial contributions permitted by the Model Code of Judicial Conduct, the judge focuses primary attention where it belongs – on the published opinion that will survive, and not on deleted preliminary drafts that will never be seen or heard from again.

Endnotes

1 Douglas E. Abrams, a University of Missouri law professor, has written or co-written six books. Four U.S. Supreme Court decisions have cited his law review articles. His latest book is Effective Legal Writing: A Guide for Students and Practitioners (West Academic Publishing 2016). Portions of this article appeared in Douglas E. Abrams, *Judges and Their Editors*, 3 Albany Gov't L. Rev. 392 (2010). The Albany article was adapted from Professor Abrams' address to the international meeting of the Association of Reporters of Judicial Opinions in Halifax, Nova Scotia in 2009.

2 Laura Mansnerus, *Hugh R. Jones, 86, Ex-Judge On New York Court of Appeals*, N.Y. Times, Mar. 6, 2001, at A19 (obituary). *See also* John Caher, *Judge Hugh R. Jones*, N.Y.L.J., Mar. 6, 2001, at 2 (obituary) (one of the court's "best writers").

3 Stewart F. Hancock, Jr., *Meeting the Needs: Fairness, Morality, Creativity and Common Sense*, 68 Alb. L. Rev. 81, 81 (2004).

4 Judith S. Kaye, *A Tribute to the Honorable Hugh R. Jones*, 65 Alb. L. Rev. 1, 2 (2001).

5 Model Code of Judicial Conduct, R. 2.9(A)(3) (2018) ("Ex Parte Communications"); Rule 2-2.9 (A)(3) (2018) ("Ex Parte Communications").

6 Model Code of Judicial Conduct, R. 2.9(A)(2) (2018) ("Ex Parte Communications"); Rule 2-2.9(A)(2) (2018) ("Ex Parte Communications").

7 *Compare, e.g.*, David J. Garrow, *When Court Clerks Rule*, L.A. Times, May 29, 2005, at 5 ("[A]n excess of clerks encourages justices to give away essential parts of their jobs to inexperienced people in their 20s whose political biases sometimes go unchecked."), *with* Jeffrey Toobin, The Nine: Inside the Secret World of the Supreme Court 156 (2007) ("The fact that law clerks draft most opinions has given rise to several misimpressions, particularly on the part of the clerks themselves. Because they have this responsibility, many clerks think they are more important than they are. . . . In general, only a small part of each opinion has any lasting significance, and the justices themselves monitor that section with care.").

8 Model Code, R. 2.9(A)(3), *supra* note 5; Rule 2.9(A)(3), *supra* note 5.

9 Bruce M. Selya, *In Search of Less*, 74 Tex. L. Rev. 1277, 1279 (1996).

10 Eugene C. Gerhart, Quote It II: A Dictionary of Memorable Legal Quotations 462 (1988) (quoting Justice Brandeis).

11 *E.g.*, Martha Dragich, *Citation of Unpublished Opinions as Precedent*, 55 Hastings L.J. 1235 (2004).

12 Douglas E. Abrams, *Hugh Richard Jones*, in The Judges of the New York Court of Appeals: A Biographical History 725 (Albert M. Rosenblatt ed., 2007); Douglas E. Abrams, *Judges and Their Editors*, 3 Alb. Gov't L. Rev. 392, 397 (2010); Douglas E. Abrams, Effective Legal Writing: A Guide for Students and Practitioners 79 (West Academic Publishing 2016).

13 George D. Gopen, Writing From a Legal Perspective 1 (1981).

14 Douglas E. Abrams, *Judges and Their Editors*, *supra* note 12, at 397; Douglas E. Abrams, Effective Legal Writing, *supra* note 12, at 79.

15 Douglas E. Abrams, *Judges and Their Editors*, *supra* note 12, at 398.

16 Hugh R. Jones, *Cogitations on Appellate Decision-Making*, 34 Rec. Ass'n Bar City of N.Y. 543, 545 (1979), reprinted in 52 N.Y. St. B.J. 189, 190 (Apr. 1980).

17 Douglas E. Abrams, Effective Legal Writing, *supra* note 12, at 79.

18 *Compare* Lee C. Bollinger, Images of a Free Press 42 (1991) (the Supreme Court "can perform a deeply educative role in society, affecting behavior far beyond the strictly legal domain"), Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 58 (1948) ("The Supreme Court . . . is and must be one of our most effective teachers."), and Bernard J. Ward, *The Federal Judges: Indispensable Teachers*, 61 Tex. L. Rev. 43, 46 (1982) (judges are "the indispensable teachers of the American people," conducting seminars "every day from the classrooms of [their] courtrooms"), *with* William H. Rehnquist, *Act Well Your Part: Therein All Honor Lies*, 7 Pepp. L. Rev. 227, 228 (1980) ("[T]he Supreme Court does not 'teach' in the normal sense of that word at all. In many cases we hand down decisions which we believe are required by some Act of Congress or some provision of the Constitution for which we, as citizens, might have very little sympathy and would not choose to make a rule of law if it were left solely to us.").

DISCIPLINARY ACTIONS

DISBARMENTS

5/4/18 Christy L. Fisher
#44256
116 N. Main
P.O. Box F
Plattsburg, MO 64477-0506

5/25/18 Nathan J. Forck
#58206
303 Marshall St.
Jefferson City, MO 65101

6/5/18 Luke B. Harkins
#41357
12208 W. 79th Terr.
Lenexa, KS 66215

6/12/18 Robert E. Arnold, III
#57059
P.O. Box 948
Raymore, MO 64083

7/3/18 Steven E. Dyer
#45397
442 Howdershell Rd.
Florissant, MO 63031-6419

SUSPENSIONS

5/1/18 Sherri L. Edwards
#48673
8320 N. Oak Trfy., Ste. 225
Kansas City, MO 64118

5/1/18 Debra J. Karpowicz
#29730
P.O. Box 11445
Springfield, MO 65808

5/16/18 Brandy L. Sutton
#51366
1031 Vermont St., Ste. B
Lawrence, KS 66044

5/22/18 Doc Netterville, IV
#42383
818 Grand Blvd., Ste. 701
Kansas City, MO 64106

6/5/18 Timothy J. Muir
#57259
5600 W. 97th St.
Overland Park, KS 66207

7/3/18 Kevin T. Cure
#41064
603 South Main
Galena, KS 66739

REPRIMANDS

5/10/18 Scott J. Eckersley
#58659
1475 S. Tate Ct.
Midway, UT 84049-6219

5/22/18 Eric G. Zahnd
#47196
415 Third St., Ste. 60
Platte City, MO 64079

PROBATIONS

5/22/18 Brandon L. Williams
#55307
462 N. Taylor, Ste. 105
St. Louis, MO 63108

7/3/18 Hrant Norsigian, Jr.
#38556
220 E. State St., Ste. 2C
O'Fallon, IL 62269

REINSTATEMENTS

5/1/18 Mark S. Brown
#45977
2112 Melrose
Ann Arbor, MI 48104

5/16/18 Aiko M. Eto
#64622
8821 Manchester Road
St. Louis, MO 63144

5/16/18 Denise F. Fields
#60036
700 E. 89th St., Unit 8K
Kansas City, MO 64106

5/17/18 Carl M. Edwards, Sr.
#47766
1908 Bus. Loop 70 West
Columbia, MO 65202

5/17/18 Byron W. Woehlecke
#45941
1301 Oak St., Ste. 400A
Kansas City, MO 64106

5/22/18 John L. Adamik, Jr.
#50851
210 Village Dr.
Marshfield, MO 65706

5/22/18 Steven R. Kratky
#61442
5022 Nottingham Ave.
St. Louis, MO 63109

5/22/18 Denise D. Lieberman
#47013
6047 Waterman Blvd.
St. Louis, MO 63112

5/22/18 Rachel L. Pickering
#55212
400 JC Rogers Dr.
Wamego, KS 66547

5/22/18 John C. Shelhorse, IV
#46744
1912R Cherokee St.
St. Louis, MO 63118

6/1/18 Rodney L. Washburn
#49079
538 Garrick Place
Dardenne Prairie, MO 63368

6/8/18 Terry L. Garner
#64282
1323 E. Montclair
Springfield, MO 65804

6/8/18 Shahzad N. Ghafoor
#50296
136 E. Walnut, Suite 300
Independence, MO 64050

6/20/18 Dale E. Gerecke
#30415
Ste. 11D
1021 Kingshighway Dr.
Cape Girardeau, MO 63701

COMPLETED PROBATION

5/23/18 Brian B. Bush
#58066
11319 Clayton Rd.
St. Louis, MO 63131

5/24/18 James W. Eason
#57112
124 Gay Ave., Ste. 200
St. Louis, MO 63105

6/21/18 Daniel L. Sayle
#31997
12399 Maverick Dr., #E
Maryland Heights, MO 63043