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But "Will It Write"?

How Writing Sharpens Decision-Making

By Douglas E. Abrams

The 2004 National Football League Draft was fast approaching, and the last-place San Diego Chargers held the first pick overall. Their expected pick, University of Mississippi quarterback Eli Manning, was no stranger to the inner workings of the NFL because his father, former New Orleans Saints quarterback Archie Manning, and his older brother, Indianapolis Colts quarterback Peyton Manning, had preceded him to stardom.

Eli told the Chargers that he would not sign if the team selected him, and he intimated that he would instead re-enter the 2005 draft, expecting selection by another team. Sitting out the 2004-2005 season would mean losing a year's multimillion-dollar income in his athletic prime, but media reports indicated that the young quarterback also believed he could get a more favorable long-term contract from a team in a major media market.

The Chargers did pick Eli first. To avoid a stalemate that would leave them with nothing to show for the first round, however, they immediately traded him to the New York Giants. The rest, as they say, is history. Just ask any Giants fan about the team's 17-14 upset victory over the New England Patriots in Super Bowl XLII in 2008.

How did future Super Bowl Most Valuable Player Eli Manning reach his high-stakes decision to spurn the Chargers and threaten spending a season on the sidelines? "Eli did what I have always suggested in making big decisions," said his father. "I'm a legal pad guy. He took out a legal pad, drew a line down the middle, and put the pluses on one side and the minuses on the other side. It wasn't even close, so he went with it."[1]

THE DISCIPLINE OF WRITING

This sort of written decision-making also aids Presidents, legislators, judges, lawyers, business people, and others who recognize that the discipline of committing arguments to paper can focus thinking more clearly than mere contemplation or oral discussion can. As author John Updike put it, writing "educates the writer as it goes along."[2] Indeed, said California Chief Justice Roger J. Traynor, writing is "thinking at its hardest."[3] "The act of writing," concluded U.S. Circuit Judge Frank M. Coffin, "tells what was wrong with the act of thinking."[4]

At least three recent Presidents – Richard Nixon, Jimmy Carter and George H.W. Bush – were also "legal pad guys" who methodically penned longhand lists of pros and cons to marshal their thoughts as they wrestled with major policy decisions.[5] Other leaders reliant on such lists when mulling over vexing personal and professional decisions include Secretary of State Hillary Rodham Clinton; Secretary of Agriculture Tom Vilsack; Senator Blanche Lambert Lincoln and former Senators Lloyd Bentsen, Sam Nunn, Lincoln Chafee and Paul Simon; former Treasury Secretary Robert Rubin; former Congress member and 9/11 Commission vice-chair Lee Hamilton; former governors Michael Dukakis and Pete Wilson; and World Bank President Robert Zoellick.[6] Even naturalist Charles Darwin made extensive notes listing the pros and cons of getting married before he proposed to his future wife.[7]

Judges offer a solid rationale for written decisionmaking. "All of us have had seemingly brilliant ideas that turned out to be much less so when we attempted to put them to paper," said U.S. Circuit Judge Wade H. McCree, Jr. "Every conscientious judge has struggled, and finally changed his mind, when confronted with the 'opinion that won't write.'"[8]

CHOOSING THE FORMAT

Rather than listing pros and cons in two columns to expose tentative decisions that "won't write," the decision maker might pen longer passages, or even an informal essay. Hand-written diagrams or flow charts might also help. Felt need and personal preference determine the format because the point-counterpoint is normally for the writer's eyes only, unless the writer shares the document with a small circle of advisors or other colleagues.

Regardless of the chosen format, writing can influence not only lawyers' own personal and professional decision-making, but also the advice lawyers provide clients about how to reach decisions on matters within the scope of representation. Some individual and institutional clients adept at problem-solving may already understand how committing thoughts to paper induces careful reflection, but other clients may not.

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Written decisionmaking should come naturally to lawyers because it remains fundamental to the American judicial system, and thus to the way law schools teach students to "think like lawyers." In bench trials or actions tried to an advisory jury, Rule 52(a) of the Federal Rules of Civil Procedure requires the court to "find the facts specially and state its conclusions of law separately." Appellate courts commonly hand down decisions with signed opinions (including majority, plurality, concurring and dissenting opinions), per curiams, or unpublished opinions or orders stating reasons. These cornerstones of trial and appellate judging hold lessons fundamental to the everyday decision-making of lawyers and their clients.

RULE 52(A)

The trial court's written findings and conclusions focus appellate review, permit application of preclusion doctrines, and inspire confidence in the trial court's decisionmaking.[9] But the federal courts of appeals have also recognized a "far more important purpose" of Rule 52(a), "that of evoking care on the part of the trial judge in ascertaining the facts."[10] The Supreme Court has recognized that "laymen, like judges, will give more careful consideration to the problem if they are required to state not only the end result of their inquiry, but the process by which they reached it."[11]

In *United States v. Forness* in 1942, the Second Circuit gave perhaps the most thoughtful judicial explanation of the prime goal of Rule 52(a).[12] The unanimous panel included Judge Charles E. Clark, the chief drafter of the Federal Rules of Civil Procedure and an acknowledged expert in their meaning and application. Writing for the panel, Judge Jerome Frank said this: "[A]s every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness . . . . Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper."[13] Judges hold no monopoly on this knowledge.

APPELLATE DECISIONMAKING

The appellate court's full opinion or abbreviated writing shows litigants that the court considered their arguments, facilitates further review on remand or by a higher court, and defines the decision's meaning as precedent.[14] But the written word's capacity to sharpen the decision makers' internal thought processes looms large, as it did in the district court. "The process of writing," says Justice Ruth Bader Ginsburg, is "a testing venture."[15]

Chief Justice Charles Evans Hughes found "no better precaution against judicial mistakes than setting out accurately and adequately the material facts as well as the points to be decided."[16]

"Reasoning that seemed sound 'in the head'," U.S. Circuit Judge Richard A. Posner explained decades later, "may seem half-baked when written down, especially since the written form of an argument encourages some degree of critical detachment in the writer. . . . Many writers have the experience of not knowing except in a general sense what they are going to write until they start writing."[17]

CONCLUSION: THE "HUMAN FACTOR"

In *Forness*, Judge Frank acknowledged that "fact-finding is a human undertaking" which "can, of course, never be perfect and infallible."[18] Writing can certainly sharpen thought in everyday decisionmaking, but the outcome depends on prudent use of the writing and other extrinsic sources of information and reason. Listing pros and cons can orient the decision maker, but the list offers no compass pointing ineluctably to the right answer. When President Bush pondered a Supreme Court nomination in 1990, for example, he took a legal pad and carefully penned the pros and cons of naming U.S. Circuit Judge David H. Souter, whose tenure on the Court did not turn out the way the President had anticipated.[19]

Because so much professional and personal decision-making involves emotion and other intangibles whose force written words alone cannot capture, the outcome does not necessarily depend on which side of the ledger – pro or con – holds the longer list. Indeed, when Charles Darwin pondered whether to propose to his future wife, his list contained 13 "cons" and only nine "pros," but he married her anyway.[20]

The "human factor," sometimes called a "gut feeling," may tilt the scale and ultimately carry the day. When Thomas P. Schneider's term as U.S. Attorney for the Eastern District of Wisconsin ended in 2001, for example, he weighed offers to join large influential law firms at handsome salaries, plus friends' suggestions that he cap his 29-year career as a prosecutor by running for state attorney general. "As most lawyers would," reported the *Milwaukee Journal Sentinel*, "Schneider grabbed a legal pad and divided the page into two columns: pro and con."[21] Then his wife stepped in. "This is not a legal brief," she told him. "This is your life."[22]

And the rest is history, as it was with Eli Manning. Schneider rejected politics and lucrative private law practice to become executive director of COA

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Youth and Family Centers, an agency dedicated to improving poor Milwaukee neighborhoods by enhancing opportunities for needy children and their families. "I've always loved working with kids," he says, "What I really care about is how you make a positive difference in this world."[23]

ENDNOTES

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10 *United States v. Forness*, 125 F.2d 928, 942 (2d Cir. 1942). See also, e.g., *Martin Midstream Partners v. Boone Towing Inc.*, 207 Fed. Appx. 439, 441 (5th Cir. 2006); *Chavez Properties-Airport Parking Albuquerque, LP v. Lorentzen*, 204 Fed. Appx. 745, 758 (10th Cir. 2006); *Davis v. New York City Hous. Auth.*, 166 F.3d 432, 435 (2d Cir. 1999).

11 *United States v. Merz*, 376 U.S. 192, 199 (1964).

12 125 F.2d 928 (2d Cir. 1942).

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22 *Id.*

23 *Id.*

Douglas E. Abrams, a law professor at the University of Missouri, has written or co-authored five books. Four U.S. Supreme Court decisions have cited his law review articles.