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Concerned Readers v. Judicial Opinion Writers

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CONCERNED READERS
a/k/a Lawyers, Law Students, and Legal Scholars,
Plaintiffs/Petitioners

v.

JUDICIAL OPINION WRITERS
a/k/a Judges and Judicial Clerks,
Defendants/Respondents

No. 90-00001
University of Michigan Law School
Journal of Law Reform Division
Argued October 30, 1989
Decided May 1, 1990

BELT, Justice.*

In a letter to a friend, Oscar Wilde wrote: “[R]emain, as I do, incomprehensible: to be great is to be misunderstood.” Many judges and judicial clerks must want to be “great” because for years, judicial opinion writers (Defendants) have frustrated and confused practicing lawyers, legal scholars, and law students (Plaintiffs) by writing ineffective opinions — disorganized, unclear, and tediously long. As a result of this weak writing, readers waste time trying to decipher holdings, needless litigation arises, and some professors make careers of writing about how poorly judges write.

In this action, Plaintiffs sought a writ of mandamus

compelling the offending judges to write better, but the court below denied the writ. Plaintiffs then petitioned for relief from poor writing. Because some judges do, in fact, write clear and effective opinions, we have granted certiorari to resolve the differences between the various courts. The issue before us, then, is whether judges and clerks have abused their discretion by writing weak opinions and, if so, how they can improve their writing. Because stronger writing greatly eases the reader’s job and makes opinions more effective, we hold that judges and clerks must write better. We therefore reverse the court below.

* Erik Paul Belt, Associate Member, *University of Michigan Journal of Law Reform*, Volume 23, 1990. B.A., Brown University, 1986; J.D., University of Michigan Law School, expected 1991.

I. DISCUSSION

A. *What Is an "Effective" Opinion?*

A secretary to Justice Holmes once pointed out that a certain passage in a draft opinion seemed unclear. Holmes replied, "Well, if you don't understand it, there may be some other damn fool who won't. So I had better change it." P. Hay, *The Book of Legal Anecdotes* 172 (1989). That is the point. Opinion writers do not write just for the parties to the instant litigation; they also write for other damn fools—namely, practicing lawyers, scholars, students, public officials, and even other judges.

If courts merely wrote for the parties, they would have an easy job because they would be writing for readers thoroughly versed in the relevant facts and arguments. An opinion could merely state who won and announce the award or court order. Because courts would have only captive readers who would know all the details of the case, they would not have to worry about length, organization, clarity, or summaries of fact and law.

But the parties are not always the sole readers. When a legal publisher prints the case, any member of the legal community might read it. These readers are ignorant of the

particular facts, issues, and maneuverings in the case. These readers were not necessarily present at the trial. They have not read the briefs. They did not hear the testimony. They might be unfamiliar with the relevant principles of law. Careful and effective opinion writers must make sages of their audience of "damn fools."

Poor writing in judicial opinions is not a new trend. For years, many readers have complained that opinions are overly long, convoluted, and unclear. Stevenson, *Writing Effective Opinions*, 59 *Judicature* 134 (1975). Despite more stress on clear writing in law schools, writing skills in the legal profession are in decline. Goldstein, *Drive for Plain English Gains Among Lawyers*, *N.Y. Times*, Feb. 19, 1988, at B7, col. 3. More and more attorneys complain about the writing of judges, and the judges complain about the writing of attorneys. Not surprisingly, a whole industry has arisen devoted to telling judges and attorneys how poorly they write and how to write better. Lutz, *Why Can't Lawyers Write?*, *Litigation*, Winter 1989, at 26. This court's own research reveals many articles that criticize legal writing and make suggestions for writing "plain" English. See, e.g., Benson, *Plain English Comes to Court*, *Litigation*, Fall 1986, at

21 (examples of unclear, jargon-filled legal writing and suggested improvements); Taylor, *Plain English for Army Lawyers*, 118 Mil. L. Rev. 217 (1987) (examples of poor legal writing by army lawyers and court-martial judges); Wydick, *Plain English for Lawyers*, 66 Calif. L. Rev. 727 (1978) (a leading law review article on improving legal writing). In fact, one expert on legal writing is so fed up with its poor quality that he has taken the "Plain English" movement one step farther. See Uelmen, *Plain Yiddish for Lawyers*, A.B.A. J., June 1985, at 78 (in which a "maven" on legal writing looks for ways to improve opinions, briefs, and other court room "schlock").

B. *The Importance of "Effective" Opinions*

The need for well-written opinions is obvious. Lawyers and courts cite past opinions for principles of law. Lawyers argue by making analogies to the fact patterns and issues of previous cases. Students learn the common law by reading these opinions. When an opinion is poorly written, tedious, unnecessarily long, poorly organized, or otherwise unclear, lawyers and courts might misapply principles of a case because they do not understand the wording of the opinion.

Further, lawyers, clerks, and law students spend hours of research time reading and re-reading confusing and lengthy opinions for a principle that should take minutes to find and understand.

Also, more (or more extensive) litigation often results. A good example of the dangers of ineffective opinions lies in the *Mount Laurel* litigation. In *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I)*, 67 N.J. 151, 336 A.2d 713 (1975), the New Jersey Supreme Court invalidated a zoning ordinance that, in effect, excluded construction of low and moderate income housing. *Id.* at 191-92, 336 A.2d at 734. In invalidating the ordinance, the court announced the "Mount Laurel" doctrine, which directed communities to provide their "fair share" of regional housing needs. *Id.* During the next eight years, so much misapplication of, and noncompliance with the Mount Laurel doctrine resulted that the New Jersey Supreme Court chose to rewrite the opinion. See *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II)*, 92 N.J. 158, 456 A.2d 390 (1983).

The *Mount Laurel II* opinion, more than one hundred pages long, basically attempted to "make the doctrine clearer." *Id.* at 200, 456 A.2d at 411. Eight years of litigation and

appeals simply because one opinion was unclear! Opinion writers can prevent these evils, however, by following the remedies set forth below.

II. REMEDIES

A. *Introductions*

Effective opinions get to the point immediately and begin with effective introductory paragraphs. The opinion writer should quickly summarize the case—the main issue of law, the identity of the parties, the procedural history, the important fact situation, and the holding—in just a few sentences. A well-written introduction need be no longer than one or two short paragraphs, depending on the importance and complexity of the case.

The introduction serves two purposes. First, it quickly summarizes the case and the important principles of law, enabling lawyers to research and prepare their cases faster. In this respect, the introduction acts like a headnote. But unlike a headnote, it carries weight because it comes from the pen of the judge, not from the word processor of the case abstractor.

Second, the introduction provides a map to the rest of the opinion. Too many times,

an opinion is so unclear that the reader does not know who won. A good example lies in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). The introduction to this case never states the holding or the outcome. Readers of the opinion, without a map for guidance, quickly become lost. In the opinion, the Court spends a lot of time summarizing the opinions of the various courts of appeal and the arguments of the litigants. But without knowing the holding and the winner, the readers do not know quite what to make of these arguments or how much importance to attach to them. They read one side's arguments and think they are controlling and then read the other side's with equal conviction. If the writer, however, had immediately stated the holding and the winner in the introduction, the readers could more readily digest each argument and categorize it.

In the same way, the opinion writer can help the reader more quickly grasp the important points of the case by including in the introductory paragraph five crucial items: 1) the issue or question of law; 2) the identity of the parties (clearly distinguishing plaintiff from defendant, appellant from appellee, or petitioner from respondent); 3) the facts of the case (summarized in a sentence or two); 4) the proce-

dural history of the case (including the main arguments of the litigants if the writer can summarize them in just a few words); and 5) the holding (including the simple verdict, such as "affirmed" or "we find for the defendant", and, if possible, the broader rule of law the case reaffirms or establishes).

One example of a superbly crafted introduction comes from *Commonwealth v. Johnson*, 27 Mass. App. Ct. 746, 543 N.E.2d 22 (1989). The introduction reads:

To the cashier and night cook of the Dragon Inn Restaurant in Dorchester the defendant Johnson had become a familiar face. He had robbed the Dragon Inn five times and had attempted a sixth robbery within a four-month period. Shot and apprehended during the last visit, the defendant was convicted on five indictments of armed robbery and one indictment of armed assault with the intent to commit robbery. On his appeal Johnson protests that he was not armed on the sixth raid on the Dragon Inn's cash register; that the judge imposed a vindictively

harsh sentence; and that veiled references by prosecution witnesses to previous arrests of the defendant were inadequately neutralized. We affirm.

Id. at 747, 543 N.E.2d at 23.

Notice here how the judge draws the reader into the fact situation in the first sentence, almost as if he were narrating a story. With great economy of words, the judge next summarizes the procedural history of the convictions and presents the issues in the form of the defendant's arguments. Of course, the introduction has some deficiencies. For instance, the judge could have stated the issues more clearly, and he might have included the broader ruling of the case (the proposition of law the case reaffirms or establishes). But as an interesting and economical summary of the facts and procedural history of the case, the introduction certainly stands out.

This same judge also provides a good example of an introduction that clearly sets forth the main issue in *Rosado v. Boston Gas Co.*, 27 Mass. App. Ct. 675, 542 N.E.2d 304 (1989):

We *focus* our inquiry on the extent of the duty of a gas company, a public utility, to

guard a customer from the misuse of appliances which the gas company does not own and which it has not undertaken to maintain.

Id. at 676, 542 N.E.2d at 304 (emphasis added). Here, the key word is "focus." The opinion itself immediately focuses the reader's attention on the important issue, making the reader's or researcher's job much easier. Of course, the introduction suffers in that it never states the verdict. But as a rhetorical beacon, it directs the reader's attention to the crucial issue.

Introductions can do more than merely state the holding, the issues, and the facts. They can also set a tone that affects the strength and importance of an opinion. For example, the *Mount Laurel I* opinion is not poorly written in the sense of grammar, style, organization, or clarity. Rather, the opinion seems matter-of-fact and businesslike. Although very professional, the opinion lacks force and conviction, conveying the impression that the court is not emphatically committed to the important doctrine it states in the opinion.

But the later *Mount Laurel II* decision stands as a sharp and refreshing contrast. In a strongly worded introduction, the New Jersey Supreme

Court immediately vents its anger and disgust with the years of noncompliance and needless litigation that *Mount Laurel I* had created. The introduction reads in part:

To the best of our ability, we shall not allow [the widespread non-compliance with the doctrine] to continue. This Court is more firmly committed to the original *Mount Laurel* doctrine than ever, and we are determined, within appropriate judicial bounds, to make it work. The obligation is to provide a realistic opportunity for housing, not litigation. We have learned from experience, however, that unless a strong judicial hand is used, *Mount Laurel* will not result in housing, but in paper, process, witnesses, trials, and appeals. We intend by this decision to strengthen it, clarify it, and make it easier for public officials, including judges, to apply.

92 N.J. at 199, 456 A.2d at 410. The tone of this paragraph shows that the court feels passionately about the doctrine and will tolerate no more non-compliance and costly litigation. Words like "firmly com-

mitted" and "determined" reinforce the "strong judicial hand" that demonstrates the court's will. If the previous court had used such forcible wording, the later court might not have needed to "strengthen" and to "clarify" the first opinion.

With a strong final sentence, the court also lets the public officials and judges who apply the doctrine know they are the real targets of the opinion, as if to tell them to wake up and do their jobs. The wording had just that effect, as the New Jersey legislature, in response to this opinion, passed the Fair Housing Act, ch. 222, 1985 N.J. Laws 966 (codified as amended at N.J. Stat. Ann. §§ 52:27D-301 to -329 (West 1986 & Supp. 1990)). Apparently, this introduction worked.

B. Outlines

Another helpful device for opinion writers to use is the outline format. *Mount Laurel II*, which is over 100 pages long as printed in New Jersey Reports, makes particularly good use of headings and an outline format to guide the reader through the dense text. For example, the opinion uses headings such as "I. Background," "A. History of the Mount Laurel Doctrine," "III. Resolution of the Cases," and "3. Procedure on Remand" to

steer the reader through the long opinion, always giving the reader landmarks so the reader does not get lost in the forest of small print in the law reporter.

This approach also has the advantage of breaking up the text, making the opinion seem less imposing. Just as good parents cut up food into tiny, easily swallowed pieces for their small children, good writers break up long tracts of print into more easily digested segments for the benefit of their readers.

One can use this technique in several ways. For example, the *Mount Laurel II* opinion was organized into summaries of the various stages in the litigation and discussions of the policies behind the doctrine. In *Commonwealth v. Johnson, supra*, however, the court chose to divide the opinion by issue. Using such headings as "1. Whether the defendant was armed with a dangerous weapon on the occasion of the last assault" and "3. Possible innuendo from testimony about photographic identification," the court neatly follows the issues outlined in the introduction, providing order to the opinion.

Not all opinions require outline formats and headings. Short opinions of a few pages do not. But longer opinions or opinions that encompass several distinct and complex is-

sues will benefit from this approach.

C. Length

Justice Holmes often wrote his opinions while standing at a high desk. In explaining why he did so, he replied, "If I sit down, I write a long opinion and don't come to the point as quickly as I could. If I stand up I write as long as my knees hold out. When they don't, I know it's time to stop." P. Hay, *The Book of Legal Anecdotes* 172 (1989). Unfortunately, today's opinion writers either sit down to write or they have stronger knees. For example, *Mount Laurel II*, as printed in the Atlantic Reporter, 2d Series, is 100 pages long. The court notes the length and even apologizes for it in a footnote: "We would prefer that our opinion took less time and less space." 92 N.J. at 199 n.1, 456 A.2d at 410 n.1. The trouble is that the court probably could have written an effective opinion that took less time and less space. Even with a good outline, readers can become lost in such a long opinion. Brief, concise opinions are more vigorous; they hold the readers' attention and let the busy lawyer or court move on to other issues faster:

One of the best examples of an opinion benefiting from its

brevity and having no less force than its longer cousins is an 1855 California Supreme Court case, *Robinson v. Picoche, Bayerque & Co.*, 5 Cal. 461 (1855). The plaintiff fell into an unguarded hole in the sidewalk in front of the defendant's premises. The defendant argued that the plaintiff was contributorily negligent because he was drunk at the time. The trial judge instructed the jury that they could consider the plaintiff's drunkenness in determining whether he was contributorily negligent. The jury did and the plaintiff appealed. The entire California Supreme Court opinion reads:

The court below erred in giving the third, fourth, and fifth instructions. If the defendants were at fault in leaving an unguarded hole in the sidewalk of a public street, the intoxication of the plaintiff cannot excuse such gross negligence. A drunken man is as much entitled to a safe street as a sober one, and much more in need of it.

The judgment is reversed and the cause remanded.

5 Cal. at 461. That's it. Seventy words. The secret of this

case is that the court disposes of the case with one argument: "A drunken man is as much entitled to a safe street as a sober one, and much more in need of it." *Id.* Many courts, not satisfied with having set forth a dispositive argument, go on to provide alternative resolutions. But if the first argument resolves the case, why continue?

D. Footnotes

Footnotes present several problems: they distract the reader's attention from the main text; they lessen the importance of judicial observations; and they elevate unimportant dicta.

1. Distraction

If judges used footnotes only for citations, then maybe footnotes wouldn't be so bad. Readers could just skip them unless they needed the cites. Often, however, judges use footnotes to make important observations or to establish important policy considerations. Take the classic example of footnote four in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). In this three-paragraph footnote, Justice Stone presented the

Court's influential statement about differing standards of scrutiny for economic and constitutional rights (deference in economic regulation and stricter scrutiny for infringement of, for example, First Amendment rights). *Id.* at 152 n.4. This one footnote has had a tremendous influence on modern constitutional law. See G. Gunther, *Constitutional Law* 474 (11th ed. 1985).

Knowing that sometimes the footnote can be important, careful readers have to look down every time they encounter a superscript number in the main text. But when detoured readers move their eyes back up the page, they have lost their place.¹ A good example lies in a poem by William Cullen Bryant, *The Prairies*. In this poem, Bryant does indeed use a footnote. Describing the sublime and breathtaking beauty of the vast prairies, the speaker says that "[t]he clouds/Sweep over with their shadows, and, beneath,/The surface rolls and fluctuates to the eye." Bryant, *The Prairies*, in *Early American Poetry* 299 (J. Eberwein ed. 1978). After "eye," Bryant inserts his footnote. The note itself says nothing important, but its effect on the reader adds to the experience the words convey. The footnote here is a mechanical device,

1. For this reason, avoid using footnotes.

used much the same way a poet uses meter to speed or slow the reading of the poem. Bryant uses the footnote to get readers to mimic the speaker of the poem as his eyes move up and down and across the rolling and fluctuating prairie. If the page is itself a prairie, then the reader has moved his eyes across it. Moreover, the reader has lost his place for a moment, just as the speaker did on first encountering the vast and overwhelming prairies.

Unfortunately, opinions are not poems. Opinion readers, unlike poetry readers, do not have the time to read and re-read and appreciate the writing. Lawyers and students often want the information as fast as possible. Therefore, by placing the cites and any comments in the main text, the writer keeps the reader's eyes moving forward, down the page, rather than back and forth. Readers can always skip over string cites in the main text but cannot resist glancing down at what is sometimes an irrelevant note or merely a string cite.

2. Importance

Footnotes not only distract readers, but they can also lead to needless litigation. A good example comes from *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S.

479 (1989), which interprets the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §§ 1961-68. Footnote fourteen of the *Sedima* opinion suggests that evidence of two acts is necessary to prove a "pattern" of racketeering within the meaning of RICO, but that the two acts might not be sufficient. *Id.* at 496 n.14. This footnote is only marginally connected to the main issue of the case, but it has sparked over four years of nationwide litigation. See *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989) (listing the many conflicting cases on this issue and holding that a pattern of RICO activity is not established merely by proving two predicate acts). Therefore, careful writers should remember that even footnotes can lead to confusion and excess litigation.

Furthermore, by setting a comment apart from the main text, the writer gives too much or too little importance to the comment, depending on the number of footnotes overall and what they say. For example, one footnote in an opinion can have the magical effect of Bryant's note in *The Prairies*. The footnote will draw attention because it is the only one and is, perhaps, unexpected. On the other hand, too many footnotes lessen the effect of each individual note. If the writer places an important

comment in a crowded field of notes, that comment might go unnoticed. The rule of thumb, therefore, should be that every statement in an opinion that is important and relevant should appear in the main text, not in a footnote. Of course, in a well-written opinion, everything is (or should be) important and relevant. So footnotes are almost never needed.

E. Word Choice

1. Pretentiousness

Listen to the first sentence of *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007 (1st Cir. 1988): "This matter arises on an infrastructure of important concerns involving the prophylaxis to be accorded to attorneys' work product and the scope of trial judges' authority to confront case management exigencies in complex multi-district litigation." *Id.* at 1009. Infrastructure? Prophylaxis? Exigencies? The judge probably broke his thesaurus as he used "conflagration" instead of "fire," "utilize" instead of "use," and "coterie" (as in "a coterie of lawyers") instead of "group." Furthermore, the judge had readers running for the unabridged dictionary as he used, with no apologies, "auxetic," "neoteric," "etiolo-

ogy," "transmogrification," "armamentarium," and "tenebrous," not to mention "maladroit," "interposition," "interdicts," and "quadripartite." 859 F.2d at 1009-21. And the most pretentious phrase in the opinion, "abecedarian verity," is not abecedarian (elementary) at all.

Rule one of good writing is to use simple, Anglo-Saxon words, not Latinate sesquipedalians (extremely long words of Latin origin). Good writers realize their main goal is to make the reader's job easy. Readers, especially lawyers and students, have little time to run to the dictionary every time they encounter unfamiliar and arcane words. Why use "auxetic" or "neoteric" when no one knows what they mean?

2. Made-up Words

In the summer of 1987, Judge Urbigkit of the Wyoming Supreme Court, in a footnote to a medical malpractice opinion, approved the word "conclusory" for use in opinions and briefs. See *Greenwood v. Wierdsma*, 741 P.2d 1079, 1086 n.3 (Wyo. 1987). The problem is that the judge, believing that "conclusory" was not a word in the English language, nevertheless approved its use. See *id.* Noting that Shakespeare occasion-

ally made up words, one English professor defended the judge's action. See *A Proper Word in Court*, N.Y. Times, Aug. 13, 1987, at A19, col. 1. But we disagree with the practice. Judges are not bards; they have little poetic license to make up words. Because the parties to the litigation and the lawyers and scholars who dissect the case for precedents rely on the clear and precise wording of opinions, judges should have no opportunity for inventing language. Even if writers need two or more words to describe a particular idea, they should not hesitate to use them. But writers should refrain from making up words, especially when they might require judicial interpretation and hence more litigation.

Some might say that judicial opinion writing is different from other types of writing and that this difference justifies legalese, wordiness, and pretension. But the object of any writing is to convey infor-

mation. Rather than making the opinion seem more important, pretension and wordiness detract from the effectiveness of the holdings and legal arguments. To really give the opinion weight, the judge should adopt a clear, concise writing style. The best judicial writers try to express decisions so that a varied audience can understand them.

III. CONCLUSION

Because many courts have demonstrated keen ability to write clear, concise, and organized opinions, Defendants' practice of issuing confusing, overly long, and poorly worded opinions appears needless and disappointing. Courts can write more effective opinions by following these few simple suggestions. We therefore direct Defendants to write effective opinions.

Reversed.