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ARTICLE 1

REFRESHING AND ENHANCING JUDGMENT WRITING SKILLS

Justice Leona Theron



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*REFRESHING AND ENHANCING JUDGMENT WRITING SKILLS**

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I INTRODUCTION

Judgment writing is an art that requires not only legal skills but also creative expression, common sense and human understanding.¹ The primary purpose of judgment writing is to communicate the decision, and the reasoning underlying it, accurately through the written word. Not everyone has the natural ability to communicate effectively. However, with study and practice the quality of judicial writing can be improved. There are as many opinions about what makes a good judgment as there are lawyers. I will explore some of the considerations that are relevant to judgment writing, in the hope that, if these considerations are kept in mind, we will be able to communicate judicial decisions effectively to interested parties.

* This article is an adaptation of an address delivered by Justice L Theron at a Judges' Seminar conducted by the South African Judicial Education Institute (SAJEI) on 17 January 2019 at Johannesburg.

¹ Address delivered by the former Chief Justice of the Constitutional Court S Ngcobo entitled 'Judgment Writing'.

II WHY DO WE NEED JUDGMENTS?

Judgment writing goes to the very heart of the exercise of the judicial function.² The giving of reasons for judicial decisions is part and parcel of the duty of the judiciary to conduct judicial proceedings fairly, respecting the rights of the parties involved.

In *Mvumbi*, the Constitutional Court explained that –

*[I]t is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, and, when a judgment is appealed, written reasons are indispensable. Failure to supply them will usually be a grave lapse of duty, a breach of litigants' rights, and an impediment to the appeal process.*³

In *Mphahlele*, the Constitutional Court held that furnishing reasons –

*explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters.*⁴

It is therefore in the interest of the open and proper administration of justice that courts state publicly the reasons for their decisions.⁵ The rendering of reasons gives some assurance that the court in question gave due consideration to the dispute and did not act arbitrarily. And this in turn is crucial to the maintenance of public confidence in the judiciary and, ultimately, the maintenance of the rule of law.

A written judgment should be given where:

- (a) the case involves complicated issues of fact and law that require resolution;
- (b) there is a possibility of an appeal no matter what the decision is;
- (c) the court issues an order declaring an Act of Parliament or a provincial Act or the conduct of the President unconstitutional;

² Address at the First Orientation Course for New Judges held at Magaliesberg on 21 July 1997 delivered by the former Chief Justice of the Supreme Court of Appeal M Corbett entitled 'Writing a Judgement'.

³ *Strategic Liquor Services v Mvumbi* NO (2009) 30 ILJ 1526 (CC); 2010 (2) SA 92 (CC) para 14.

⁴ *Mphahlele v First National Bank of SA Ltd* 1999 (2) SA 667 (CC) para 12.

⁵ 'Judgment Writing' (note 1 above).

- (d) novel points of law are raised;
- (e) there is differing authority on the issues; and
- (f) the matter is of great public interest.

The option of making an order with a direction that reasons will be delivered later should be used sparingly. Only when the judge is convinced that the decision that is intended to be given in support of the order is correct should this be resorted to.⁶ This option leaves no room for afterthought or a change of mind about the case, so be careful. If the practice is used, reasons must be furnished within a reasonably short time after the order.

III PURPOSES OF WRITING A JUDGMENT

As mentioned, the primary purpose of the judgment is to communicate the decision as well as the reasoning of the court. Judgments are generally read and studied by a number of different people. Therefore, before the writer begins, it is important to identify the group most likely to be interested in the judgment. There are advantages that flow from this. How this audience will respond, its needs and requirements, as well as the intended goal and function of the particular judgment, will determine the form and content of the judgment.

Where the decision is intended for the parties alone, only minimal facts along with an abbreviated legal analysis is necessary. On the other hand, where the judgment is directed to the legal community or the academic fraternity, the analysis, logic and reasoning must be clearly expressed in greater detail.

IV THE STRUCTURE OF A JUDGMENT

What should a judgment consist of or contain?

First, the judgment should begin with an introductory statement setting out the nature of the case and identifying the parties. This statement should be concise and uncluttered by unnecessary detail. References to the pleadings and case law should ordinarily be avoided in the introduction.

For an example of a good introduction, consider the opening paragraph in the Constitutional Court's judgment of *Saidi*.⁷ The paragraph reads:

⁶ 'Judgment Writing' (note 1 above).

⁷ *Saidi v Minister of Home Affairs* 2018 (4) SA 333 (CC).

Does a Refugee Reception Officer (RRO) have the power to extend a temporary asylum permit pending the outcome of a review – in terms of the Promotion of Administrative Justice Act (PAJA) – of a decision of a Refugee Status Determination Officer (RSDO) rejecting an application for asylum, including the PAJA review of decisions on internal reviews and appeals? That is the principal question that must be answered in this matter.

Or consider the opening paragraph of *Pillay*:⁸

What is the place of religious and cultural expression in public schools? This case raises vital questions about the nature of discrimination under the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) as well as the extent of protection afforded to cultural and religious rights in the public school setting and possibly beyond. At the centre of the storm is a tiny gold nose stud.

Second, the facts of the judgment must be laid out in a chronological sequence. It is not necessary to recount every step of the litigation – only the facts or history relevant to the issues to be determined.

Third, the issues should be listed and dealt with separately.

After the issues, the applicable law must be explained. When citing case law, only necessary and relevant portions should be cited. Avoid, if at all possible, citing long passages. Clearly state why the authority is being referred to. Where possible, try paraphrasing instead of direct citation, or insert the citation in a footnote. This approach tends to make judgments more reader friendly.

Thereafter, the law must then be applied to the facts. The conclusion and remedy follow.

The last part of the judgment should tie in with the introduction. The conclusion should resolve the issues identified in the introduction. The conclusion should not contain new material, factual or legal, not previously discussed.

Even if the conclusion or decision is wrong, the reader should be able to understand the reasoning of the judge and how the judge arrived at that particular conclusion.

Returning to *Saidi*, the last paragraph of Langa CJ's judgment directly answers the question posed in the first paragraph:

For all these reasons I conclude that section 22(3) [of the Refugee Act] grants the RRO a discretionary power to do two things. These are to extend permits and to amend conditions attached to them. Therefore, I do not support the

⁸ *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC).

declaration that the RRO has no discretion and as a result he or she is obliged to extend every permit upon application.⁹

And Pillay:

It is worthwhile to explain at this stage, for the benefit of all schools, what the effect of this judgment is, and what it is not. It does not abolish school uniforms; it only requires that, as a general rule, schools make exemptions for sincerely held religious and cultural beliefs and practices. There should be no blanket distinction between religion and culture. There may be specific schools or specific practices where there is a real possibility of disruption if an exemption is granted. Or, a practice may be so insignificant to the person concerned that it does not require a departure from the ordinary uniform. The position may also be different in private schools, although even in those institutions, discrimination is impermissible. Those cases all raise different concerns and may justify refusing exemption. However, a mere desire to preserve uniformity, absent real evidence that permitting the practice will threaten academic standards or discipline, will not.¹⁰

V EDITING THE JUDGMENT

Before delivery of the judgment, ensure that all issues have been dealt with, eliminate repetition, delete irrelevant detail, check punctuation, simplify lengthy complex sentences, and scrutinize length and content of paragraphs.

Decisions should be based on sound legal principles. It is essential to carefully evaluate the legal principles upon which a judgment rests. For example, in determining an appropriate sentence, a judicial officer reasoned as follows:

In respect of the sentence, I sentenced you in terms of the minimum sentencing provisions for robbery with aggravating circumstances, that is 15 years. The three years that I added on were because my life was threatened by some members of your gangs, that is the information that I was given and that is why I came here under police protection. It had nothing to do with any other case that day, it was your case. And since the National Intervention Unit took that threat seriously I just abided by what they asked me to do.¹¹

The presiding officer was quite clearly not entitled to add three years to the sentence because her life had been threatened. This could have been avoided had she reflected critically on her legal reasoning before handing down the judgment on sentence.

⁹ Saidi (note 7 above) para 87.

¹⁰ Pillay (note 8 above) para 114.

¹¹ *Mthembu v S* [2017] ZAKZPHC 21.

Editing also prevents obvious, patent errors that often creep into judgments. They do not reflect on the competence of the judge, but are nonetheless embarrassing and confusing. For example, in *Madiba*,¹² the Supreme Court of Appeal held that:

*It is quite clear that [the trial Judge] misdirected himself when he stated that the cumulative effect of the sentence imposed was that the appellant was sentenced to 70 years' imprisonment. Regard being had to the fact that one of these sentences imposed was life imprisonment, it is incomprehensible how [the trial Judge] came to this conclusion.*¹³

VI DO'S AND DON'TS

There are several 'do's and don'ts' that can easily improve judgment writing and delivery.

Do use simple clear language. Verbose, complicated language should be avoided. It helps no one:

*Innovative nuances of evidential inadequacies, procedural infirmities and interpretational subtleties, advanced in defence, otherwise intangible and inconsequential, ought to be conscientiously cast aside with moral maturity and singular sensitivity to uphold the statutory sanctity, lest the coveted cause of justice is a casualty.*¹⁴

The Supreme Court of India recently set aside a judgment of the Himachal Pradesh High Court on the basis that it could not comprehend the legalese used in the judgment. Here is an extract from the High Court judgment:

However, the learned counsel appearing for the tenant/JD/petitioner herein cannot derive the fullest succour from the aforesaid acquiescence occurring in the testification of the GPA of the decree holder/landlord, given its sinew suffering partial dissipation from an imminent display occurring in the impugned pronouncement hereat wherewithin unravelments are held qua the rendition recorded by the learned Rent Controller in Rent Petition No.[..] standing assailed before the learned Appellate Authority by the tenant/JD by the latter preferring an appeal therebefore whereat he under an application constituted under Section 5 of the Limitation Act sought extension of time for depositing his statutory liability qua the arrears of rent determined by the learned Rent Controller in a pronouncement made by the latter on . . .

¹² *S v Madiba* 2015 (1) SACR 485 (SCA).

¹³ *Madiba* (note 12 above) para 11.

¹⁴ *State of Karnataka v Selvi J. Jayalalitha* 2017 INSC 143 at 544–545.

*The summom bonum of the aforesaid discussion is that all the aforesaid material which existed before the learned Executing Court standing slighted besides their impact standing untenably undermined by him whereupon the ensuing sequel therefrom is of the learned Executing Court . . .*¹⁵

Do exercise logic, deal with each issue separately, and ask counsel to identify the issues.

Do maintain an impartial demeanour when dealing with litigants. The following exchange appears from the record of the proceedings of a local court:

COURT: Are any of these people in court today? --- I am not sure. I don't believe you, you are scared, aren't you? Am I right? You are scared to say anything. --- I . . . [intervention]. Yes, you don't have to answer me

. . .

COURT: Come here, please, accused 4. Come here, please. No, come here. Stay there. Turn your face that way. Turn your face this way. He has got one scar on his left cheek, but on the side of his cheek, one about two and a half centimetre scar. Go back there.

COUNSEL: Your worship, if the Court can just note the scar on his nose as well.

COURT: On where?

COUNSEL: On his nose.

COURT: Come back here. Oh, yes, I see now he has got a scar across his right nose, but this is three years later. Go back there. Across his right nostril.

COURT: . . . after all [the witnesses'] tooth nonsense, not nonsense, sorry, tooth problem.

This letter, written by a judge was part of the record in an application for leave to appeal to the Supreme Court of Appeal (where there was a complaint that the judge had delayed in delivering reasons for judgment):

This case was before me during the urgent court proceedings, at the end of July, 2007. I gave brief reasons indicating that I expected that I might be called upon to give more detailed reasons, in the future. A week or so – or even less – after 26 July, 2007, Mr Masilo was in my chambers, asking for full reasons. I did not chastise him for approaching me, a judge, for that purpose and in that fashion. You know, JP, that is unprofessional. I told him that full reasons are – as I had said in court – tantamount to a full judgment, that I did not have time to attend to it before the short recess, as I had other judgments that took precedence to it. It surprises me that Mr Masilo wrote this letter – which, by the way, reached me

¹⁵ *Sri Pawan Kumar Sharma v Sarla Sood and Others* 2011 HHC at 3 and 7.

*shortly after 11 September, 2007. Incidentally, something I had forgotten when I spoke to Mr Masilo – I had no short recess, having been in the unopposed motion roll. So, regrettably I cannot touch that judgment before January, 2008. I attach a copy of a letter I wrote on 13 September 2007, in reply to Mr Masilo's letter. My registrar (Francois) and I are uncertain as to whether it was, indeed, forwarded to Mr Masilo, as Francois went for study leave in about that time.*¹⁶

Do be respectful and courteous to all parties, the legal representatives as well as colleagues. It may be necessary to express disagreement with another judgment or the views of a colleague. Do so courteously and with full recognition of the fact that to err is human: you yourself may be wrong.

Do not rely on points of law that have not been raised by, or canvassed with, the parties. For example, a Canadian judge found an accused guilty of second-degree murder on the basis of a provision of the Canadian Criminal Code that has been unconstitutional for 26 years.¹⁷ The prosecution did not rely on the impugned section in its written argument. Even less surprisingly, nor did the defence.

Do not quote heads of argument at length. As stated in *Stuttafords Stores v Salt of the Earth Creations*:

The judgment [on appeal] consists of 1890 lines of typing of which, apart from a summary of the relief sought and the terms of the order, only approximately 32 lines are the judge's original writing.

The rest consists of words taken exactly from [X]'s counsel's heads of argument, sometimes even without taking out phrases like 'it is submitted' and emotive comments on the parties' contentions and actions.

...

*While some reliance on . . . counsel's heads . . . may not be improper, it would have been better if the judgment had been in the judge's own words.*¹⁸

Do not improperly draw from your own experience beyond the evidence. It is important that the judgment is decided on the relevant facts and law – not a judge's personal experience.

¹⁶ *National Director of Public Prosecutions v Naidoo* 2011 (1) SACR 336 (SCA).

¹⁷ *R v Vader*, 2016 ABQB 55 (CanLII).

¹⁸ *Stuttafords Stores (Pty) Ltd v Salt of the Earth Creations (Pty) Ltd* 2011 (1) SA 267 (CC) paras 9–11.

VII CONCLUSION

Courts are theatres in which many of the dynamics and dramas of society are played out.¹⁹ Judgments analyse and record some of these performances. They also provide opportunities for skilful writing. Judgments should, however, be confined to the relevant issues and facts. It is essential that the reasoning underpinning a judgment is clear, lucid and understandable for the intended target audience. As stated by the former Chief Justice S Ngcobo '[b]revity, simplicity and clarity are the watchdogs for effective judicial writing.'²⁰

¹⁹ 'Judgment Writing' (note 1 above).

²⁰ 'Judgment Writing' (note 1 above).

ARTICLE 2

THE STRUCTURE OF A JUDGMENT

Justice MM Corbett



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THE STRUCTURE OF A JUDGMENT

Taken from 'Writing a Judgment' The Hon MM Corbett

The South African Law Journal vol 115 (1998) at 116

– Edited –

I would recommend a basic structural form for judgment-writing. This basic form comprises the following elements.

(a) An introductory section

This section sets the stage, shows how the matter comes before the court (for instance, by way of action or on notice of motion or on appeal), states who the parties are and describes them and their activities briefly, and indicates in broad terms what the case is about.

(b) A setting out of the facts

This is a most important part of the judgment, for it forms the basis of the court's decision. The facts of the case must be gleaned from the pleadings (to the extent that they make common cause on the facts) and from the evidence placed before the court in the case of a trial action or, in the case of motion proceedings, from the affidavits. It is generally convenient to commence by setting out the undisputed facts; and then to proceed, in so far as it is necessary to do so, to make findings on the disputed factual issues. As regards this latter step, it may be more logical and convenient to defer it until after the issues have been identified and in the course of considering each individual issue.

In setting out the common-cause facts, try to be as selective and concise as possible. Think carefully about the case as a whole and discard evidence and facts which are not relevant to the essential issues in the case. Try, in setting out the common-cause facts, to produce a logical and readable narrative. Generally facts are best recounted by the narrator and understood by the reader if they are presented in a chronological sequence.

Avoid as far as possible long quotations from the evidence (oral or on affidavit) and from documents constituting exhibits in the case. Rather summarize the evidence or the documentary exhibit in your own words, but adhering as far as possible in regard to important matters to the language used by the witness or the deponent, or in the document. Reserve direct quotation for critical passages in the evidence or in the documents.

(c) *The law and the issues*

The next element of the judgment is the identification of the law and the issues. Here, depending on the case, different situations may confront the judge. For example, (i) the dispute between the parties may relate solely to the law, the facts being common cause, and the decision in the case will depend on how the disputed question of law is resolved; or (ii) the dispute may relate solely to the facts, or some of them, the parties being *ad idem* about the law and its application, and the decision will depend on how the facts are determined; or (iii) both the facts and the law may be in dispute and both have to be resolved; or (iv) there is no dispute about the facts or the law but the case depends on how the law is to be applied to the facts. This last-mentioned situation would arise where the relevant rule of law requires the court to make a value judgement on the facts, for instance that certain conduct constituted negligence or was unlawful in the circumstances. The exposition of the law and the issues will thus depend upon what is in issue.

(d) *Applying the law to the facts*

This is the next stage. It determines how the case is to be decided. Sometimes, once the basic facts and the law have been decided, the answer is clear and self-evident. For example, if the dispute is about the conclusion of a contract, and the facts show that the parties reached an unconditional agreement about a serious commercial matter, *cadit quaestio*. But in many instances it is not as simple as that. The principle of law which has to be applied requires the court to decide the matter in accordance with what is fair and reasonable or proper and in accordance with both mores in all the circumstances of the case or in accordance with what are perceived to be the legal convictions of the community; in other words, the court is required to pass a value judgment.

(e) *Determining the relief (including orders for costs)*

The next and penultimate stage is to determine the relief the parties are entitled to, including orders as to costs: This depends upon the findings of law and fact and the conduct of the proceedings generally. Sometimes a plaintiff, though successful, is not entitled in its entirety to the order claimed. Consequently this must be carefully scrutinized in the determination of the relief to be granted. Similarly, careful consideration must be given to the question of costs and whether there should be any deviation from the rule that normally costs follow the event.

(f) *Finally, the order of the court*

This must be carefully drafted in the light of the findings as to the relief to be granted. You will be surprised how often judges overlook some essential part of the order, for instance by allowing an exception without making any consequential order in regard to the pleading in question, or by allowing an appeal and omitting to substitute an appropriate order for that of the court below.

As a general rule the suggested structure will, I think, produce a logical, flowing judgment and will also provide a framework which will test the conclusions which the writer seeks to draw.

The Hon MM Corbett

ARTICLE 3

THE AUSTRALIAN LAW JOURNAL ON THE WRITING OF JUDGEMENTS



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THE AUSTRALIAN LAW JOURNAL
ON THE WRITING OF JUDGMENTS

ON THE WRITING OF JUDGMENTS*

The Hon Justice Michael Kirby CMG**

AN EMPIRE OF INDIVIDUALISTS

Who would be so bold as to write on the writing of judgments? As many lawyers as there are, so many opinions and more exist about what makes a good judgment. No primer on the way to do it, this essay is, instead, a reflection on some of the features of judgment writing in Australia today. It begins with a few practical considerations to be kept in mind in assessing particular judgments. It proceeds to a consideration of the old controversy about whom a judgment is written for. It acknowledges the different characteristics of judges and their writing, before embarking on the illustration of some of the stable and some of the changing features of judgment writing in that empire of individualists. It closes with a reflection on brevity, simplicity and clarity - the blessed trinity of good judgment style. Where I refer to 'judges' I mean, of course, judicial officers of every rank. Doubtless many others who labour away in the numberless tribunals which are

now such a feature of the modern administration of justice are equally involved. And where I use "judgment" I mean not the formal order which is the judgment properly so called, but the reasons for judgment - what United States lawyers call the "opinion": the explanations given by the judge for the order finally proposed or made.

The daily experience of the courts demonstrates the differing skills of advocates and judges in oral communication. It also demonstrates that on some days the most brilliant advocate is tongue-tied and the sharpest judicial mind, listless or distracted. It should therefore not surprise the reader of judgments that some who write them are better than others, or that the quality of the same pen varies over time and even changes from day to day.

The second practical consideration with which I preface these remarks is pressure. Pressure upon modern judges - at first instance and on appeal - is, in most instances, much greater than it was in the case of their forebears. True, the High Court of Australia can now, by the requirement of special leave, control its workload. But for most judges, there is much less control. The backlog increases. Community and institutional pressure for speedier justice is relentless.¹ The time for reflection, for careful planning, thoughtful research and for polishing prose, is strictly limited. And diminishing. It is in this world of unprecedented stress and pressure that most judges, today, complete their judgments.

A third practical consideration is the change in the mode of trial and in the modern understanding of the judicial obligation to give reasons. Even when I was young in the law, jury trial was far the commonest means of resolving factual disputes at common law. The skill of the advocate, and of most trial judges, lay in communicating with juries: in addressing or instructing them. Juries were then abolished in motor vehicle accident cases, and, later in a wider range of cases.² Now, there are proposals for an even more radical reduction in the role of the jury. These changes have imposed upon judges at first instance an increasing obligation of fact-finding. Combined with the growing insistence upon the giving of reasons by judicial officers,³ the burden of judgment writing for trial judges has increased. What could once be left safely to the sphinx-like jury⁴ must now be attempted by the first instance judge. He or she must find facts, record any relevant findings on credibility and provide at least sufficient exposition of the applicable law to permit a disappointed litigant to consider and if so advised, exercise any rights of appeal for which the law provides.

The functions of judgment writing at first instance and on appeal differ. There are, of course, common elements. Furthermore, appellate courts sometimes sit in a trial function, as when the Court of Appeal hears proceedings for contempt or for the removal of the name of a legal practitioner from the roll of practitioners. Some appeals

are limited to points of law. Some, substantially to points of law or rulings on evidence.⁵ But increasingly appeals are by way of rehearing, requiring the appellate court to review not only findings of law, but findings of fact as well.⁶ Appellate courts today are rarely confined to consideration of short questions of law. They must typically sift the facts. Proper sifting may add to the length of judgments and to their complexity. That is the price of providing a second look at the facts.

Judgments, at least of judges of superior courts, can establish binding precedents of legal authority. Even in courts lower in the hierarchy, the specialised nature of the jurisdiction and conventions of judicial comity may make it useful to study earlier decisions, to guide judges and legal practitioners or other repeat players towards the proper resolution of like cases. This said, an important distinction between judgments of an appellate court and of a trial judge lies in the fact that it is more likely that the holding of an appellate court will not only dispose of the appeal before it but establish a binding legal principle. This is not necessarily so. Many decisions of the Court of Appeal involve no question of principle (eg damages appeals) or no novel application of legal rules (eg disputes over motor vehicle negligence). Yet many do. These are more likely to be reported than judgments at first instance. In a time of rapid change in both statute and common law, many novel points arise for judgment. The reasons given by the

judge must therefore serve many purposes.

THE READERS OF JUDGMENTS

The litigants: It is interesting to reflect upon the fact that, despite the seven century tradition of the common law, there is no agreement upon the audience for whom a judge writes his or her judgment. The losing party is frequently said to be a primary focus of concern. The winner will often have little interest in the reason for success, usually being convinced of the rightness of the cause anyway. But in closely fought and expensive litigation, the loser is entitled to have from the judge a candid explanation of the reasons for the decision. This is not only for the exercise of any appeal rights that may exist. It is also to uphold the intellectual integrity of our system of law which must daily demonstrate, by its performance in particular cases, its adherence to the law, attentiveness to argument, impartiality and logical reasoning. True, some disappointed litigants will not bother to read the laboured reasons of the judge. Moreover, successful appellants have their own entitlement to the judge's candid reasons, for these may immure the judgment against unwarranted appeal or even reversal on grounds abandoned at first instance. Clearly, then, the parties, as the principal players in the drama of litigation, are entitled to the judge's reasons. This affects the way in which a judgment at first instance, or at the first level of appeal, should be written.

Legal profession: The judgment is also written for the

legal representatives of the parties and for the profession generally. Even if the parties themselves do not persist and read the lengthy exposition of the facts, their lawyers will usually do so; if only to test the judgment for the accuracy and fairness of its fact-finding. Even if the litigants do not fully understand the analysis of legal precedent and the exposition of legal principles, their lawyers are entitled to have it demonstrated that the judge had the correct principles in mind and properly applied them. The legal profession is entitled to examine the body of judgments for the learning and precedents that they provide and for the reassurance of the quality of the judiciary which is still the centrepiece of our administration of justice. It does not take long for the profession to come to know, including through the written pages of published judgments, the lazy judge, the judge prone to errors of fact-finding, the judge without understanding of the laws of evidence or the judge who has difficulties with complex propositions of law. These reputational considerations are important for the exercise of appellate rights, for the judge's own self-discipline, for attempts at improvement and for the maintenance of the integrity and quality of our judiciary. It is principally through the pages of written judgments that that quality may be assessed.

Other judges: Then judgments are certainly written for other judicial officers. At first instance they may be written for judicial officers lower in the hierarchy facing

common legal problems. They may be written for judges in the same specialised court. An important point may be decided which will not be taken on appeal because of the obvious correctness of the decision or because the parties cannot afford it. No judge of a superior court can approach his or her functions without an awareness that a judgment may be reported and that it may establish a legal principle, binding until set aside by an appellate court. The opportunities of creativity and exposition of legal principle are by no means confined to appellate courts in banc. Knowledge of this fact imposes a discipline and quality control upon all judges, but especially judges of the superior courts. In the appellate courts, judges are writing for other judges. If they are subject to review or the possibility of appeal, a judgment must be written with this possibility in mind. That is not to say that an intellectually dishonest attempt should be made, eg by formulae on the credibility of witnesses, to render a judgment "appeal-proof". The best judges perform their reasoning function honestly and to the best of their ability without undue concern that an appellate court may find error or reach a different conclusion. Nevertheless, it is obviously desirable that sufficient should be stated in the judgment to ensure that it does not fall victim on appeal to an issue that was abandoned or otherwise not litigated before the court in question.⁷

That consideration apart, the legal duty of a judge who is subject to appeal, to state his or her reasons in

deference the right of appeal is not now in doubt in Australia. The judge must state explicitly and concisely the facts as they are found and the reasons for the decision. The duty is not confined to cases where an appeal lies. It may arise as an incident of the nature of the decision in question. But it takes on a particular force where there is an appeal - whether by right or by leave. There are exceptions to the duty as where a decision is "too plain for argument". Or where a procedural decision is made and the reasons for it are clear from the context or from the preceding exchanges with the parties on their representatives. However, the failure of a trial judge to state findings and reasons, and of any judge to state reasons, amounts to derogation from the right to appeal and in abdication of the judicial function. Such a failure makes it impossible for the appellate court to give effect to the appellate right and so to carry out its functions.

All of this was said in a series of decisions which came together in the New South Wales Court of Appeal in Pettitt v Dunkley.^a Justice Asprey there explained important legal functions which are fulfilled by the reasons which support judicial orders:

"The rights of appeal are statutory rights granted by the legislature to the parties and the failure of a trial judge in the appropriate case to state his findings and reasons amounts, in my view, to an encroachment upon those rights. The omission of the trial judge makes it impossible for an appellate court to give effect to those rights, either for one party to the appeal or another, and so carry out its own appellate functions. It is unnecessary to

stress the prime importance to a party to an appeal, whether he be appellant or respondent, of the findings and reasons at first instance and this is not limited to the acceptance or rejection of evidence on the basis of demeanour for, in arriving at his conclusions, the trial judge may simply have preferred one possible view of the primary facts to another as being in his opinion the more probable, or he may have preferred the evidence of one witness to another for a variety of reasons, although both were considered by him to be telling the truth as they may have observed the facts to be. ... Just as it is impossible to confine the grounds upon which an appellate court will order a new trial within rigid categories ... so the ambit of the difficulties confronting parties to an appeal will place the appellate court to which they look for the exercise of their statutory rights in many cases in a position which may prevent the court from giving effect to the paramount consideration of obviating a miscarriage of justice.

In my respectful opinion the authorities to which I have referred and the other decisions which are therein mentioned establish that where in a trial without a jury there are real and relevant issues of fact which are necessarily posed for judicial decision, or where there are substantial principles of law relevant to the determination of the case dependent for their application upon findings of fact in contention between the parties, and the mere recording of a verdict for one side or the other leaves an appellate tribunal in doubt as to how those various factual issues or principles have been resolved, then, in the absence of some strong compelling reason, the case is such that the judge's findings of fact and his reasons are essential for the purpose of enabling a proper understanding of the basis upon which the verdict entered has been reached, and the judge has a duty, as part of the exercise of his judicial office, to state the findings and the reasons for his decision adequately for that purpose.

Judges reversed: Appellate courts must also keep in mind the fact that the judges appealed from will usually read their judgments. At least, they will usually do so

where the appeal is upheld. The appellate court has, inescapably, an educative function which it performs through its written judgments. The expression of error detected can be frank without that hurtfulness which will cause unnecessary offence. The history of different conclusions upon the same legal point, as famous cases proceed through the judicial hierarchy, offers sufficient proof of the fact that even highly talented lawyers will quite often reach quite different conclusions, and for different reasons, upon the same question. Upon some matters a simple mistake may be detected. A basic error of law may be demonstrated, perhaps a statute overlooked. Most judges will readily acknowledge such mistakes when they are pointed out, however embarrassing they may be. Often, they will be entitled to blame counsel for failing to direct them to the point. However, on many matters of legal principle, minds simply differ.⁹ On others, the law is obscure or is expressed in terms of such generality that different results may quite readily be derived from its application to particular facts. The realisation of these inescapable features of our legal system provides a balm for the sting of appellate reversal. It also provides to appellate courts a reason for intellectual modesty and the avoidance of arrogance or insensitivity of expression.

Test of conscience: Finally, a judgment is ultimately

written for the judge who writes it. It must have integrity and carry with its words the evidence of the manifest impartiality and intellectual honesty of the writer. Judges, at least in Australia, are members of an independent branch of government. They are uncorrupted and enjoy high public standing. They are protected from removal from office by constitutional and statutory guarantees and by the common law.¹⁰ Out of self regard for the privilege of membership of this elite band with its ancient lineage and high responsibilities, judges of our tradition should always strive to perform their functions with lawfulness, neutrality and dispassion. These are our traditions. Written judgments provide the opportunity for each judicial officer to demonstrate to his or her own conscience a worthiness to be a participant in such a high tradition of moral integrity and social utility.

CATEGORIES OF JUDGES

Various attempts have been made to classify judges according to their differing approaches to the writing of judgments. In 1979, Lord Justice Templeman, as he then was, in a BBC interview said:

"Judges and their judgments - I think you can divide into three categories; there are the philosophers, the scientists and the advocates. The present Lord Chancellor, Lord Hailsham, I would put in the category of philosopher; Lord Wilberforce and Lord Diplock I would put into the scientific vein and Lord Denning is one of the advocates. And in common with those other judges whose judgments are feats of advocacy, you can see some traces of the eloquence in the advocacy which they used when they were at the

Bar, and these three elements are all there in Lord Denning's judgments."¹¹

There are difficulties in this, or any such, classification. Indeed, this is acknowledged in the final comment that Lord Denning's judgments show evidence of all three "categories". So do those of most judges. A judgment in one case may involve the predominance of one of the qualities identified. Care must be taken to avoid stereotyping judges, any more than other subgroups of the community.

Yet it is probably true that different judges show different proportions of the three qualities which Lord Justice Templeman has selected as criteria. Bringing the classifications closer to home, one might say that Justice Windeyer in the High Court of Australia evidenced a bias to a philosophical approach. Certainly, his profound knowledge of, an interest in, legal history turned his attention to fundamental concepts of the common law where he felt most at home. Chief Justice Dixon was probably our greatest "scientist", espousing as he did "complete legalism" and believing that the law would lose its meaning if it were not the limited function of the judge to find the pre-existing law and to declare it.¹² Amongst the chief "advocates" one might name Chief Justice Isaacs, Chief Justice Barwick and Justice Murphy. Yet none of them - philosopher, scientist or advocate - could wholly escape his background of training and professional experience in the law. No Australian judge has entered upon office without

such training and background. The functions of Australian judges, deprived of a Bill of Rights or the Charter of their Canadian counterparts, are more limited. Their work is less likely to take Australian judges into the byways of philosophy, sociology and economics. Yet all of these disciplines can be relevant, from time to time, to common law reasoning and to the interpretation of statutes.

Judgments of the Supreme Court of the United States have been analysed according to the recorded influence of great philosophers and writers upon the thinking of the justices.¹³ Thus between 1790 and 1986 the 71 members of the Supreme Court referred to the writings of Plato in 9 opinions, to Locke in 11, to Montesquieu in 27 and to the Federalist Papers in no fewer than 317 judgments. Shakespeare was mentioned in 24 opinions. Surprisingly, even Sigmund Freud was referred to in 4.¹⁴ It is mainly in the elaboration of the fundamental rights in the Bill of Rights that references to literature and philosophy appear. Thus in the United States v Loud Hawk¹⁵ Justice Powell, citing Homer's Odyssey in a case involving the claim to speedy trial alluded to Penelope's promise that she would not choose a husband until the shroud she was weaving was finished. Her technique involved working on it in the day but then secretly unravelling it at night. Justice Powell suggested that the defendants were up to Penelope's trick:

"At the same time defendants were making a record of claims in the District Court for speedy trial they consumed 6 months by filing indisputably frivolous petitions for rehearing

and for certiorari ... [and] filled the District Court's docket with repetitive and unsuccessful motions."

Only a judge with wide reading, an imaginative research staff or whose experience has taken him or her outside the law will have the intellectual capital to draw upon such philosophical and literary allusions. Even if the judge has such experience, the legal tradition (and concern about the reaction of the profession or of other judges) may still the pen that moves to a literary allusion. Alternatively, such references may fall victim to the blue pencil and disappear into oblivion in the penultimate draft by the miracle of word processing. No Penelopes appeared in the recent expositions in the High Court of Australia about speedy trial.¹⁶ Yet it is not unknown to see literary allusion; though more frequently in the judgments of English judges than of Australian.¹⁷

STABLE AND CHANGING FEATURES

The basic format: There are some stable and some changing features of judgment writing. The stable features derive from the very nature and purpose of a reasoned judgment. Fundamentally, this is to explain an order formally entered by the Court as an enforceable rule between the parties in the litigation before it. For that purpose, a judgment will typically begin with a statement of the relevant facts. It will follow with an exposition of the principles of law perceived to be applicable. In the manner

of the logical syllogism, it will then express conclusions derived from the application of the law as expounded to the facts as found.¹⁸

Literature and humour: Within this basic format, there is much room for variation and indeed variety. I have already referred to allusions to literature and learning beyond the law books. Humour is also sometimes evident. There are some authors who suggest that it has no place at all in judgment writing, the issues between the parties being too serious. "For a judge to take advantage of his criticism-insulated, retaliation-proof position to display his wit is contemptible, like hitting a man when he is down".¹⁹ Others, to the contrary, suggest that humour has a proper place in enlivening the prose and communicating the ideas of a judge. Just as humour can be effective in the ordinary communications of life so, it is urged, it has a place (although necessarily limited) in judicial communication.²⁰ Justice Wallach of the Supreme Court of New York put it this way:

"It must immediately be conceded that the place of judicial opinions is rather low in the literary pantheon; as an art form they probably rank slightly above a political speech and just below a sermon... Despite all this I would urge that a touch of humour, carefully controlled, can properly find a place in judicial writing. At best, it can be useful in deflating the overblown argument; at worst (provided it is not nasty and therefore not humorous at all) it is probably harmless. And at least I can attest that over my fourteen years of judicial opinionating it has relieved the tedium of the writer. Whether it will ever relieve the tedium of the reader can [only] be tested by time."²¹

On the other hand, some United States judges have clearly gone too far in their indulgence in humour. Thus in Fisher v Lowe²² a Judge Gillis dealt with the claim by the owner of a tree who sued the driver and owner of a car who had crashed into it, in the following way:

"We thought that we would never see
A suit to compensate a tree
A suit whose claim in tort is press'd
Upon a mangled tree's behest;
A tree whose battered trunk was pressed
Against a Chevy's crumpled chest;
A tree that faces each new day
With bark and limb in disarray;
A tree that may forever bear
A lasting need for tender care
Flora lovers though we three,
We must uphold the Court's decree."

There are many other attempts at opinions in verse in the United States. Some of them have resulted in disciplinary action against the judge involved, when deemed to have gone too far even for the tolerant taste of American lawyers.²³

In Australia humour is definitely confined to the minor key. Doubtless, this is because most Australian judges share Prosser's view that "the bench is not an appropriate place for unseemly levity. The litigant has vital interests at stake. His entire future, or even his life, may be trembling in the balance, and the robed buffoon who makes merry at his expense should be choked with his own wig".²⁴ Nevertheless, attempts at humour occasionally appear.²⁵

Views will doubtless differ about the suitability of judicial humour in the record of a judgment and at the expense of parties or their legal representatives or

witnesses. Clearly a judge, tempted by such humour must consider the permanency of the record, the potential harm to reputation of the subject of the humour, the difficulty of affording an adequate answer or correction and the attention thereby given to the comment, precisely because of its pithy humorous expression indeed. Yet judges are supremely individuals. Their expression is, in part, a reflection of their personalities and individual values.

Dangers of irony: Irony is more common in judgment writing of our tradition than other forms of humour. Perhaps irony, a more restrained form of humour, is thought to be more in keeping with the sober purposes of the judiciary. Perhaps it simply reflects the characteristics of the English personalities who left their indelible mark upon our image of what a good judge is. Just the same, irony, being frequently hurtful, can get the judicial writer into difficulties.

Perhaps the best known instance of this danger is Lord Atkin's allusion to Lewis Carroll in his notable dissent in Liversidge v Sir John Anderson & Anor. After a vigorous but dispassionate dissection of the opinion of the majority, his Lordship's speech reached its stinging point:

"I know of only one authority which might justify the suggested method of construction: 'When I use a word,' Humpty Dumpty said in a rather scornful voice, 'it means just what I choose it to mean, neither more nor less'. 'The question is,' said Alice, 'whether you can make words mean so many different things'. 'The question is,' said Humpty Dumpty, 'which is to be master - that's all'" ("Through the Looking Glass", c.VI). After all this long discussion

the question is whether the words "if a man has" can mean "if a man thinks he has". I am of the opinion that they cannot, and that the case should be decided accordingly."²⁶

It is now known that, as a result of this passage, Lord Atkin was sent to a judicial Coventry by the other Law Lords. They refused to meet him or to eat with him. At one point they even refused to speak to him. Before the speech was delivered, the Lord Chancellor (Lord Simon), who had not participated in the case, put great pressure upon Atkin to change the tone, if not the content of his judgment. Atkin refused. Lord Maugham, who had presided made a bizarre attack upon Atkin in the legislative session of the House of Lords. The opinion has been expressed that Lord Atkin never really recovered from this treatment before his death in 1944.²⁷ He did not live long enough to see his opinion of the law vindicated.²⁸ Indeed, it cannot be denied that the vigorous expression of his point of view helped to capture the attention of law commentators and judges. Perhaps it thereby contributed to the ultimate ascendancy of the important legal concepts which Atkin was espousing. The power of vivid language to do this should never be underestimated.

Another instance of the use of judicial irony (and of literary allusions) which caused no end of trouble for the judicial officer employing them can be seen in the case of Justice Staples of the Australian Conciliation and Arbitration Commission. Justice Staples, from his days as a

barrister, was given to the use of vivid prose unusual in the grey and detailed area of industrial decision-making to which he was appointed. In an important case, a recommendation by him to the Broken Hill Pty Company Limited and a union for the settlement of a long-standing maritime dispute was rejected by the company. Justice Staples wrote:

"Let them, then, twist slowly, slowly in the wind, dead and despised, as a warning to the Commission of the limits of the persuasion of a public authority upon those who zealously uphold the privileges of property and who exercise the prerogatives of the master over those of our citizens whose lot falls to be their employees."²⁹

The company regarded this use of language as insulting to it. It was one of the matters which led to the removal of Justice Staples by the President of the Commission from his panel in charge of the maritime industry. His ultimate isolation and final removal from judicial duties, even judicial office, followed a further ironic reference, this time to a novel about the shearing industry in resolving an industrial dispute concerning shearers. Perhaps the fate of Justice Staples stands as a warning of the dangers to judges in Australia of what may happen to those who use excessively florid prose and irony found hurtful by the powerful interests on the receiving end.³⁰

Nonetheless, subtle irony, detectable only by the cognoscenti can certainly be useful in conveying a key point in the reasoning of a judge. It is a legitimate technique of argumentation if properly used. Thus, Justice Meagher is

most faithful to the doctrine of precedent and stare decisis (the principle that earlier judicial decisions of high authority provide a rule binding on later judges who are bound to apply it). He is probably closer to the "scientific" ideal of Chief Justice Dixon than many modern judges. Yet, in a recent case, he was able to reach a conclusion which appeared to two of his colleagues (Justice Clarke and myself) to fly in the face of a series of settled decisions of the Court of Appeal. It therefore gave me more than a little satisfaction to begin my reasons in the case with reference to the settled procedure by which authority of the Court might later be overruled by it:³¹

"This motion tests the Court's fidelity to its own earlier holdings and to the procedure which it has laid down for the overruling of earlier determinations of questions of law, when they are subsequently challenged: (see Proctor v Jetway Aviation Pty Limited [1984] 1 NSWLR 166 at 171, 185.) It also raises the approach which the Court takes to the construction of legislation. Is it to be strict and literalist, taking words in isolation, out of their context and apart from their clearly intended operation? Or is it to be purposive, so that the meaning is given to the words in order to effect their intended purpose? The latter is the approach now required by Parliament itself ... It is increasingly that adopted by the courts of common law both in this country and elsewhere."

Not daunted, Justice Meagher expressed his view succinctly and with force:

"The result, startling and inconvenient though it may be, in my opinion is that leave is required for an appeal from any decision on a separate issue, whether that decision be final or interlocutory. I am not deterred from this

conclusion by the circumstance that in the past the Court of Appeal has stumbled into the opposite conclusion in four cases, in none of which the present point was really argued."³²

CHANGES IN JUDGMENT STYLE

Opening words: The foregoing passages illustrate some of several changes in judgment writing style which have begun to emerge in Australian judgments in recent years.

It is not now uncommon to see in the opening words of a judgment an expression of the key issues which fall to be decided. In a sense this passage provides a headline to the judgment. Its purpose is to invite readers to an interest in the issues discussed by capturing their attention at the outset. This has long been a common technique in the writing of judicial opinions in the United States. Indeed, it is recommended in a standard text on judicial opinion writing in that country.³³ It has not been common in Australia where, as in England, judgments have commonly begun with those tedious words: "This is an appeal ..." or "This is an action ...". If only to avoid such cliché expressions, such dull phrases should never be used. The writer who loses the opportunity to state clearly at the outset the issue in hand (as he or she sees it) has lost a vital chance to communicate effectively with the potential audience and to grasp its interest and favour. Today there is so much to read that the effective communicator, bidding for attention to his or her ideas, will work at the task of ensnaring the busy, distracted reader. There is no reason why legal prose should

be tedious and boring, whatever the writing style adopted.

Judge Learned Hand expressed the ideal:

"I like to think that the work of a judge is an art ... After all why isn't it in the nature of an art? It's a bit of craftsmanship, isn't it? It is what a poet does, it is what a sculptor does. He has something vague, he has some vague purposes and he has an indefinite number of what you might call frames of preference amongst which he may choose; for choose he has to, and he does."³⁴

Sub-headings: A second change that is occurring in Australian judgments is the introduction of headings in reasons both at first instance and on appeal. Once it was rare in Australia to see a heading interrupt an appellate judgment. It is still comparatively rare in England. But in the New South Wales Court of Appeal, a number of judges have introduced headings or clear division of their texts. I did so from the outset, following the conventions brought with me from the Law Reform Commission.³⁵ Justice McHugh experimented at first with divisional sections of judgments. Later he too introduced headings in his judgments in the Court of Appeal. He has followed the same technique since his appointment to the High Court of Australia.³⁶

Subheadings provide an especially useful means of taking the reader efficiently to that section of the judgment which he or she wishes to find. It is a common method of communication in written texts in other disciplines. It would be unthinkable in commercial and economic material today to provide a dense unbroken text without such simple

keys to unlocking the meaning and reasoning of the author. Presentation to the reader of unbroken passages of judicial prose, unrelieved by the merest symbol and uninterrupted by headings which provide the guideposts for the journey displays in my opinion a want of real concern about the processes of communication. It may even sometimes hide a lack of structure or plan. Disclosure of headings reveals, even to the most cursory reader, the plan followed by the judicial writer. Headings also provide an opportunity for the writer to convey key ideas. Tedious, elementary headings such as "The facts" and "The law" should certainly be avoided. But the opportunity should be used to display the logical progression of the reasoning of the judgment and to do so, if possible, with words which add to the process of persuasion.

Exit Latin: A third change is the gradual abandonment of Latin and the virtual elimination of Greek in judicial texts. Once it was necessary in Australia (as it still is in South Africa) to be trained in Latin to secure entrance to the law school. Latin was considered essential for an understanding of Roman Law, usually the sole intruding example of comparative law to disturb the self-contained universe of the common law. But now Roman Law is not compulsory. A diminishing number of law students has studied Latin at school. The proportion in the community at large is smaller still. If the purpose of reasons for judgment is to communicate effectively with the various audiences

identified, it is highly desirable that Latin expressions should be dropped - or where still useful, at least translated. Otherwise a barrier is placed between legal expression and an important section of the audience for whom the judgment is written. Such barriers serve only to alienate judges and lawyers from the community they serve. The flourish of Latin as an illustration of classical learning is unnecessary. Learning can quite readily be demonstrated, by those anxious to do so, in other ways.

Gender neutrality: The avoidance of gender specific language, unwarranted by the context, is a fourth feature of recent times. In the High Court of Australia sensitivity on this score has followed the appointment to the Court of Justice Mary Gaudron.³⁷ It is now perfectly normal to find in the text of High Court judgments care in avoiding the single personal pronoun "he". Instead, "he or she" is now typically used.³⁸ Other expedients are sometimes adopted (such as the use of the plural) to secure a gender neutral expression. As this technique of legal expression has now reached the statute book and reflects a matter keenly felt in some circles in the community, it is desirable that judges should wherever possible avoid discrimination in the language they use. Hidden away in language may be a world of inappropriate attitudes and prejudice. The use of gender neutral language tends to evidence a gender neutral attitude to legal tasks.

There is an increasing number of women judges

appointed in Australia. Yet there is still confusion as to whether they should be called "Miss Justice", "Mrs Justice", "Madam Justice" or simply "Justice". At least in this country we do not have the problem, as elsewhere throughout the Commonwealth of Nations, of titling a woman judge "My Lord". Nor do we need to approach the eccentricity of the English in the Court of Appeal where Dame Elizabeth Butler-Sloss is styled "Her Ladyship, Lord Justice Butler-Sloss". Nearly a decade ago I proposed that all judges of superior courts in Australia - male and female - should, as in South Australia following the appointment of Justice Roma Mitchell, adopt the simple style "Justice".³⁹ Sadly, when Dame Roma retired, the Judges of the Supreme Court of South Australia who had given such a worthy lead reverted to "Mr Justice". The High Court, following the appointment of Justice Gaudron, changed the title of the Justices by dropping "Mr" in every case. However, in the Supreme Courts and in the Federal Court confusion reigns. In due course, it may be expected that the solution of the High Court will be adopted throughout the Australian judiciary. Meantime, in their daily expression, individual judges should also follow the High Court's lead and avoid "sexist" pronouns and expressions.

Schedules and footnotes: A fifth recent innovation in Australian judgment writing is the increasing tendency of judges to use appended schedules of cases or other material relied upon and to use footnotes. Such techniques are

commonplace in the opinions of United States judges.⁴⁰ They occasionally appear in judgments of the High Court of Australia. Thus, in Barwick CJ's very useful synthesis of case law on the jurisdiction of a court summarily to terminate an action in General Steel Industries Inc v Commissioner for Railways (NSW) & Ors⁴¹ his Honour appended a list of the case law which he had "examined on the subject" in coming to his conclusions. The appendix comprises 16 cases, some only of which are referred to in the reasons.⁴² In the New South Wales Court of Appeal, the use of appendices and footnotes has so far largely been confined to the reasons of Justice Priestley.⁴⁴ Because unusual in this country, the judicial footnote can be a way of making a telling point strictly peripheral to the issues in hand but important in the writer's process of reasoning and perhaps for the future. In the United States, footnotes have sometimes played a very important function in digesting a body of law or in synthesising an opinion in a way that is highly influential upon later decisions.⁴⁴ Many American texts appeal for restraint in the use of footnotes⁴⁵; just as local observers urge that citations should likewise be confined.

Summary and index: Sixthly, another technique of increasing use to be mentioned in this context is the summary and index to help readers through a particularly long judgment. The judgment of the High Court of Australia in the Tasmanian Dams Case⁴⁶ was a decision of high controversy.

It involved consideration of many separate arguments in the seven separate reasons of the judges. In that case, a statement was issued by the Court, at the time judgment was delivered, summarising the effect of the decision of the Court reached in relation to each question by a majority of the judges. That statement is reproduced in the authorized report.⁴⁷ So is the table of contents which refers to the subdivisions of each separate judgment.⁴⁸ Such subdivisions have also been used in the New South Wales Law Reports, eg in the Spycatcher litigation.⁴⁹

BREVITY, SIMPLICITY AND CLARITY

Judicial trinity: Brevity, simplicity and clarity. These are the hallmarks of good judgment writing. But the greatest of these is clarity. Of course, some people see the world as exceedingly simple. There are some lawyers and not a few judges of this persuasion. They are blind to the complexities that lie hidden in facts or the subtleties of the law and the ambiguities of language in statutes and other documents. Still others, perfectly aware of such subtleties, have mastered a writing style notable for simplicity of expression. To avoid invidious local examples but to illustrate the point, it is useful to compare⁵⁰ the writing styles of Justice Megarry and Lord Denning MR in describing the same facts in In re Vandervell's Trusts [No 2]⁵¹. Justice Megarry wrote:

"An important consideration was that under the articles the VP Company could distribute its profits as dividends among the ordinary shares,

the "A" shares or the "B" shares, or to any one or two of these classes to the exclusion of the others or other, as the Company determined in general meetings; and in practice this meant that Mr Vandervell had complete control over whether or not any dividends were paid on any of these shares."⁵²

Lord Denning expressed the same facts in these words:

"In 1949, he set up a trust for his children. He did it by forming Vandervell Trustees Limited - the trustee company, as I will call it. He put three of his friends and advisers in control of it. They were the sole shareholders and directors of the trustee company. Two were chartered accountants. The other was his solicitor."⁵³

The Megarry passage comprises one sentence of approximately 75 words. The Denning passage comprises 6 sentences, 57 words in all.

Writing style: It might be said that the appellate judge, with the benefit of the trial judge's exposition to work on, can reduce the relevant facts to those necessary to illustrate the legal concepts thought to govern the case. But every lawyer knows that out of the choice of facts will frequently emerge the applicable legal rule. And appellate second sight does not explain so radical a change of style. Lord Denning's is the style of the evangelist, the advocate. Some writers disapprove of the staccato of his short sentences.⁵⁴ Others do not find his style to be as effective as the Megarry exposition.⁵⁵ They fear that "simple syntax may reflect over-simplification and ... a failure to distinguish the more important [facts] from the

less important".⁵⁶ Writing, including judicial writing, has been analysed for indications of a tendency to absolute expression as against recognition that things are usually more complex and thus in need qualification. By this measure, Lord Denning's style places him in the category of absolute writers. Justice Megarry's places him amongst the qualifiers.⁵⁷ In Lord Denning's prose, many are the adverbs of intensification, such as "very", "extremely", "only", "really" and so on. Justice Megarry, on the other hand, is more prone to use qualified determiners ("most" of the facts of the case are undisputed but some are in issue" It was Mr Robbins who in many of the matters ... acted almost as Mr Vandervell's alter ego"). Analysis such as this simply catalogues writing as we tend, in everyday life, to categorize human personalities along a "confident" or "cautious" spectrum.

It should not surprise us that writing, with its tendency to reflect the complex, diverse personalities about us should exhibit features as varied as is human personality itself. Yet there are common features evident. Its very diversity is clearly a strength of the common law judicial system. Judges, with gifts of communication, writing in a simple, straightforward and "magisterial"⁵⁸ style tend to have the greatest influence because of their clarity of expression. Yet, on the other hand, rhetoric and the use of vivid phrases play an important part in persuasion. In this way such language may come to have a disproportionate impact

on the development of the law. Benjamin Cardozo once pointed out:

"The [appellate] opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the tenseness and tang of the proverb and the maxim. Neglect the help of these allies, and it may never win its way."⁵⁹

From the legal profession and academic lawyers (and not a few judges) come constant calls for brevity of appellate court reasons. The same appeals usually include, if possible, a request for a single reason stating a clear holding. I entirely agree that these are ideals to be pursued wherever possible and appropriate. There are few tasks more unrewarding than searching amongst the wreckage of multiple judicial opinions, offering different reasons, for a binding rule which can be readily applied in the hectic activities of a work-a-day court. A notable illustration of the inconvenience of multiple opinions, where a clear and simple rule is imperative (or at least highly desirable) is the current authority of the High Court of Australia on forum non conveniens.⁶⁰

Single opinions: In the United States of America, recognising the key role in government played by the Supreme Court there has, virtually from the start, been a tradition of a single majority and (where applicable) a single minority opinion.⁶¹ The Australian judicial hierarchy saw an extreme version of this thirst for clarity in the rule followed almost to its dying days by the Judicial Committee

of the Privy Council, in tendering but one opinion to the Crown.⁶² This extreme example of the magisterial style, was doubtless influenced by early attitudes in Downing Street to the laws of the colonies, available time of the Law Lords and their legislative function. To this day, Privy Council decisions are admirably brief. Yet they can sometimes be expressed in language of power and even emotion.⁶³ Dissents are still rare. Many Australian lawyers, surveying the increasing length of the opinions of appellate courts, yearn for a return to the certitudes of the Privy Council style and the similar style of the early days of the High Court of Australia. Various expedients have been suggested to produce brevity including writing judgments by longhand (Justice Kitto) whilst standing up (Chief Justice Dixon) and with pen and inkwell (Justice Meagher).

Perhaps in response to these calls, a slight movement can recently be detected towards single or joint judgments in Australia's appellate courts, thereby reversing the trend of the heyday of judicial individualism. The latter probably reached its apogee in the 1980s. Yet against these considerations it is important to bear in mind the pressures which tug in the opposite direction. The growing body of binding authority, including of the High Court of Australia itself, intellectual honesty in response to counsel's arguments and the demonstration of appropriate judicial neutrality may today require a more detailed review of binding decisions than was earlier the case. The facility of

reference to a wider range of extrinsic aids to construction also adds to the length of oral hearings, written submissions and judgments. Yet this may be a price willingly paid for the escape from the rigidities of a strictly textual interpretation.⁶⁴ Increasing candour in the acknowledgment of judicial choices⁶⁵ invites a more candid discussion of questions of principle and policy than would have been common, even a decade ago. This will also have a price for the length of opinions. It may be a price worth paying, in preference to a return to the "fairytale" of completely value-free judicial decision-making.

Concurrent opinions: There is another consideration. It is in the variety of judicial opinions that the pool of ideas is provided from which the common law system draws its vitality and strength. The diversity actually symbolises the independence of the judiciary, and all its members. It permits the light and shade of reasoning, even where a common conclusion is achieved. Justice Kitto revealed that Chief Justice Dixon once told him that he never agreed in the judgment of another judge "without having some cause to regret it afterwards".⁶⁶ Even if collectively judges of appellate courts wish to reduce the length and complexity of their judgments, it is a characteristic of the people appointed to such courts, and of their training, that they will rarely be willing to forsake their own unique opinions in the name of an institutional ideal. They will continue to perform their duties in their own way. Save for the

impermissible exclusion of particular judges from the exercise of their commissions or the organisation of sitting arrangements to avoid the embarrassing expression of individual opinions, there is nothing much that courts or their presiding judges can do about the individualism of judges; except by persuasion and example.

Dissenting opinions: The most acute form of individual opinion is the dissent. Some famous judges, including Lord Reid, have expressed the view that the writing of dissenting judgments should be conserved to very important points of principle. I do not agree. A judge is duty bound to offer his or her reasons for the order that is made by the Court. If, in a collegiate court, those reasons differ in any matter of substance, the judge must identify the difference. The statistics demonstrate that dissenting opinions in Australian courts are much lower in number and proportion than in equivalent courts of the United States.⁶⁷ Perhaps this is a reflection of different traditions and different judicial functions of the judiciary in each country. The dissent must be disregarded for extracting from the decision of a court its binding rule.⁶⁸ But that does not mean that the dissent has no value for the long-term development of the law. In the United States, dissents have played a very important part in the development of constitutional law. Thus, Justice Harlan's dissent in Plessy v Ferguson⁶⁹ concerning the doctrine of "separate but equal" treatment of "coloured"

people on trains came, in time, to sustain the Court's switch of opinion in Brown et al v Board of Education of Topeka et al.⁷⁰ Similarly the dissent of Justices Black, Douglas and Murphy in Betts v Brady, Warden⁷¹ provided the intellectual foundation for the Court's later holding in Gideon v Wainwright⁷² that a poor person facing a serious criminal charge had a right to counsel. There have been many similar instances in Australian legal history. The passage of time, changes in the membership of a court and even the ascendancy of the dissenter can explain the shift of legal authority.⁷³

A dissent expressed within the institutions of the law provides a legitimate means of protest against opinions which are, at the moment, in the minority.⁷⁴ They help to reflect the diversity of contemporary society, of which a diverse judiciary is but a muted reflection. They appeal to the present generations of lawyers, and to the future. Hence, Chief Justice Hughes' perception that the dissent appeals to the "brooding spirit" of the common law;⁷⁵ Justice Cardozo expressed the same thought:

"The dissenter speaks to the future, and his voice is pitched to a key that will carry through the years. Read some of the great dissents ... and feel after the cooling time of the better part of a century, the flow and fire of a faith that was content to bide its hour. The prophet and martyr do not see the hooting throng. Their eyes are fixed on the eternities."⁷⁶

Even those who will not accord such high ambitions to the

typical dissent in Australian judgments, may be willing to acknowledge their social value as "one of the processes that aids the development as the law meets and solves new situations".⁷⁷

CONCLUSIONS

Courts are public theatres in which many of the human dramas of society are played out in an abbreviated and somewhat stylized fashion. In the necessarily artificial circumstances of a courtroom and judicial technique it is impossible entirely to suppress the human drama. Judgments and legal opinions record some of these performances. They therefore provide opportunities for skilful writing. But it is writing always under the constraint imposed by the purpose at hand, to detail the refinements of fact and law that need to be dealt with for that purpose and form of decision-making. The characteristics of the judicial opinion at first instance and on appeal are different. Yet they enjoy many common features. There are many practical constraints which inhibit creative writing by a judge. Some of these have been identified.

It is important to keep in mind the audience for whom the reasons are written. Yet there is no unanimity of opinion as to who that audience should be. To some extent a basic structure of opinion-writing is stamped on judicial reasons by their fundamental purpose. Yet within that structure there is much room for individual variance: to exhibit skills of communication, a familiarity with the great

writings of literature and of philosophy, the deft use of irony and even, occasionally, restrained humour.

Styles of judicial writing are constantly changing. Some of the changes have been collected. The use of headings. The demise of Latinisms and legal cliches. The avoidance of words or expressions showing gender-bias. The occasional use of footnotes, appendices and other aids to communication. Clearly, there are more changes still to come. Yet it is more remarkable to note the familiarity of a judgment two centuries old than to mark the changes that have lately crept in, almost imperceptibly to their expression.

Brevity, simplicity and clarity are the watchwords for effective judicial writing. However, a number of constraints on brevity have been acknowledged. Brevity at the price of a return to a mechanistic view of the law would be unacceptable to many judges today. The use of extrinsic aids to construction and the candid acknowledgment of policy choices which must be made tend to add to the length of judicial reasons. At a price worth paying, most would say. And on conditions, such as the general availability of the extrinsic "aids", others would add.⁷⁸

Individual opinion-writing and the dissenting judgment are the hallmarks of a system of justice which truly respects the independence of its judges and acknowledges the judge's only masters to be the law and conscience. Diversity of opinion - and one might add of judgment writing style - is a great strength of the common law judicial tradition. It

provides a never-ending stream of ideas and of ways to communicate them. Ideas are the most powerful engines for change and progress. Continuity amidst constant change of substantive law and orthodoxy amidst experimental variety in its exposition have helped to develop the law of a rural society of feudal England to the formidable body of the common law today. It is a body of law laid down by the succeeding centuries of judicial opinion-writing. It is this happy mixture of stability and movement which explains why that most lasting institutional legacy of the British Empire - the common law - continues to flourish in every corner of the world and to serve in these fast changing times the legal needs of a third of humanity. It is the privilege of each succeeding generation of judges of the common law to nurture and advance this precious legacy.

* Text of a paper on which was based a lecture to the First Australian Conference on Literature and the Law held at the University of Sydney, April 20-22, 1990 on the initiative of the Department of English in the University of Sydney and the Faculty of Law of Monash University, Melbourne.

** President of the New South Wales Court of Appeal. Personal opinions.

1. Even in the courts themselves, this is acknowledged. See eg Gaudron J in Jago v District Court of New South Wales (1989) 63 ALJR 640, 662.
2. See Pambula District Hospital v Herriman (1988) 14 NSWLR 387 where the history of these developments is

set out.

3. See Public Service Board of New South Wales v Osmond (1986) 159 CLR 656; Pettitt v Dunkley [1971] 1 NSWLR 376. See below.
4. In Ward v James [1966] 1 QB 273 at 301 Lord Denning MR described the jury's verdict to be "as inscrutable as the sphynx". See Quinn v Rocla Concrete Pipes Ltd (1986) 6 NSWLR 586.
5. Land and Environment Court Act 1979, (NSW) s 57(1); Cf Compensation Court Act 1984, (NSW) s 32.
6. Warren v Coombes (1979) 142 CLR 531. See also Viscount de L'Isle v Times Newspapers Ltd [1988] 1 WLR 49, 62, (CA).
7. Coulton & Ors v Holcombe & Ors (1986) 162 CLR 1; Water Board v Moustakas (1988) 62 ALJR 209 and Banque Commercial SA en Liq v Akhil Holdings Limited (1990) 64 ALJR 244.
8. [1971] 1 NSWLR 376 (CA). The passage from the judgment of Asprey JA appears at 381-382. The decision has been applied in numerous cases, see eg Housing Commission of New South Wales v Tatmar Pastoral Co [1983] 3 NSWLR 378; Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247. It has been accepted in other States of Australia. See eg Watson v Anderson 1976) 13 SASR 329. It has been followed in the Federal Court of Australia. See eg Australian Timber Workers Unions v Monaro Sawmills Pty Ltd (1980) 42 FLR 369, 374, 380.

- It was accepted as the law in New Zealand. See R v Awatere [1982] 2 NZLR 644, 648 (CA); R v MacPherson [1982] 1 NZLR 650. In the High Court of Australia it appears to have been accepted as stating the law. See obiter remarks of Gibbs CJ in Public Service Board of New South Wales v Osmond (1986) 159 CLR 656, 666-7.
9. A glaring example is Oceanic Sun Line Special Shipping Company Inc v Fay (1988) 165 CLR 197.
 10. See Macrae & Ors v Attorney-General for New South Wales (1987) 9 NSWLR 268; Quin v Attorney General for New South Wales (1988) 16 ALD 550. But see now Attorney General for New South Wales v Quin (unreported, High Court of Australia, 7 June 1990. Cf M D Kirby, "The Removal of Justice Staples and the Silent Forces of Industrial Relations" (1989) 31 Jl Indl Rels 334.
 11. Interviewed by H Young, Talking Law, BBC, 16 September 1979, 3 cited in M D Kirby, The Judges, Boyer Lectures, 1983, ABC, 41. A good example of Lord Denning's style is Beswick v Beswick [1966] Ch 538. His judgment begins: "Old Peter Beswick was a coal merchant in Eccles, Lancashire. He had no business premises. All he had was a lorry, scales and weights..." ibid, 549.
 12. O Dixon, "Concerning Judicial Method" in Woinarski (ed) Jesting Pilate, 1965, 155.
 13. F Snyder, "The Great Authors and Their Influence on the Supreme Court", 7 Leg Ref Services Q 285 (1987).
 14. See eg Boutilier v Immigration and Naturalisation

- Service 387 US 118, 130 (1967) (per Douglas J, dissenting).
15. 474 US 302 (1986) (per Powell J). See Snyder, 288.
 16. Jago n 1 above.
 17. See eg Russell LJ in Sydall v Castings Limited [1967] 1 QB 302 at 321: "I may perhaps be forgiven for saying that it appears to me that Lord Denning MR has acceded to the appeal of Bassanio in the Merchant of Venice ... 'To do a great right, do a little wrong'. But Portia retorted: ... 'It must not be; ...'. I am a Portia man". On the other hand Judge [later Justice] Cardozo counselled caution: ... "In days not far remote, judges were not unwilling to embellish their deliverances with quotations from the poets. I shall observe towards such a practice the tone of decent civility that is due to those departed". Law and Literature and Other Address Essays and Addresses, Harcourt Beach and Co, NY, 1931, 29.
 18. See Kitto J in R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Limited (1970) 123 CLR 361 at 374-5. Applied New South Wales Bar Association v Muirhead (1988) 14 NSWLR 173, 197.
 19. G R Smith, "A Primer of Opinion-Writing for Four New Judges" in G R Winters, Handbook for Judges, American Judicature Soc, 1975, 123, 137. See also W Prosser, "The Judicial Humorist", 1952, vii; "Judicial humor is a dreadful thing".

20. A Jordan, "Imagery, Humor, and the Judicial Opinion" in 41 Uni Miami L Rev 693 (1987).
21. R Wallach, "Let's Have a Little Humor" [1984] NYLJ 2, Col 3.
22. 122 Mich App 418, 333 N W 2d 67 (1983). The headnote was also written in lyrics.
23. In re Inquiry relating to Rome 218 Kan 198; 542 P 2d 676 (1975). In that case a Kansas State Court trial judge placed a prostitute on probation for soliciting an undercover policeman. He expressed his reasons in an opinion written in verse which led to an inquiry into alleged improper judicial conduct. See Jordan, 702. Lord Mansfield tried poetry in The King v Shipley (1784) 4 Dougl 73; 99 ER 774.
24. Prosser, above n 19.
25. See eg G & J Shopfittings & Refrigeration Pty Limited (In Liq) v Lombard Insurance Company (Aust) Limited (1989) 16 NSWLR 363 at 377.
26. [1942] AC 206 at 245. Lord Denning frequently used irony to good effect. See eg In re Vandervell's Trusts [No 2] [1974] Ch 269 when he said at 321: "Even a court of equity would not allow him to do something so inequitable and unjust".
27. See R Stevens, "The Law and Politics: The House of Lords as a Judicial Body 1800-1976", 1979, 287.
28. See eg Nakkuda Ali v M F De S Jayaratne [1951] AC 66, 76 (PC); Salemi v MacKellar [No 2] (1977) 137 CLR 397.

29. The Broken Hill Pty Co Ltd v Seamans' Union of Australia (BHP Case) (1975) 171 CAR 711. See also Federated Storemen and Packers Union of Australia v Albany Woolstores Pty Ltd (1979) 231, CAR 388, where Staples J concluded his decision with an allusion to Joseph Furphy's book about the wool trade by declaring the way in which he had fixed the figures he arrived at: "I shall simply select a figure as Tom Collins selected a day from his diary and we shall see what turns up. Such is life".
30. See discussion M D Kirby, "The Removal of Justice Staples - Contrived Nonsense or Matter of Principle?" in (1990) 6 Aust Bar Rev 1.
31. National Employers' Mutual General Insurance Association Limited v Manufacturers' Mutual Insurance Limited (1988) 17 NSWLR 223, 225.
32. ibid, 242.
33. J J George, Judicial Opinion Writing Handbook, (2nd ed), Hein & Co, Buffalo, 1986.
34. L Hand, quoted in Jordan, above n 20, 693.
35. In the first reported judgment in the Court of Appeal following appointment, headings appear. See Brian Cassidy Electrical Industries Pty Limited (In Prov Liq) and Anor v Attalex Pty Ltd [1984] 3 NSWLR 52, 54. See also in the judgment of McHugh JA, then also recently appointed. See 73.
36. See judgment of McHugh J eg Chan v Minister for

- Immigration and Ethnic Affairs (1989) 63 ALJR 561, 576 ff. Other Justices have now increasingly adopted the same style. See eg Gaudron J loc cit, Brennan J in South Australia v Tanner (1989) 63 ALJR 149, 154. Toohey and Gaudron JJ in Mickelberg v The Queen (1989) 63 ALJR 481, 495 ff.
37. See eg Mason CJ and Toohey J in Mills v Meeking (1990) 64 ALJR 190, 194 ("One would expect such a person to remain in the company of the member or officer until he or she has furnished a sample of breath for analysis ...") However, the practice is not universal. Thus Dawson J in the same case (loc cit 195) refers to "a person" as "he". So does McHugh J (at 202), although he is elsewhere at pains to repeat the noun to avoid gender designation.
38. See eg the extract from the judgment of Mason CJ and Wilson, Dawson and Toohey JJ in Federated Insurance Limited v Wasson (1987) 163 CLR 303 at 313 extracted in n 75 below.
39. See M D Kirby, The Judges, above n 11, 13.
40. Probably the most famous footnote in United States legal authority is footnote 4 to the opinion of Stone J in United States v Carolene Products Co, 304 US 144 (1938). The history of this footnote, the correspondence between Hughes CJ and Stone J about it and editorial comments on it are found in W F Murphy, J Fleming and W F Harris, American Constitutional

Interpretation, Foundation Press, NY, 1986, 482ff.

41. (1964) 112 CLR 125.
42. Ibid at 129.
43. Appendix at 138. See also the schedule to the reasons of Priestley JA in Silovi Pty Ltd v Barbaro & Ors (1988) 13 NSWLR 466, 476. Powell J annexed an appendix of books on security and intelligence matters tendered in evidence to his judgment in Attorney General for the United Kingdom v Heinemann Publishers Australia Pty Limited & Anor (1987) 8 NSWLR 341 at 386-7.
44. See eg Priestley JA in Commissioner for Motor Transport v Kirkpatrick (1988) 13 NSWLR 368, 392-3.
45. Note discussion in G R Smith above n 19, 137.
46. Tasmania v The Commonwealth; The Tasmanian Dams Case (1983) 158 CLR 1.
47. ibid 58-9.
48. id, 56-8.
49. Attorney General for the United Kingdom v Heinemann Publishers Australia Pty Limited & Anor (1987) 10 NSWLR 86 at 91 (Street CJ).
50. This is done in D R Klinck, "Style, Meaning and Knowing: Megarry J and Denning MR" in (1987) 37 Uni Toronto L J 358.
51. [1974] Ch 269.
52. Ibid 273-4.
53. id, 316.
54. J A G Griffith, Book Review (The Discipline of the Law)

- in (1979) 42 Mod L Rev 348. See discussion M D Kirby, "Lord Denning: An Antipodean Appreciation" in [1986] Denning LJ 103, 107.
55. Klinck, above n 50, 367.
56. ibid, 370.
57. id, 385.
58. R Weisberg, "How Judges Speak: Some Lessons on Adjudication in Billy Budd; Sailor with an Application to Justice Rehnquist", 57 NY Uni L Rev 1, 49 (1982). See also analysis by B Cardozo, Law and Literature above n 17, 342: "It eschews ornament. It is meager in illustration and analogy. If it argues, it does so with a downward crush and overwhelming conviction of the syllogism and seldom with tentative gropings towards the inductive apprehension of a truth imperfectly discerned".
59. Cardozo, loc cit.
- 60 See Fay above n 9. See also Voth v Manildra Flour Mills Pty Limited (1989) 15 NSWLR 513 and notes at (1987) 103 LQR 398 and (1989) 64 ALJ 219 and (1989) 13 NZ Uni L Rev 337, 357f.
61. The calls for single opinions are by no means confined to Australia. Douglas J of the Supreme Court of the United States alluded to the pressure when he wrote: "All of us in recent years have heard and read many criticisms of dissenting ... opinions. Separate opinions have often been deplored. Courts have been

- criticised for tolerating them". See W Douglas cited in J L Campbell, "The Spirit of Dissent" 66 Judicature 305, 312 (1983).
62. See discussion J Crawford, Australian Courts of Law, Oxford, Melbourne, 1982, 169 ff.
63. See eg Jeyaretnam v Goh Chok Tong [1989] 1 WLR 1109 (PC).
64. See eg McHugh JA in Kingston v Keprose Pty Limited (1987) 11 NSWLR 404, 421 ff and the cases there cited.
65. See Lord Reid, "The Judge as Lawmaker" in (1972) 12 Journal of Public Teachers of Law, 22. For useful discussion of Realpolitik in the present context see W Sadurski, "It All Comes Out in the End : Judicial Rhetorics and The Strategy of Reassurance" (1987) 7 Oxford J Legal Stud 258 and J Goldsworthy, "Realism about the High Court" (1989) 18 Fed L Rev 27.
66. F Kitto in Law Foundation (NSW) Judicial Essays, 9.
67. For discussion see S S Ulmer, "Exploring the Dissent Patterns of the Chief Justices: John Marshall to Warren Burger" in S Coldman and C M Lamb, Judicial Conflict and Consensus: Behavioural Studies of American Appellate Courts, Uni Kentucky, 1982, 53. There has been no equivalent analysis of dissent patterns in appellate courts in Australia. For figures on dissents in the NSW Court of Appeal see Annual Review 1986, 53 where the highest rate of dissent was Mahoney JA (14) followed by Kirby P (13); Samuels JA

- (7); McHugh JA (6); Priestley JA (2); Glass JA (1) and Hope JA (nil). The 1987 statistics were Kirby P (18); Mahoney and Samuels JJA (5); McHugh JA (2) and Priestley and Glass JJA (1). Hope JA was again nil. See Annual Review 1987, 38. For 1988 the figures were Mahoney JA (16), Kirby P (13); McHugh JA (10); Samuels JA (3); Clarke JA (3) and Street CJ, Hope JA and Priestley JA 1 each. See Annual Review 1988, 29.
68. See Dickinson's Arcade Pty Limited v Tasmania (1974) 130 CLR 177, 188.
69. 163 US 537 (1896).
70. 347 US 483 (1954).
71. 316 US 455 (1942).
72. 372 US 335 (1963).
73. See eg the apparent influence of the earlier dissenting opinions about the meaning of s 92 of the Australian Constitution upon the unanimous opinion of the High Court in Cole v Whitfield (1988) 165 CLR 360.
74. Campbell, above n 61, 307.
75. Hughes CJ as quoted in J Edwards, "Dissenting opinions of Mr Justice Smith", 34 U Det L J 82 (1956). The expression was used by the High Court of Australia by Mason CJ, Wilson, Dawson and Toohey JJ in Federation Insurance Limited v Wasson & Ors (1987) 63 CLR 303 at 314 ("A dissenting judge will often see his or her judgment as an appeal to the brooding spirit of the law, waiting for judges in future cases to discover its

wisdom").

76. B Cardozo, Law and Literature above n 17, 36. See also W Douglas cited in Campbell above n 61, 311.
77. J Simmons, "Use and Abuse of Dissenting Opinions" 16 L.A. L Rev 498 (1956). See also E McWhinney, "Judicial Concurrences and Dissents: A Comparative View of Opinion-Writing in Final Appellate Tribunals" (1953) 31 Canadian Bar Rev 609.
78. See eg Fothergill v Monarch Airlines Limited [1981] AC 251, 278 (HL).

ARTICLE 4

WHAT IS “GOOD LEGAL WRITING” AND WHY DOES IT MATTER?



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What is "Good Legal Writing" and Why Does it Matter?

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WHAT IS “GOOD LEGAL WRITING” AND WHY DOES IT MATTER?

Mark K. Osbeck*

ABSTRACT

Law schools face increasing pressure to improve instruction in practice-oriented skills. One of the most important of these skills is legal writing. The existing literature on legal writing contains various rules and suggestions as to how legal writers can improve their writing skills. Yet it lacks an adequate theoretical account of the fundamental nature of good legal writing. As a result, legal writers are left without a solid conceptual framework to ground the individual rules and suggestions. This Article attempts to fill the theoretical void in the literature by offering a systematic analysis of what it is for a legal document to be well written. It starts by examining a foundational conceptual issue, which is what legal writers mean when they say that a legal document is well written. It argues that legal readers judge a document to be well written if the writing helps them make the decisions they need to make in the course of their professional duties. The Article then provides an analysis of the fundamental qualities that enable legal writing to do this, concluding that there are three such qualities: clarity, conciseness, and the ability to appropriately engage the reader. The Article explains why each of these qualities is essential to good legal writing, and it examines the tools good writers use to make their writing clear, concise, and engaging. Lastly, the Article examines what it is that distinguishes the very best writing in the field, arguing that great legal writing is not just writing that is especially clear, concise, and engaging, but is instead writing characterized by a separate quality, elegance, that is aesthetic in nature. The Article then goes on to explore what it is that makes such writing elegant, and whether it is desirable for legal writers to strive for elegance in their own writing. The Article concludes by briefly considering the pedagogical implications of the analysis discussed in the previous sections.

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INTRODUCTION

On April 9, 2010, Chester Paul Beach, Jr., the associate general counsel for one of America's largest industrial companies, United Technologies Corporation, spoke at a high-profile conference in New York that concerned the future of legal education. Addressing the staffing practices of corporate law firms, Mr. Beach startled the predominantly academic audience when he told them that "we're one of those firms who does not allow first or second year associates to work on our matters without special permission — because they're worthless."¹

Mr. Beach's observation about the readiness of beginning lawyers to practice law created something of a stir in the law school community. Yet it was really just a poignant expression of an increasingly common sentiment. During the past two decades or so, law schools have come under increasing pressure from outside the academy to improve the practice-oriented skills of their graduates.

This pressure began in 1989, when the American Bar Association's Section of Legal Education and Admission to the Bar formed a task force to explore the practicing bar's perception of a significant disconnect between legal education and the practice of law. That task

1. Chester Paul Beach, Assoc. Gen. Counsel, United Techs. Corp., Address at Future Ed: New Business Models for U.S. and Global Legal Education, (Apr. 9-10, 2010), available at <http://nyls.mediasite.com/mediasite/Full/ac401784b0234af89d50e059b4e95c3021> (follow "Future Ed Conference - Panel 1).

force, headed by Robert MacCrate, issued what is now known as the *MacCrate Report* in July 1992.² The heart of the report was its *Statement of Lawyerly Skills and Professional Values*. This identified the skills the task force deemed essential to the competent practice of law, one of which was effective oral and written communication.³ The task force stressed that it was important for law schools to focus on these skills in their instruction because “surveys understandably indicate that practicing lawyers believe that their law school training left them deficient in skills they were forced to acquire after graduation.”⁴

In 2001, the ABA stepped up its pressure on law schools to improve skills education, mandating for the first time that law schools require at least one “additional rigorous writing experience” after the first year to supplement the traditional first-year legal writing and research course.⁵ The ABA explained that it did so in order “to reflect the importance of legal writing instruction to the law school curriculum.”⁶

The judiciary has also weighed in on the importance of improving the legal writing and other practice-oriented skills of law school graduates. For example, in a widely discussed article entitled *The Growing Disjunction Between Legal Education and the Legal Profession*, Judge Harry T. Edwards of the United States Court of Appeals for the District of Columbia Circuit observed that “many law schools—especially the so-called ‘elite’ ones—have abandoned their proper place, by emphasizing abstract theory at the expense of practical

2. See generally AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, THE REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992).

3. *Id.* at 138–41. The Task Force Recommendations explicitly addressed the need for improvements in legal-writing pedagogy, stating that “[i]n view of the widely held perception that new lawyers today are deficient in writing skills, further concerted effort should be made in law schools and in programs of transition education after law school to teach writing at a better level than is now generally done.” *Id.* at 332.

4. *Id.* at 5.

5. 2011–12 STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCH., *Program of Legal Education* § 302 (a)(3) (2011), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_standards_and_rules_for_web.pdf (last visited Mar. 21, 2012). For a thorough discussion of this revision and its impact, see Kenneth D. Chestek, *MacCrate (in)Action: The Case for Enhancing the Upper-Level Writing Requirement in Law Schools*, 78 U. COLO. L. REV. 115 (2007).

6. COUNCIL ON THE SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, MEMORANDUM FROM JOHN A. SEBERT, CONSULTANT, ON 2000-2001 CHANGES TO THE STANDARDS, INTERPRETATIONS, AND RULES (June 2001) (on file with the author).

scholarship and pedagogy.”⁷ Judge Edwards faulted law schools for not providing their graduates sufficient training in the skills they would need to practice law, and raised his “serious concern” concerning the “lack of good training in legal writing.”⁸ “In my twelve years on the bench,” he wrote, “I have seen much written work by lawyers that is quite appalling. Many lawyers appear not to understand even the most elementary matters pertaining to style of presentation in legal writing”⁹

Judge Edwards is not alone among members of the judiciary in his assessment of the poor writing skills of lawyers. One of the most prominent and prolific federal judges, Richard Posner, has observed that the communication skills of the advocates he sees “are often quite bad, sometimes awful.”¹⁰ Like Judge Edwards, he believes that “[m]aybe all this is the result of the growing gap between practice and the academy.”¹¹ Other judges agree. One empirical study found that approximately 94% of both federal and state judges surveyed reported that basic writing problems routinely marred the briefs they read, and that a clear majority of respondents thought that new members of the profession did not write well.¹²

Voices from outside the bench and bar have also pressured law schools to put a greater emphasis on legal writing and other practice-oriented skills so that their students will be better prepared to practice law when they graduate. In 2007, the Carnegie Foundation for the Advancement of Teaching issued an influential report called *Educating Lawyers* (also commonly referred to as the *Carnegie Report*), which found that “[l]aw schools face an increasingly urgent need to bridge the gap between analytical and practical knowledge”¹³ It accordingly recommended that law schools make a greater effort to integrate skills instruction into the curriculum in order to “more fully complement the teaching and learning of legal doctrine with the teaching and learning of practice.”¹⁴

7. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1993).

8. *Id.* at 63.

9. *Id.* at 64.

10. Interview, *A Conversation with Judge Richard A. Posner*, 58 DUKE L.J. 1807, 1815 (2009).

11. *Id.* at 1816.

12. Susan Hanley Kosse & David T. ButleRitchie, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study*, 53 J. LEGAL EDUC. 80, 85–86 (2003).

13. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW*, SUMMARY 8 (2007).

14. *Id.*

That same year, a committee of scholars and practitioners sponsored by the Clinical Legal Education Association issued a report entitled *Best Practices for Legal Education* that was designed to encourage a dialogue on how to improve skills training in law schools.¹⁵ The impetus for this report was the committee's determination that "there is a compelling need to change legal education in the United States" because "most law school graduates lack the minimum competencies required to provide effective and responsible legal services."¹⁶

Not surprisingly, the increased pressure on law schools to improve the legal writing and other practice-oriented skills of their students has spurred a burgeoning body of academic literature on practical lawyering skills. Indeed, just in the area of legal writing (which is perhaps the most fundamental of practice-oriented skills), commentators have produced literally dozens of articles and books in recent years aimed at improving the legal writing skills of law students and lawyers.¹⁷ And yet, while commentators have generated many helpful works on legal writing and legal-writing pedagogy, they have largely ignored the theoretical underpinnings of legal writing. Numerous books and articles offer advice on how to write better or how to teach writing better, but none provides a systematic analysis as to the fundamental goals of legal writing.¹⁸

This void in the literature hampers legal writers. Without an adequate understanding of the fundamental goals of legal writing, legal writers cannot make full and effective use of the individual rules and suggestions they find in the existing literature. As with practitioners in any discipline, legal writers require more than just rote memorization of various rules and suggestions if they want to become proficient in their craft; they need also to understand *why* they are being taught to write a certain way. For only then do they pos-

15. ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* 1 (2007).

16. *Id.* at 1, 5.

17. See Almas Kahn, *A Compendium of Legal Writing Sources*, 50 WASHBURN L.J. 395 (2011) (summarizing the principal works in the field).

18. By "legal writing," I mean to include various types of expository writing that lawyers, judges, and related professionals (e.g., judicial clerks) produce in the course of their work. The prototypical examples of such writing are legal memoranda, letters, briefs, motions, and judicial opinions. I do not mean to include in this analysis academic legal writing or the products of transactional drafting (e.g., contracts), though much of what is discussed in this Article applies to these types of writing as well. Likewise, while the focus of this Article is on legal writing specifically, there is certainly a significant overlap between good legal writing and good expository writing generally.

sess an adequate conceptual framework to make sense of the individual rules and suggestions they learn.¹⁹ Furthermore, from a pedagogical perspective, it is difficult to see how legal-writing instructors can effectively teach their students how to write well if they themselves do not have a clear understanding of what exactly good legal writing entails.

This Article endeavors to fill the theoretical void in the existing literature by providing a systematic analysis of what it is that makes a legal document well written. Part I of the Article explores the concept of good legal writing and what exactly legal readers *mean* when they say that a legal document is well written. It concludes that good writing is essentially writing that satisfies the needs and desires of the reading audience, and in the context of *legal* writing, this means writing that promotes the readers' ability to make the important decisions legal readers need to make in the course of their professional duties. Part II then analyzes the fundamental qualities²⁰ that enable good legal writing to do this. It argues that there are three such fundamental qualities: clarity, conciseness, and the ability to appropriately engage the reader. It examines why each of these fundamental qualities is essential to good legal writing, and it explores the various tools legal writers use to make their writing clear, concise, and engaging. Lastly, Part III discusses a separate, aesthetic quality, referred to as "elegance," which, it argues, is the hallmark of the very best legal writing. Part III then explores what it is that makes great writing elegant, and whether it is desirable for legal writers to strive for elegance in their own writing. The Article concludes by briefly considering two pedagogical implications of the analysis discussed in the previous sections.

19. Stanley Fish makes this point with regard to learning how to write good sentences: "If you learn what it is that goes into the making of a memorable sentence . . . you will also be learning how to take the appreciative measure of such sentences. And conversely, if you can add to your admiration of a sentence an analytical awareness of what caused you to admire it, you will be that much farther down the road of being able to produce one (somewhat) like it." STANLEY FISH, *HOW TO WRITE A SENTENCE: AND HOW TO READ ONE* 8-9 (2011).

20. By "fundamental qualities," I mean essential qualities that enable good writing and cannot themselves be reduced to other, more basic qualities. As Charles Calleros explains: "Many rules of composition are nothing more than conventions that reflect generalities about the best way to achieve clear, concise writing with effective emphasis and flow." CHARLES R. CALLEROS, *LEGAL METHOD AND WRITING* 5 (5th ed. 2006). My claim is that the specific legal-writing guidelines found in the literature are all geared toward producing writing that is clear, concise, and engaging, as discussed in Part II.

I. WHAT IT MEANS TO SAY THAT A LEGAL DOCUMENT IS WELL WRITTEN

Since the principal goal of this Article is to provide a systematic analysis of good legal writing, it is important as a preliminary matter to explore what exactly it *means* to say that a legal document is well written. For without a clear conceptual understanding of "good writing," it is difficult to isolate its essential characteristics. Accordingly, this Part addresses that foundational concept.

As a starting point, it is tempting to look to the *writer's purpose* for guidance as to what it means for a legal document to be well written. In other words, it seems plausible to assert that a well-written document accomplishes (or is reasonably calculated to accomplish) the writer's purpose in writing the document.²¹ If, for example, the writer's purpose in writing a brief is to persuade the court, then under this criterion, the brief is well written if in fact it persuades the intended audience (i.e., the court). Similarly, if the writer's purpose in writing a memorandum is to convey information to a client, then the memorandum is well written if it effectively conveys the writer's intended message to the client.

This criterion has a certain intuitive appeal. After all, legal writers do not write in a vacuum; they write in order to accomplish specific objectives (e.g., to persuade a court of a certain position or to explain a point of law to a client). Legal writing is an inherently social activity in which the legal writer puts pen to paper in order to have a certain effect on a target audience.²² Thus, it would not be unreasonable to conclude that a document's being well written simply means that the writing enables the document to achieve the author's intended purpose.

On closer inspection, however, this theory does not provide an adequate account of the concept of good writing. For while it is correct to say a document that enables the writer's purpose is an *effective* document (and admittedly, from an advocate's perspective, that may well be the more important consideration),²³ such a conclusion

21. Stanley Fish takes this view: "People write or speak sentences in order to produce an effect, and the success of a sentence is measured by the degree to which the desired effect has been achieved." FISH, *supra* note 19, at 37.

22. I am indebted to J.B. White for his helpful comments on this issue.

23. Normally, an advocate's main concern is to persuade the court of a position, and if a brief succeeds in doing that, the advocate is not overly concerned with whether the court thought it was a well-written brief. For that reason, some legal-writing texts appear to focus more on the *effectiveness* of legal writing than on the writing quality *per se*. See generally ANNE

does not necessarily mean that the document is well written. A document can be effective even though it is not well written, and conversely, a document can be well written even though it is not effective.

A document can be effective even though it is not well written because there are other factors besides writing quality that can enable a document to advance the writer's purpose. For instance, a brief that takes advantage of a judge's known predilections or prejudices can be an effective document, even though it is poorly written; so too can a brief that is deliberately unclear.

Consider, for example, a brief in opposition to a motion for summary judgment, where the lawyer preparing the motion has a weak case and deliberately tries to obscure the material issues through murky writing in hopes that the court will be too confused after reading the brief to feel comfortable rendering summary judgment. Rule 56, which governs summary judgment, sets a high bar, requiring the court to find that there is no genuine dispute as to any material fact.²⁴ If the court concludes that there is any material fact in dispute that a reasonable jury could resolve in favor of the non-moving party, summary judgment is not appropriate.²⁵ In these circumstances, a lawyer with a weak case may rationally conclude that the most effective way to defeat a summary judgment motion is to write an unclear brief so that the judge has a hard time determining whether there are any genuine disputes. And while deliberately obscuring the issues in an attempt to confuse the court may raise concerns as to the lawyer's ethical duty of candor to the tribunal,²⁶ it can nevertheless be an effective litigation tactic. Yet this effectiveness does not necessarily mean that the obscure brief is well written. In fact, briefs of this nature are generally regarded as poorly written by the legal community, since clarity is almost universally regarded as the hallmark of good legal writing.²⁷ Therefore, it is certainly possi-

ENQUIST & LAUREL CURRIE OATES, *JUST WRITING* 5-161 (3d ed. 2009) (providing a "Guide to Effective Writing" in Part I).

24. See FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

25. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) ("If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself . . . whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.").

26. See MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2002) ("A lawyer shall not knowingly make a false statement of law or fact to a tribunal . . .").

27. See *infra* Part II.A.

ble for a document to be poorly written, even if the document advances the writer’s purpose.

Conversely, a document can be well written even though it does not advance the writer’s purpose. If a brief has weak legal arguments, for example, it is unlikely to persuade the court, even if it is otherwise well written. Likewise, the particular predilections of the target audience can influence whether a document is effective, regardless of the document’s overall writing quality.

Suppose, for example, that a litigator is writing a brief to a federal district court judge on an issue of statutory interpretation. Suppose also that the litigator’s principal argument is based on legislative history, even though the judge has expressed an aversion to the use of legislative history in statutory interpretation.²⁸ (This could just as easily be a simple stylistic preference, such as Judge Posner’s aversion to footnotes in briefs.)²⁹ In that scenario, the litigator’s failure to consider the preferences of the intended audience plainly detracts from the brief’s ability to fulfill its purpose of persuading the judge, even though it is otherwise a well-written brief. Therefore, it is apparent that a document can be well written, even though it does not advance the writer’s purpose.

Thus, while there is significant overlap between a well-written document and one that is effective, the two concepts are not coextensive. Some well-written documents do not achieve the writer’s purpose, and conversely, some documents that do enable the writer to achieve the writer’s purpose are not well written. Consequently, what it means for a legal document to be well written cannot be explained by reference to the purpose of the writer.

A more promising approach to understanding the concept of good writing is to look to the needs and interests of the reading audience. After all, whether a piece of writing is regarded as well written is a judgment of the reader; a document’s quality does not depend upon the writer’s own assessment of the work. A writer can reasonably determine after the fact whether a given document was an effective document (i.e., whether it achieved the writer’s intended purpose). But it is the *readers* who determine whether the document is regarded as well written, based upon their perception as to

28. See, e.g., *Zedner v. United States*, 547 U.S. 489, 511 (2006) (Scalia, J., concurring) (“[T]he use of legislative history is illegitimate and ill advised in the interpretation of any statute—and especially a statute that is clear on its face . . .”).

29. See Richard A. Posner, *Against Footnotes*, 38 CT. REV. 24, 24 (2001) (taking issue with Bryan Garner’s suggestion that lawyers and judges should put citations in footnotes when writing briefs and opinions).

whether the writing meets their expectations. If the readers determine that the writing style tracks their needs and interests, and therefore advances *their* purpose for reading the document, then it will be considered a well-written document. The writer's purpose and the writer's own assessment are immaterial. This is true not only of legal writing, but of all writing. At bottom, "good writing" means writing that fulfills the expectations (i.e., satisfies the needs and interests) of the intended audience.

In the context of *legal* writing, the lawyers and judges who comprise the intended audience have very particular needs and interests when they read legal documents. Unlike readers of fiction, they are not looking for writing that entertains them or edifies them in some way. Rather, lawyers and judges read legal documents because they need to extract information from these documents that will help them make decisions in the course of their professional duties.³⁰ For example, a partner in a law firm reads an associate's memo in order to obtain information concerning the law and its application to the facts. This in turn helps the partner decide how to advise the client, or how to approach a strategic decision the lawyer needs to make with respect to a case or a transaction. Likewise, a judge reads a lawyer's pre-trial brief in order to obtain information about the case and in order to understand the parties' arguments. This in turn helps the judge decide how to rule on a motion. And similarly, a lawyer reads a judicial opinion in order to obtain information about the law and how it is likely to be interpreted or applied in a future case. This information in turn helps the lawyer decide how best to make an argument, structure a transaction, or advise a client as to a proposed course of action.

In each of these instances, the legal reader's purpose for reading the document is to extract information that will facilitate the reader's decision-making. And thus, the legal reader will regard a document as well written if and only if the writing facilitates that decision-making. Good legal writing, therefore, is best understood as writing that helps legal actors make decisions in the course of their professional duties.

30. See RICHARD K. NEUMANN, *LEGAL REASONING AND LEGAL WRITING* 51 (6th ed. 2009) ("Think of memoranda and briefs as manuals to guide the reader's decision-making.").

II. THE THREE FUNDAMENTAL QUALITIES THAT ENABLE GOOD LEGAL WRITING

The previous Part argued that a legal document is well written if the writing facilitates legal decision-making. This Part advances a theory as to the fundamental qualities that enable legal writing to do this. It concludes that there are three such qualities: clarity, conciseness, and the ability to engage the reader. It then discusses the nature of these fundamental qualities, examines how these qualities facilitate the reader’s ability to make professional decisions, and explores the tools good legal writers use to incorporate these qualities into their writing.

A. Good Legal Writing Is Clear

While the existing literature on legal writing lacks a systematic analysis of the fundamental qualities of good legal writing, there does appear to be a consensus in the literature—as well as in the practice of law—that the chief hallmark of good legal writing is *clarity*. As Justice Benjamin Cardozo put it, “there can be little doubt that in matters of literary style the sovereign virtue for the judge is clearness.”³¹ Likewise, most contemporary commentators on legal writing exalt clarity above all else. In their book *Making Your Case*, for example, Brian Garner and Justice Antonin Scalia claim that “one feature of a good style trumps all others. Literary elegance, erudition, sophistication of expression—these and all other qualities must be sacrificed if they detract from clarity.”³²

So what accounts for the exalted status of clarity? If, as discussed in Part I, good legal writing is writing that facilitates legal decision-making, the answer becomes apparent. The legal reader picks up a document in order gain information that will help the reader make a decision: an associate reads an opinion in order to better understand the law and to better predict what a court is likely to do in a given factual scenario; a partner reads an associate’s memo in order to gain a better understanding of the legal challenges facing the client; and a judge reads a brief in order to better understand the facts and the lawyer’s arguments. In each of these scenarios, the reader’s objective will be frustrated if the reader cannot understand the writer’s

31. BENJAMIN N. CARDOZO, *LAW AND LITERATURE* (1931), reprinted in *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* 7 (Fred B. Rothman, & Co., 1999).

32. ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 107 (2008).

message. As Bryan Garner puts the point, “A lawyer should keep in mind that the purpose of communication is to communicate, and this can’t be done if the reader or listener doesn’t understand the words used.”³³ Clarity, therefore, is the most basic quality of good legal writing. For it is only when writing is clear that the reader can accurately comprehend the writer’s message and use that information to facilitate professional decision-making.³⁴

So if clarity is the legal writer’s primary goal, then the next question is: what makes writing clear? Here, the legal-writing literature is fairly well-developed. As a starting point, clarity requires proper (i.e., conventional) grammar and punctuation.³⁵ And while there is not a lot of discussion as to *why* writers need to follow conventional grammatical rules in order to be clear, it is apparent that language has to have certain agreed-upon rules to govern its basic functioning. Otherwise, there would be no possibility of shared meaning, and therefore no possibility of language itself.³⁶

To be sure, language speakers can debate the wisdom of certain minor rules that reside around the periphery of a system of linguistic rules. For example, rules such as not ending a sentence with a preposition, or requiring that commas and periods be placed inside quotation marks, are certainly not essential to understanding the

33. BRYAN A. GARNER, *THE REDBOOK: A MANUAL ON LEGAL STYLE* 183 (2d ed. 2002).

34. See CALLEROS, *supra* note 20, at 3 (“The importance of clarity in legal writing should be obvious: Your legal memorandum will not enlighten, nor will your brief persuade, unless the reader of each can understand it.”).

35. See generally Lillian B. Hardwick, *Classical Persuasion Through Grammar and Punctuation*, 3 J. ASS’N LEGAL WRITING DIRECTORS, 75, 75–107 (2006). See also JOHN C. DERNBACH ET AL., *A PRACTICAL GUIDE TO LEGAL WRITING & LEGAL METHOD* 200 (3d ed. 2007) (“Errors in grammar, punctuation, and spelling suggest that the writer is sloppy and careless—qualities that people do not want in a lawyer. Minor errors distract the reader from the message to be conveyed. Major errors may distort the message or make it unintelligible.”); LAUREL CURRIE OATES & ANNE ENQUIST, *THE LEGAL WRITING HANDBOOK* 607 (5th ed. 2010) (noting that effective and correct writing “depends on understanding the grammar of an English sentence”); NEUMANN, *supra* note 30, at 224 (stating that correct punctuation and grammar make writing clearer and easier to understand); WILLIAM STRUNK, JR. & E.B. WHITE, *THE ELEMENTS OF STYLE* 1–14 (4th ed. 2000) (devoting the first chapter to basic rules of grammar and usage); RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* 84 (5th ed. 2005) (noting in the final chapter devoted to punctuation that “when you write, you should punctuate carefully, in accordance with ordinary English usage”). But see JOHN BRONSTEEN, *WRITING A LEGAL MEMO* 35–37 (2006) (arguing that conforming to grammatical rules is frequently “an enormous waste of time”).

36. See generally STEVEN PINKER, *THE STUFF OF THOUGHT: LANGUAGE AS A WINDOW INTO HUMAN NATURE* 25–32 (2007) (discussing the role of basic grammatical rules in enabling children to learn language).

English language.³⁷ And there may even be instances when ignoring some of these minor rules rather than following them rigidly advances clarity.³⁸ But the writer who disregards in a significant way the rules of the language—particularly its core rules—makes it difficult, if not impossible, for readers accustomed to following those rules to understand the writer’s message. Imagine, for example, a brief that consistently misuses verb tenses, or that contains no verbs at all, or worse still, scrambles the words in sentences in completely unconventional ways. Generally, the greater the deviation from the core rules of grammar, syntax, and semantics, the more difficult it will be for the reader to understand the writer’s message.³⁹

Of course, clear writing requires more than just staying within the rough confines of conventional grammar, syntax, and semantics. The conventional rules have a fair degree of flexibility, and so the writer still has to make choices with regard to sentence structure and word usage from within the universe of acceptable conventions. How then does a skillful writer do this in order to maximize clarity?

The most common prescription in the literature is to use ordinary words⁴⁰ and simple sentence structures.⁴¹ Richard Wydick, for example, states in his classic book *Plain English for Lawyers* that “good legal writing is plain English.”⁴² And Joseph Williams, in his well-known book *Style: Lessons in Clarity and Grace*, states that “[i]n general, your sentences should begin with elements that are relatively short: a short introductory phrase or clause, followed by a short,

37. See generally JOSEPH M. WILLIAMS & GREGORY G. COLOMB, *STYLE: LESSONS IN CLARITY AND GRACE* 13–23 (10th ed. 2010) (distinguishing “Real Rules” of grammar that affect meaning from essentially arbitrary “Invented Rules” that grammarians think writers should follow).

38. BRONSTEEN, *supra* note 35, at 36.

39. Cf. FISH, *supra* note 19, at 25–33 (explaining how the possibility of meaning derives from the logical forms of sentences).

40. See, e.g., DEBORAH E. BOUCHOUX, *ASPEN HANDBOOK FOR LEGAL WRITERS* 98–101 (“[Legalise] results in incomprehensible writing”); BRONSTEEN, *supra* note 35, at 33–35 (using short, simple words aids clarity); NANCY L. SCHULTZ & LOUIS J. SIRICO, *LEGAL WRITING AND OTHER LAWYERING SKILLS* 90–91, 93–94 (5th ed. 2010) (use of simple, concrete words and avoiding legalese advances goal of clarity); WYDICK, *supra* note 35, at 56–58.

41. A number of legal-writing texts emphasize the importance to clarity of simple, subject-and-verb sentences. See, e.g., BRONSTEEN, *supra* note 35, at 19–29; VEDA R. CHARROW ET AL., *CLEAR AND EFFECTIVE WRITING* 163–165 (2007); LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS AND ORGANIZATION* 225–26 (5th ed. 2010); TERRI LECLERCQ, *GUIDE TO LEGAL WRITING STYLE* 23–31 (4th ed. 2007); NEUMANN, *supra* note 30, at 227–28; OATES & ENQUIST, *supra* note 35, at 77–78; SCHULTZ & SIRICO, *supra* note 40, at 98–99; WYDICK, *supra* note 35, at 41–43.

42. WYDICK, *supra* note 35, at 5; see also Julie A. Baker, *And The Winner Is: How Principles of Cognitive Science Resolve the Plain Language Debate*, 80 U.M.K.C. L. REV. 287, 289 (2012) (discussing how psychological theory pertaining to “cognitive fluency” bolsters the argument that readers generally prefer plain language).

concrete subject, followed by a verb expressing a specific action. After the verb, the sentence can go on for several lines, if it is well-constructed. . . ."⁴³

Judge Cardozo's description of the facts in his famous opinion in *Palsgraf v. Long Island Railroad Co.*⁴⁴ provides a good example of this type of simple, concrete writing. There, Cardozo summarizes the complicated events that led to the plaintiff's injuries in a lucid and succinct fashion:

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues.⁴⁵

Even though this factual scenario is fairly complicated, Cardozo makes it easy to follow. The reader needs to read the paragraph only once to understand what happened and to gain a clear idea of what caused the plaintiff's injuries. Cardozo accomplishes clarity by using ordinary language and a series of simple sentences that employ Professor William's prescription for clarity: a concrete subject at or near the beginning of the sentence, followed by a verb that expresses a specific action.⁴⁶

The legal-writing community now widely accepts the view that writers should adopt a "plain" style of writing in order to maximize clarity. This acceptance is due in large part to the efforts of the so-

43. WILLIAMS & COLOMB, *supra* note 37, at 85.

44. 162 N.E. 99, 99 (N.Y. 1928).

45. *Id.*

46. WILLIAMS & COLOMB, *supra* note 37, at 85.

called "Plain Language Movement."⁴⁷ This movement is led by an influential group of legal scholars, judges, and practitioners who seek to advance clarity in legal writing by purging it of cumbersome sentence constructions and empty legal jargon.⁴⁸ Proponents of the movement apply this prescription broadly to legislative and transactional drafting,⁴⁹ as well as to expository legal writing.

The Plain Language Movement has undoubtedly advanced the cause of clarity in legal writing. Yet some critics of the movement have argued that this comes with a cost. Specifically, they argue that focusing too much on the use of ordinary terms at the exclusion of technical terms inhibits the *precision* of legal writing. They assert that, particularly in the context of transactional drafting, ordinary terms can be vague and ambiguous,⁵⁰ whereas technical legal terms can add increased precision.

If these critics of the Plain Language Movement are correct, their critique creates a dilemma for legal writers who are trying to write clearly because an important aspect of clear writing is the ability to convey information with an appropriate degree of precision. Suppose, for example, I leave written directions for my auto-mechanic to check out the low-pitched grinding sound coming from the driver's side of the engine, just above the axle. That precise description makes the mechanic's job much easier than if I just say that the car is

47. The seminal work that gave rise to the Plain Language Movement is DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* (1963). Perhaps the most significant work in recent years is JOSEPH KIMBLE, *LIFTING THE FOG OF LEGALESE: ESSAYS ON PLAIN LANGUAGE* (2006). For a short history of the Plain Language Movement, including an interesting discussion of George Orwell's influence on the Movement, see Judith D. Fischer, *Why George Orwell's Ideas About Language Still Matter for Lawyers*, 68 MONT. L. REV. 129, 132-35 (2007).

48. See, e.g., Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 SCRIBES J. LEGAL WRITING 1, 5-38 (1996-97) (summarizing various studies that show readers have a preference for plain language).

49. See generally Wayne Schiess, *The Art of Consumer Drafting*, 11 SCRIBES J. LEGAL WRITING 1, 1-22 (2007) (arguing that the use of short, simple sentences and simple words advances clarity in transactional drafting).

50. See, e.g., Jeffrey Barnes, *The Continuing Debate*, 27 STAT. L. REV. 83, 91 (2006); David Crump, *Against Plain English: The Case for a Functional Approach to Legal Document Preparation*, 33 RUTGERS L.J. 713, 715 (2001-02); Brian Hunt, *Plain Language in Legislative Drafting: Is It Really the Answer?*, 23 STAT. L. REV. 24, 27-36 (2002); see also Rabeea Assy, *Can the Law Speak Directly to Its Subjects? The Limitation of Plain Language*, 38 J. L. & SOC'Y 376, 402 (2011) (arguing that there is an inevitable linguistic gap between technical legal terms and ordinary language terms because the former are closely tied up with a body of theories, doctrines, principles, and rules that the speaker must have some understanding of in order to use legal language effectively), available at <http://ssrn.com/abstract=1906372>.

making a funny noise. By being more precise, I have made my communication clearer.⁵¹

Supporters of the Plain Language Movement counter that it is merely a myth that plain language is at odds with precision.⁵² They argue that plain language is generally just as precise—and often more precise—than traditional legalese.⁵³ And that may be true. No one can seriously dispute that a great number of “lawyerly” terms are mere jargon and add nothing to their plain-language equivalents.

Yet even plain-language advocates admit that there are times when plain language is less precise than more technical language. They merely maintain that such instances are relatively uncommon in legal writing and do not detract in any significant way from their general prescription against using legalese.⁵⁴ But while plain language advocates and their critics may disagree as to how *frequently* plain language and precision actually come into conflict, it is hard to deny that on at least *some* occasions, communications can be made clearer by the use of more precise technical terms. This is true in the legal context and more generally. An emergency-room physician, for example, is not likely to tell the on-call cardiologist that the patient has a “rapid heartbeat.” Rather, the physician is likely to report that the patient has a “ventricular tachycardia” because that is the level of specificity the cardiologist requires. Likewise in the context

51. One could argue that precision is a separate quality from clarity, rather than a component of clarity. But for present purposes, it does not really matter. In either case, the same dilemma confronts the plain-language advocate: *either* precision is a component of clarity, in which case the writer needs to balance precision against the benefits of using plain language in order to maximize clarity, *or* precision is actually an independent quality, distinct from clarity, that the writer needs to balance against the goal of clarity in order to maximize the overall quality of the writing.

52. See, e.g., BRYAN A. GARNER, *The Myth of Precision*, in A DICTIONARY OF MODERN LEGAL USAGE 580, 580 (2d ed. 1995); Joseph Kimble, *The Great Myth that Plain Language Is Not Precise*, 7 SCRIBES J. LEGAL WRITING 109, 110–11 (1998–2000); David Mellinkoff, *The Myth of Precision and the Law Dictionary*, 31 UCLA L. REV. 423, 423–24 (1983); Wayne Schiess, *What Plain Language Really Is*, 9 SCRIBES J. LEGAL WRITING 43, 158–59 (2003–04).

53. See, e.g., Joseph Kimble, *Answering the Critics of Plain Language*, 5 SCRIBES J. LEGAL WRITING 51, 53–55 (1994–95).

54. See *id.* at 54 (“Plain-language advocates have said repeatedly that technical terms and terms of art are sometimes necessary, and that some legal ideas can be stated only so simply. But technical terms and terms of art are only a small part of any legal document—less than 3% in one study. This hardly puts a damper on plain language.”); GARNER, *supra* note 52, at 663 (“Of course, where clarity and precision are truly at loggerheads, precision must usually prevail. But the instances of actual conflict are much rarer than lawyers often suppose. Precision is not sacrificed when the drafter uses technical words where necessary and avoids JARGON that serves no substantive purpose.”).

of legal writing, it is sometimes clearer—depending on the audience—for a lawyer to use terms of art such as *preliminary injunction*, *promissory estoppel* or *quantum meruit* than to try to translate those concepts into “plain language.”

The basic prescription to use ordinary language in legal writing, therefore, cannot, without further elaboration, provide much meaningful guidance to the legal writer because it glosses over some important contextual considerations. When someone says that legal writers should use plain language, the question inevitably arises: plain to whom? What constitutes a “plain” or “ordinary” term is ultimately relative to the audience and depends upon contextual considerations, such as the readers’ vocabulary, language proficiency, and background knowledge. Scalia and Garner say that the good legal writer does not use words that require the judge to get out a dictionary.⁵⁵ But even that depends on the judge: a wordsmith such as Justice Scalia likely requires the use of a dictionary less frequently than some other judges.⁵⁶ So the legal writer following the Garner and Scalia “dictionary” rule would need to adapt it to the intended audience, writing in language that is simpler for some judges than for others.

In the final analysis, therefore, a general prescription to use plain language is helpful only if it is understood to be shorthand for a more nuanced rule,⁵⁷ such as the following:

When you use distinctive technical or legal terms, consider whether the terms add any value beyond their ordinary-language equivalents. If not, use the ordinary term. If so, then consider the nature of the audience to determine whether the increased precision resulting from the technical

55. SCALIA & GARNER, *supra* note 32, at 107.

56. However, even he needed it for one word that came up in oral argument: “orthogonal.” See Robert Barnes, *Supreme Court Justices, Law Professor Play with Words*, WASH. POST, Jan. 12, 2010, at A03 (describing Justice Scalia’s delight in learning a new word during Professor Richard Friedman’s oral argument).

57. Plain-language devotees may not object to this rule. In fact, some of them seem to suggest that their prescription to use plain language is actually just shorthand for some more nuanced rule like this one. Bryan Garner, for example, grants that simple language is not appropriate in every context:

Despite the myth to the contrary, no formula unfailingly produces a good prose style. Much hangs on the context and the purpose. So the ‘plain English’ movement in the law—a salutary force in almost every respect—would be misguided to the extent that some of its advocates might believe that every motion can be simply expressed. Though it is true that lawyers have often obscured simple thoughts by using murky language, it is also true that complex expressions are sometimes unavoidable.

BRYAN A. GARNER, *GARNER ON LANGUAGE AND WRITING* 48 (2009).

term outweighs any loss of clarity that may result from using a term that may not be familiar to all members of the intended audience.⁵⁸

The benefits of using precise technical terms, in other words, must be balanced against the benefits of using language that is clear to a broader audience. Technical terms may sometimes aid precision, but they also inhibit clarity if the reader does not understand them. Thus the writer needs to take into account contextual considerations, such as the background knowledge of the intended audience, in order to strike the appropriate balance.⁵⁹

Thus far, this Part has examined how the use of conventional grammar, simple sentence structure, and (appropriately) plain language advances clarity. But there are other prescriptions for clarity discussed in the literature as well. One such prescription involves eliminating unnecessary words and phrases from sentences that may impede the reader's comprehension.⁶⁰ Sometimes referred to as "clutter," this verbiage impedes clarity because it distracts the reader's attention from the writer's intended message.⁶¹ According to William Zinsser, removing clutter is an essential component of clarity because "[c]lutter is the disease of American writing. We are a society strangling in unnecessary words, circular constructions, pompous frills and meaningless jargon."⁶²

The literature also stresses the appropriate use of repetition to make writing clearer. Using a particular term consistently and avoiding what is sometimes called "elegant variation" in word choice⁶³ can avoid needless confusion on the part of the reader. This

58. Professors Enquist and Oates offer a similar test that is a bit simpler: "Given the document's reader, writer, purpose, and surrounding circumstances, does the legalese increase or decrease communication between writer and reader?" See ENQUIST & OATES, *supra* note 23, at 128.

59. Linda Edwards summarizes this point nicely:

When writing to a law-trained reader, you may choose to use some legal terms unfamiliar to laypersons because those terms communicate legal concepts more clearly and concisely than non-legal terms would. But do not resort to the jargon of law unless it is necessary to convey your point more clearly and concisely.

EDWARDS, *supra* note 41, at 228.

60. See, e.g., EDWARDS, *supra* note 41, at 341; OATES & ENQUIST, *supra* note 35, at 121-26; STRUNK, JR. & WHITE, *supra* note 35, at 23-25; WYDICK, *supra* note 35, at 7-22; WILLIAM ZINSSER, ON WRITING WELL 6-16 (7th ed. 2006).

61. EDWARDS, *supra* note 41, at 347 ("Clutter reduces clarity, irritates the reader, and deemphasizes the important facts.").

62. ZINSSER, *supra* note 60, at 6.

63. See, e.g., BOUCHOUX, *supra* note 40, at 92 ("[L]egalese results . . . in incomprehensible writing"); WYDICK, *supra* note 35, at 69-70.

is particularly true in the context of transactional drafting, where the reader may incorrectly assume that synonyms have slightly different connotations, but it also applies in the context of expository writing.⁶⁴ Repetition is also helpful for emphasis. Repeating key words or phrases in a document can be an effective way to highlight them for the reader.⁶⁵ And while there are sometimes downsides to this type of repetition (e.g., redundancy can make the writing less engaging and less concise),⁶⁶ its judicious use makes the writer’s key points more pronounced.

The legal-writing literature discusses a number of other factors that make writing clear.⁶⁷ These include the following: eliminating meta-discourse (sometimes referred to as “throat-clearing phrases”),⁶⁸ not overusing negatives,⁶⁹ avoiding noun strings⁷⁰ and nominalizations,⁷¹ and preferring the active voice.⁷² More recently, commentators have discussed how the format of the printed page and the typography of a document can affect the reader’s ability to comprehend the text.⁷³ And while it is beyond the scope of this Article to discuss all of these factors in detail, there is one other factor

64. EDWARDS, *supra* note 41, at 228; OATES & ENQUIST, *supra* note 35, at 546.

65. See, e.g., BRONSTEEN, *supra* note 35, at 59; ENQUIST & OATES, *supra* note 23, at 2 (“[S]killful legal writers often use selected repetition to emphasize a point.”).

66. LECLERCQ, *supra* note 41, at 52 (“[R]epetition results in lengthy documents and uninteresting reading.”).

67. For a good overview on writing clear paragraphs and sentences, see generally HELENE S. SHAPO ET AL., *WRITING AND ANALYSIS IN THE LAW* 209–48 (5th ed. 2008).

68. By “meta-discourse” or “throat-clearing phrases,” the writers mean introductory phrases that add little or no meaning to a sentence (e.g., “It should be noted . . .,” or “It is important to point out . . .”). See EDWARDS, *supra* note 41, at 279–80; see also CHARROW ET AL., *supra* note 41, at 163–65; NEUMANN, *supra* note 30, at 229; OATES & ENQUIST, *supra* note 35, at 115–17.

69. BOUCHOUX, *supra* note 40, at 83–84; WYDICK, *supra* note 35, at 71–72.

70. See, e.g., WYDICK, *supra* note 35, at 71; CHARROW ET AL., *supra* note 41, at 192–93.

71. EDWARDS, *supra* note 41, at 223–24; LECLERCQ, *supra* note 41, at 58–59; WILLIAMS & COLOMB, *supra* note 37, at 33 (“No element of style more characterizes turgid writing, writing that feels abstract, indirect, and difficult, than lots of nominalizations, especially as the subjects of verbs.”); WYDICK, *supra* note 35, at 23–25.

72. See, e.g., CHARROW ET AL., *supra* note 41, at 173–76; EDWARDS, *supra* note 41, at 222–23; NEUMANN, *supra* note 30, at 230–31; SCHULTZ & SIRICO, *supra* note 40, at 91–93; WYDICK, *supra* note 35, at 27–28.

73. See, e.g., Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. ASS’N LEGAL WRITING DIRECTORS 108, 110–11 (2004) (explaining why an “argument must be presented in a visually effective manner so the reader can more easily understand the argument and retain more of the material”); MATHEW BUTTERICK, *TYPOGRAPHY FOR LAWYERS* (2010) (explaining how typographic style affects clarity and persuasion in legal writing and providing a primer on how lawyers can use typography effectively).

that merits special consideration here—namely, the organization of a document, for most commentators agree that “[g]ood organization is crucial in legal writing.”⁷⁴ This is because legal readers expect to see material presented in a certain manner and will struggle to follow the writing if the organization is unconventional.⁷⁵ And while writing authorities outside of the law also stress organization as an important aspect of clarity,⁷⁶ the need to follow conventional organization is particularly emphasized in legal writing, where an almost formulaic organization tends to be associated with professionalism.⁷⁷ For that reason, teaching students the conventional forms of organization (e.g., the IRAC format) tends to occupy a significant part of the first-year legal writing curriculum in most law schools.⁷⁸

To sum up, there is no simple prescription for clarity. Clarity is dependent on a number of different factors, and it is context-dependent. The legal writer must consider carefully the purpose of the writing, as well as the needs, interests, and background knowledge of the intended audience when deciding what is appropriate for a particular document. But it is important for the legal writer to keep in mind that clarity is the paramount goal of legal writing, since readers can only make effective use of a document to aid their professional decision-making if they understand the writer’s message.

74. NEUMANN, *supra* note 30, at 55.

75. See, e.g., *id.* at 91–102; BOUCHOUX, *supra* note 40, at 109–18; CALLEROS, *supra* note 20, at 240 (“[A]n important element of clarity in any legal document is effective organization on all the levels”); DERNBACH ET AL., *supra* note 35, at 115–32; LECLERCQ, *supra* note 41, at 7–22; SHAPO ET AL., *supra* note 67, at 117–59.

76. See, e.g., STRUNK, JR. & WHITE, *supra* note 35, at 15 (“[I]n most cases, planning must be a deliberate prelude to writing. The first principle of composition, therefore, is to foresee or determine the shape of what is to come and pursue that shape.”); WILLIAMS & COLOMB, *supra* note 37, at 178–85 (discussing how proper organization creates “global coherence” within a document).

77. See ENQUIST & OATES, *supra* note 23, at 36 (following the IRAC format is the common practice in the legal profession and expected for memos and briefs).

78. Almost everyone who has taken an introductory legal writing course in an American law school during the last fifteen to twenty years is familiar with some variant of the IRAC format for organizing legal analyses. For a detailed discussion of that format, see CALLEROS, *supra* note 20, at 71–94.

B. Good Legal Writing Is Concise

The second fundamental quality of good legal writing is *conciseness*.⁷⁹ Conciseness is often confused with *brevity*, but concise writing is not merely brief, or brusque.⁸⁰ Rather, it is *efficient*. Concise writing conveys the writer’s points succinctly, without superfluous words, and with an appropriate level of detail.⁸¹

What constitutes the appropriate level of detail for any given document depends on the context. Often, it is simply not possible to explain a complex idea with the same degree of economy as one can express a simple idea.⁸² A motion *in limine* on a minor point of evidence and a complicated appellate brief on an important matter of constitutional law may both be written in a concise fashion, even though the appellate brief is much longer and more detailed than the motion *in limine*. The difference in length and detail is appropriate not only because of the relative complexity of the issues, but also because the appellate court has more time to give a careful reading to each brief. The interests and needs of the intended audience are paramount here: the appellate judges likely have more time and a greater inclination to read a more detailed and nuanced brief than a trial judge with a crowded docket. Concise writing, therefore, is often brief, but it is always efficient. Within any given context, the writing makes its points in the most economical way.

Consider the following excerpt from Judge Posner’s dissent in *Jordan v. Duff & Phelps, Inc.*:⁸³

A corporate employee at will quit, owning shares that he had agreed to sell back to the corporation at book value. The

79. Most legal-writing texts extol the virtues of concise writing. See, e.g., BOUCHOUX, *supra* note 40, at 102–07; DERNBACH ET AL., *supra* note 35, at 195–98; NEUMANN, *supra* note 30, at 217–19; ENQUIST & OATES, *supra* note 23, at 295 (“In all types of expository prose in the United States, conciseness is heralded as a writing virtue.”).

80. STRUNK, JR. & WHITE, *supra* note 35, at 23 (“This requires not that the writer make all sentences short, or avoid all detail and treat subjects only in outline, but that every word tell.”).

81. To exemplify colloquially the difference between the two prongs of conciseness: efficiency means not using ten words to say what can just as well be said in six words, while employing the appropriate level of detail means not telling someone about the history of watch-making when they ask what time it is.

82. GARNER, *supra* note 57, at 48 (noting that it is not possible to convey all concepts in simple language and that “complex expressions are sometimes unavoidable”); WILLIAMS & COLOMB, *supra* note 37, at 118–19 (“Despite those who advise against long sentences, you cannot communicate every complex idea in a short one: you have to know how to write a sentence that is both long and clear.”).

83. 815 F.2d 429, 444 (7th Cir. 1987).

agreement was explicit that his status as a shareholder conferred no job rights on him. Nevertheless the court holds that the corporation had, as a matter of law, a duty, enforceable by proceedings under Rule 10b-5 of the Securities Exchange Act, to volunteer to the employee information about the corporation's prospects that might have led him to change his mind about quitting, although as an employee at will he had no right to change his mind. I disagree with this holding. The terms of the stockholder agreement show that there was no duty of disclosure, and since there was no duty there was no violation of Rule 10b-5.⁸⁴

In one short paragraph, Posner effectively describes the essential facts, the majority's position, and the basis for his dissent. Wasting no words in dealing with a matter of some complexity, the paragraph is (fittingly, for a Law and Economics guru such as Judge Posner) a model of efficiency.

So what is it about conciseness that makes it a fundamental quality of good legal writing? Most commentators seem to just take it as an article of faith that conciseness is a virtue. Strunk and White, for example, tell us: "A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines, and a machine no unnecessary parts."⁸⁵ But they do not state that reason, nor is it at all obvious that conciseness in writing can be justified on the same grounds as not adding a superfluous part to a machine, or not adding an extra line in a drawing.⁸⁶

One possible rationale, as some legal writing texts note, is that concise writing is *clearer* than writing that is not concise.⁸⁷ Because it is less complex, concise writing is generally easier to digest. A second possibility, as discussed in the subsequent Section, is that conciseness is part of what makes writing *engaging*.⁸⁸ Writing that is not

84. *Id.*

85. STRUNK, JR. & WHITE, *supra* note 35, at 23.

86. *See id.* at 23–24. Are we to assume, for example, that a drawing that depicts a flock of birds in flight has more birds than necessary if it has twelve birds in the picture rather than eleven, or perhaps ten? How would that determination be made? And does it really involve the same rationale as eliminating superfluous words from a sentence?

87. *See, e.g.,* NEUMANN, *supra* note 30, at 217–19 ("[C]oncise writing is by nature more clear . . ."); ELIZABETH FAJANS ET AL., WRITING FOR LAW PRACTICE 163 (2d ed. 2010) ("Roundabout, repetitive, and wordy sentences are difficult to understand . . .").

88. STRUNK, JR. & WHITE, *supra* note 35, at 23 ("Vigorous writing is concise.").

concise is frequently turgid and ponderous;⁸⁹ the reader tends to lose interest having to slog through an unnecessarily long text in order to grasp the writer’s meaning.

But conciseness cannot be a *fundamental* quality of good writing if these are its only virtues. For if conciseness were valuable only because it made writing clearer and more engaging, it would merely be an extrinsic good—not something valued for its own sake, but rather a virtue ultimately reducible to the qualities of clarity and engagement. If conciseness is a fundamental (i.e., irreducible) quality, then there must be something more to it—something that makes it valuable in its own right. What is it? To answer that question, we need to return to the initial premise from Part I that good legal writing is writing that facilitates the reader’s ability to extract information from the document that will aid the reader’s professional decision-making. A legal reader has limited time to devote to a document and a limited attention span. A concise piece that makes its point efficiently and with an appropriate level of detail does not waste the reader’s time and takes full advantage of this limited window of opportunity. Conciseness may not be essential to all types of writing,⁹⁰ but it is essential in the context of *legal* writing because the “reader of legal writing has no time to spare and either will resent inflated verbiage or will simply refuse to read it.”⁹¹ So conciseness is fundamental to good legal writing because it helps readers make effective use of their limited time. That promotes efficient decision-making by allowing legal actors to devote the appropriate amount of time to each of their decisions, rather than spending an excessive amount of time on one decision and having to shortchange another as a result.

How then does a writer make writing concise? At first blush, that would seem to be an easy question—just shorten the document. But the answer is actually more complicated. For concise writing, as discussed above, is not principally about brevity; rather, it is about efficiency and conveying the appropriate level of detail. Concise writing is writing that is as succinct as possible without unduly restricting the amount of information conveyed. As Strunk and White

89. NEUMANN, *supra* note 30, at 217.

90. For example, literature that is read purely for pleasure or for its aesthetic appeal may not be subject to this consideration—indeed, readers of fiction sometimes wish a piece could go on longer, just because it is an enjoyable read.

91. NEUMANN, *supra* note 30, at 217.

propose, the writer must eliminate all unnecessary words from sentences, and all unnecessary sentences from paragraphs.⁹²

The tricky part, of course, is in knowing what words and sentences are “unnecessary.” If one or more words can be eliminated from a sentence without impairing the meaning in any way, then making the sentence more concise is easy. And making a sentence more concise can make it clearer as well.⁹³ As discussed in the previous section on clarity,⁹⁴ most of us can benefit from meticulous editing of our own work to eliminate clutter.⁹⁵ But sometimes the task is more difficult. Occasionally conciseness can be achieved only by eliminating qualifiers from a sentence that make the sentence slightly more accurate but that are not essential. And sometimes conciseness can be achieved only by eliminating details that make a paragraph slightly more thorough. In these situations, the legal writer needs to make a judgment call as to whether being a bit more accurate or thorough justifies lengthening and increasing the “working parts” of the document.⁹⁶ While there are no simple rules of thumb to guide the legal writer in making these decisions, the legal writer should keep in mind the important role conciseness plays in facilitating the reader’s professional decision-making when attempting to strike the appropriate balance.

C. Good Legal Writing Is Engaging

Good legal writing is clear and concise—almost no one disputes that.⁹⁷ However, there is more to it than just those two qualities. Good writing, as opposed to merely competent writing, also *engages*

92. See *supra* text accompanying note 85.

93. Eliminating unnecessary qualifiers is one way that conciseness can enhance clarity. See Nelson P. Miller, *Why Prolixity Does Not Produce Clarity: Francis Lieber on Plain Language*, 11 SCRIBES J. LEGAL WRITING 107, 108 (2007) (“Prolixity does not produce clarity. An attempt at ‘perfect perspicuity’ is in effect ‘a matter of impossibility.’ Rather, it only produces confusion.” (citation omitted) (quoting Francis Lieber)).

94. See *supra* text accompanying notes 60–62.

95. For a helpful discussion of the different types of clutter that can inhibit conciseness, see WILLIAMS & COLOMB, *supra* note 37, at 100–11.

96. See *id.* at 64 (“When you read or write [in] a style that seems complex, you must determine whether it needs to be so complex to express complex ideas precisely . . . [A] style should be as complex as necessary, but no more.” (emphasis omitted)).

97. In fact, a survey of judges, lawyers, and legal-writing professors found that “all [groups] rank clarity and concision as the two most essential elements of good writing.” Kosse & ButleRitchie, *supra* note 12, at 85; see also Kristin K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 LEGAL WRITING 257, 284 (2002) (“The overwhelming message from judges is that they want briefs that are concise and clear.”).

the reader.⁹⁸ This Section discusses why engaging the reader is important to good writing and what it is that makes writing engaging. It then examines the potential for conflict between the qualities of engagement and clarity, and the need for the legal writer to strike an appropriate balance between these two fundamental qualities.

1. *The importance of engaging the reader*

Lord Denning, a well-known British jurist, described the importance of engaging the reader as follows:

No matter how sound your reasoning, if it is presented in a dull and turgid setting, your hearers – or your readers – will turn aside. They will not stop to listen. They will flick over the pages. But if it is presented in a lively and attractive setting, they will sit up and take notice. They will listen as if spellbound. They will read you with engrossment.⁹⁹

In other words, readers will not want to keep reading a document, no matter how clear and concise it is, if it does not engage their interest.¹⁰⁰

To appreciate the importance of engagement as a fundamental quality of good legal writing, consider the following paragraph:

Our client is Bill Smith. Smith has filed a lawsuit in federal court. It is a personal injury case. Smith was watching a softball game. Smith got hit with a softball. He was injured. He suffered a concussion. Smith received treatment at Methodist hospital. He now seeks damages. He claims to have mental and physical injuries. Smith doesn't know if he is entitled to damages for mental injuries. He wants us to find out. This memo addresses that issue.

This paragraph is unquestionably clear and concise, just like the paragraph from Lord Denning. But unlike Denning's paragraph, it would be a stretch to call it well written. Why? Well, because the style is tedious and monotonous. It is the writing equivalent of the

98. I do not include transactional documents in this analysis of the fundamental qualities of legal writing, even though there is certainly overlap between the qualities of good writing and the qualities of good drafting. For example, contracts that are drafted in a clear and concise style are considered better drafted, other things being equal, than contracts that are not clear and concise. Engagement, however, is not a significant area of overlap.

99. GARNER, *supra* note 57, at 39 (quoting LORD DENNING, *THE FAMILY STORY* 216 (1981)).

100. ZINSSER, *supra* note 60, at 5 (“Good writing has an aliveness that keeps the reader reading from one paragraph to the next . . .”).

children's song: simple and straightforward, but lacking any stylistic depth that would make it interesting.

Contrast it with the following excerpt from Justice Brandeis's concurrence in *Whitney v. California*.¹⁰¹

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution.¹⁰²

The Brandeis excerpt is unquestionably clear and concise. But it also commands the reader's attention. It is crisp and powerful, and compels the reader to keep reading.¹⁰³ It encourages the reader to engage with the material by agreeing with it, disagreeing with it, reconstituting it into the reader's own ideas, etc. In other words, writing that is engaging stimulates the reader's thinking. And it is this quality that separates truly good legal writing from merely competent legal writing. Engaging writing makes the reader's job easier, just as clarity and conciseness make the reader's job easier. Writing that does not engage the reader's attention makes it more difficult for the reader to glean necessary information from a document because it makes the reading process more laborious. And that in turn hinders the reader's ability to make professional decisions based upon the document.

101. 274 U.S. 357 (1927).

102. *Id.* at 377.

103. As one commentator puts it, good writing is not just clear and concise, it also "sing[s]." Philip Frost, *Plain Language in Transition*, 84 MICH. B. J. 46, 46 (2005).

2. What makes writing engaging

What, then, makes writing engaging to the reader? On this point, the legal-writing literature is fairly extensive. This Section discusses the main tools good writers use to engage the reader.

One simple tool is variety. The writer’s use of varied sentence structures, for example, can make the text more engaging.¹⁰⁴ Writing that is overly repetitive in its syntax gets tedious; conversely, writing that has appropriate variation in the length and pattern of the sentences, with smooth transitions between sentences, has a natural flow¹⁰⁵ that helps to maintain the reader’s interest, in the same way that variation in speech patterns enlivens conversation.¹⁰⁶ And the same holds true with respect to individual words: using a more expressive vocabulary¹⁰⁷ adds interest to writing.¹⁰⁸ As Joseph Williams puts it, “Your readers want you to write clearly, but not in Dick-and-Jane sentences.”¹⁰⁹

In addition to variety, other, more abstract factors also determine whether the writing will engage the reader. The writer’s *voice*, for example, contributes significantly. If the writing style seems stilted, overly casual, or artificial, the writer’s ability to connect with the reader is diminished.¹¹⁰ Some law students seem to emulate the style they see in older cases when they first try to write legal memoranda and briefs, apparently thinking that this is the way lawyers are sup-

104. BOUCHOUX, *supra* note 40, at 98 (“[Y]ou do not want a project filled with sentences of approximately the same length. Such a writing would be tedious to read.”); OATES & ENQUIST, *supra* note 35, at 598 (“[V]ariety in sentence length helps create an interesting and varied pace.”); WYDICK, *supra* note 35, at 36 (“To keep the reader’s interest, you need variety in sentence construction . . .”).

105. For more on creating a sense of “flow” in writing (i.e., cohesion between sentences), see WILLIAMS & COLOMB, *supra* note 37, at 68–69. “Sentences are cohesive when the last few words of one set up information that appears in the first few words of the next.” *Id.* at 69 (emphasis omitted).

106. See SCALIA & GARNER, *supra* note 32, at 112.

107. *Id.* (“With words, ask yourself whether there’s a more colorful way to put it.”).

108. For this reason I take issue with the advice of certain commentators who set out an overly simplified writing style as a model for lawyers to emulate. See, e.g., MARK HERRMANN, *THE CURMUDGEON’S GUIDE TO PRACTICING LAW* 1–8 (2006). Such writing may be clear, but it can also be torturous in large doses. Nevertheless, I have had some success referring particularly wordy students to Herrmann’s book. What I tell them, which seems to work well, is to strike a happy medium between the Spartan style of writing they see in that book and their current writing style.

109. WILLIAMS & COLOMB, *supra* note 37, at 43.

110. See GARNER, *supra* note 57, at 400 (“[I]f you wish to write well, you’ll have to resist sounding like a machine. Or an old-fashioned pontificator. You’ll have to learn to sound like the best version of yourself.”).

posed to write. But the result is writing that is artificial-sounding and lifeless, full of legal jargon and stilted constructions. Other students come to law school having learned to write in a stuffy, intellectual style that they apparently picked up from their exposure to academic writing in college. Superficially it sounds “intelligent,” but it is ponderous and dense, using a lot of words to say relatively little.

These types of writing fail to engage the reader because they employ a voice that is not authentic.¹¹¹ The writing style comes across as artificial to the reader. A writer who writes in an inauthentic voice tends to produce tepid prose.¹¹² It is not necessarily bad; it just lacks character and individuality. J.B. White, one of the principal figures in the law and literature movement, describes the development of an authentic writer’s voice as central to the enterprise of becoming an effective lawyer:

Law, as you can see, is for me a kind of writing, at its heart less of an interpretive process than a compositional one. The central task for the lawyer from this point of view is to give herself a voice of her own, a voice that at once expresses her own mind at work in its best way and speaks as a lawyer, a voice at once individual and professional.¹¹³

It is difficult to define the concept of voice.¹¹⁴ Basically, though, it refers to a style that comes naturally to the writer, so that a glimmer of the writer’s personality reveals itself through the text.¹¹⁵ A writer’s authentic voice lets the reader see that there is a real person behind the document.¹¹⁶ Consider, for example, Justice Holmes’s infamous pronouncement in favor of forced sterilization in *Buck v. Bell*:¹¹⁷

111. For an interesting book-length treatment of the topic of voice, see TOM ROMANO, CRAFTING AUTHENTIC VOICE (Lisa Luedeke ed., 2004).

112. *Id.* at 5 (“[S]ome writers’ presence is aloof and distant, so abstractly intellectual and fraught with jargon that their words are impenetrable, like an unyielding brick wall.”).

113. JAMES BOYD WHITE, THE LEGAL IMAGINATION, at xv (abr. ed. 1985).

114. See J. Christopher Rideout, *Voice, Self, and Persona in Legal Writing*, 15 LEGAL WRITING, 67, 74–77 (2009) (providing a brief history of the concept of voice and describing the difficulties in defining the concept).

115. See ZINSSER, *supra* note 60, at 25 (“But whatever your age, be yourself when you write.”).

116. See, e.g., RALPH FLETCHER, WHAT A WRITER NEEDS 68 (1993) (“When I talk about voice I mean written words that carry with them the sense that someone has actually written them. Not a committee, not a computer: a single human being. Writing with voice has the same quirky cadence that makes human speech so impossible to resist listening to.”).

117. 274 U.S. 200, 207 (1927) (citation omitted).

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.¹¹⁸

The reasoning and result of this decision may be open to question, but is there any question as to its authenticity? Holmes’s commanding presence comes through loud and clear, and the power of Holmes’s voice is likely a factor in why only one member of the Court dissented from such a dubious holding.

Of course, in the context of legal writing, individuality is constrained to some extent by lawyers’ notions of a professional tone and their desire for uniformity. A law firm, for example, may impose certain style limitations on its lawyers in order to bring a level of consistency to the firm’s work product.¹¹⁹ Still, legal writers need not aspire to rigid conformity. Even within the confines of legal writing, there is room for individuality. The legal writer who is able to project an authentic voice while still maintaining a professional tone will produce a more engaging style of writing.

Occasionally, as in a work of fiction, the writer may make effective use of a voice that is not the writer’s own, but rather a character the writer wants the reader to identify with. Chief Justice Roberts’s amusing dissent in *Pennsylvania v. Dunlap*,¹²⁰ for example, illustrates this technique. In his recitation of the facts, he cleverly employs the point of view as well as the voice of the arresting officer in order to help the reader appreciate the officer’s perspective on whether there was probable cause to make an arrest:

North Philly, May 4, 2001. Officer Sean Devlin, Narcotics Strike Force, was working the morning shift. Undercover surveillance. The neighborhood? Tough as a three-dollar steak. Devlin knew. Five years on the beat, nine months with the Strike Force. He’d made fifteen, twenty drug busts in the neighborhood.

Devlin spotted him: a lone man on the street corner. An-

118. *Id.*

119. See, e.g., HERRMANN, *supra* note 108, at 1–8 (describing the rules that govern writing style in the author’s law firm).

120. 555 U.S. 964 (2008) (Roberts, J., dissenting), denying cert. to *Commonwealth v. Dunlap*, 941 A.2d 671 (Pa. 2007).

other approached. Quick exchange of words. Cash handed over; small objects handed back. Each man then quickly on his own way. Devlin knew the guy wasn't buying bus tokens. He radioed a description and Officer Stein picked up the buyer. Sure enough: three bags of crack in the guy's pocket. Head downtown and book him. Just another day at the office.¹²¹

For the most part, however, the most effective voice in legal writing is the writer's own. It is not precisely the same as the way the writer would normally speak.¹²² But it does reflect a style that comes naturally to the writer, rather than a style that the writer mimics or assumes for effect.¹²³

Another tool that can make writing engaging is the writer's ability to incorporate humor into writing.¹²⁴ The occasional use of humor in the appropriate context makes the experience of reading more enjoyable for the reader (assuming the reader has a sense of humor), which alone makes it easier for the writer to hold the reader's interest.

Humor can be particularly effective in legal writing when it is used to soften the blow of an unpopular message. Consider, for example, Judge Cardozo's opinion in *Murphy v. Steeplechase Amusement Company*.¹²⁵ There, the New York Court of Appeals held that the assumption-of-risk doctrine prevented recovery by a young man injured on an amusement-park ride that was aptly named "the Flopper." Justice Cardozo expressed the rationale for the decision as follows:

One who takes part in such a sport accepts the dangers that

121. *Id.* at 448; see Melissa H. Weresh, *Chief Justice John Roberts' Blog-Style Dissenting Opinion Garners Mixed Reviews*, 68 THE IOWA LAW., Dec. 2008, at 12, 12-13 (2008) (analyzing the Chief Justice's writing style in *Dunlap*, including the appropriateness of its humorous tone).

122. See BRYAN A. GARNER, *LEGAL WRITING IN PLAIN ENGLISH* 48-50 (2001). Garner suggests that a writer's natural voice resembles the writer's spoken voice, and that a skillful writer needs to develop a good ear for how his writing sounds in order to develop a natural voice. He also offers several tips on how the writer can enhance the natural, "spoken" quality of writing.

123. ZINSSER, *supra* note 60, at 25 ("Think of [voice] as a creative act: the expressing of who you are. Relax and say what you want to say. And since style is who you are, you only need to be true to yourself to find it gradually emerging from under the accumulated clutter and debris, growing more distinctive every day. Perhaps the style won't solidify for years as *your* style, *your* voice. Just as it takes time to find yourself as a person, it takes time to find yourself as a stylist . . .").

124. For a good overview of the effective use of humor in judicial opinions, see Thomas E. Baker, *A Review of Corpus Juris Humorous*, 24 TEX. TECH L. REV. 869 (1993).

125. 166 N.E. 173 (N.Y. 1929).

inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball. The antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquility. The plaintiff was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.¹²⁶

By using a dry, tongue-in-cheek tone to suggest that a vigorous young man who elects to jump on a ride called “the Flopper” might reasonably expect to be flopped about, Cardozo makes the application of an otherwise harsh doctrine seem more palatable to the reader. The mildly humorous tone disarms the reader’s natural sympathies for the injured plaintiff and invites the reader to conclude that the plaintiff voluntarily assumed the risk of injury. This type of humor is what William Zinsser refers to as the “secret weapon” of the nonfiction writer. “It’s secret,” he claims, “because so few writers realize that humor is often their best tool—and sometimes their only tool—for making an important point.”¹²⁷

Of course, contextual considerations are important when it comes to humor. At times the subject matter at issue may make humor inappropriate or even in bad taste.¹²⁸ And inappropriate humor is actually counter-productive because it causes the reader to disengage from the text. Some commentators, in fact, think that humor should be avoided altogether in legal writing because it too often backfires by trivializing serious matters.¹²⁹ So in every instance the legal writer should carefully weigh the advantages and disadvantages of employing humor, and use it in legal documents only with considerable discretion.

126. *Id.* at 174.

127. ZINSSER, *supra* note 60, at 207.

128. See Marshall Rudolph, Note, *Judicial Humor: A Laughing Matter?*, 41 HASTINGS L. J. 175, 179 (1989) (lamenting the excessive and inappropriate use of humor in judicial opinions).

129. See, e.g., EDWARDS, *supra* note 41, at 215; MICHAEL D. MURRAY & CHRISTY H. DESANTIS, LEGAL WRITING AND ANALYSIS 266 (2009) (“The law is too serious of a business for humor.”).

Another important component of engaging writing is the writer's ability to tell a compelling story.¹³⁰ Outside of a purely academic setting, the law is inherently tied up with events in the lives of real people. Briefs and memoranda do not just concern arcane legal concepts; rather, they concern the problems and challenges people face in their everyday lives, individually or collectively.¹³¹ And when people discuss these problems and challenges, they do so by telling stories. As J.B. White puts it, "The story is the most basic way we have of organizing our experience and claiming meaning for it. We start telling the stories of our lives as soon as we have language, and we keep it up until we die."¹³² So the legal writer who can effectively convey factual information through narrative is much more likely to engage the reader's attention than one who merely enumerates the facts in cut-and-dried fashion.

Consider, for example, how Lord Denning describes the facts in *Miller v. Jackson*,¹³³ a case concerning some rather simple allegations of negligence and nuisance:

In summertime village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played these last 70 years. They tend it well. The cricket area is well rolled and mown. The outfield is kept short. It has a club house for the players and seats for the onlookers. The village team plays there on Saturdays and Sundays. They belong to a league, competing with the neighboring villages. On other evenings after work they practice while the light lasts. Yet now after these 70 years a judge of the High Court has ordered that they must not play there anymore. He has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. This newcomer has built, or has had built for

130. See ZINSER, *supra* note 60, at 261–62 ("[N]arrative—good old-fashioned storytelling—is what should pull your readers along without their noticing the tug."). For a good overview on why storytelling is effective and how writers construct a compelling story, see RICHARD K. NEUMANN, JR. & SHEILA SIMON, *LEGAL WRITING* 199–204 (2008).

131. See Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 *LEGAL WRITING* 127, 130 (2008) ("Law, and the legal system, should be about people It is a tool to enrich and order peoples' lives. So why do legal briefs focus so much on the abstract law and overlook the people?").

132. WHITE, *HERACLES' BOW* 169 (1985).

133. [1977] Q.B. 966, 976 (Eng.).

him, a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket. But now this adjoining field has been turned into a housing estate. The newcomer bought one of the houses on the edge of the cricket ground. No doubt the open space was a selling point. Now he complains that when a batsman hits a six the ball has been known to land in his garden, or on or near his house. His wife has got so upset about it that they always go out at weekends. They do not go into the garden when cricket is being played. And the judge, much against his will, has felt that he must order the cricket to be stopped: with the consequence, I suppose, that the Lintz Cricket Club will disappear. The cricket ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much the poorer. And all this because of a newcomer who has just bought a house there next to the cricket ground.¹³⁴

In one long paragraph composed almost entirely of simple, plain sentences, Lord Denning is able to spin a very compelling narrative. It provides the reader with all the essential facts. But it does so in a way that is highly persuasive as well as engaging. The narrative sets up an almost archetypal conflict between happy villagers and a troublesome interloper that practically begs for resolution in favor of maintaining the villagers’ traditional ways.

Judge Learned Hand’s opinion in *Sheldon v. Metro-Goldwyn Pictures Corp.*¹³⁵ provides another good example of effective storytelling. In that opinion, the court awarded injunctive relief as well as compensatory damages to the authors of a play who had brought a copyright infringement action against a movie producer. Judge Hand’s opinion first tells the historical story that provides the basis for the plot in both the play and the movie: the story of a young woman named Madeleine Smith who faced trial in Scotland in 1857 for allegedly poisoning her lover with a cup of arsenic-laden hot chocolate. The opinion then goes into significant detail comparing the specific plots and dramatic techniques of the play and the movie. It also discusses the plot of a contemporaneous novel – again based upon the story of Madeleine Smith – which the defendant movie-producer claimed the movie was based upon. (The movie-producer

134. *Id.*

135. 81 F.2d 49 (2d Cir. 1936).

had purchased the rights to the novel but not the play.) After summarizing all three stories in a lively manner worthy of a novelist, and demonstrating the significant overlap among them, Judge Hand succinctly concludes, “if the picture was not an infringement of the play, there can be none short of taking the dialogue.”¹³⁶

Unfortunately, storytelling ability like Judge Hand’s and Lord Denning’s is uncommon in legal writing. And far too many legal writers disregard storytelling altogether, merely reciting factual material in a dry, mechanical way, as if the “facts” were simply data points rather than stories about real people. But in doing so, these writers lose a powerful persuasive tool. A growing body of literature indicates that most people, including judges, make decisions more readily on the basis of stories that they can relate to their own experiences than they do through argument, statistics, or logic.¹³⁷ As the Denning and Hand opinions illustrate, effective storytelling enhances the reader’s receptivity to the writer’s message.¹³⁸ And thus a document that effectively blends legal analysis with narrative will be more engaging and persuasive than a document that focuses solely on legal arguments and the dry recitations of facts.¹³⁹

136. *Id.* at 56.

137. See, e.g., W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 81-90 (1981) (using studies of jury trials to argue that jurors rely primarily on stories told by the witnesses and lawyers to process and organize information and to assess the credibility of the parties’ competing claims); STEVEN LUBET, NOTHING BUT THE TRUTH: WHY LAWYERS DON’T, CAN’T, AND SHOULDN’T HAVE TO TELL THE WHOLE TRUTH 1 (2002) (“[N]arrative has proven to be the most successful way to persuade the fact finder.”); Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ASS’N LEGAL WRITING DIRECTORS 1, 19-22 (2010) (presenting empirical evidence that judges prefer briefs that stress narrative); Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUD. F. 7, 28-40 (1996) (arguing that narrative is an essential component of our thinking about legal rules and principles); Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 LEGAL WRITING 3, 15-46 (2009) (arguing that storytelling can enhance the effectiveness of pleadings such as complaints); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer For Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Fact Sections*, 32 RUTGERS L.J. 459, 465-80 (2001) (discussing the benefits of storytelling for persuasion and explaining how to incorporate the techniques of fiction writing to tell stories in briefs). For a good overview of the scholarly literature on storytelling and the reasons why people are persuaded through stories, see J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING 53, 53-78 (2008).

138. See generally MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 32-41 (2d ed. 2008) (explaining how and why narrative techniques make the reader more receptive to the writer’s message).

139. See Foley & Robbins, *supra* note 137, at 464-65 (“[L]awyers [are] . . . essentially professional storytellers [and] *should* develop that skill, and that those who do develop it will have a decided advantage over those who do not.”); Nancy Levit, *Legal Storytelling: The Theory and the*

Other tools that skillful writers use to engage readers have their roots in classical rhetoric.¹⁴⁰ One such tool is what classical rhetoricians called *pathos*,¹⁴¹ which refers to the writer’s ability to connect with the reader at an emotional level, thereby increasing the reader’s level of engagement by making the reader more receptive to the writer’s message.¹⁴² To be sure, *pathos* is not just influenced by writing style.¹⁴³ The facts themselves are normally the principal driver of the reader’s emotional response, and the legal writer has no control over the inherited facts. Still, the way the legal writer tells the client’s story also plays an important role in determining whether the text connects with the reader at an emotional level.¹⁴⁴ For one thing, the legal writer can affect the reader’s emotional response by deciding which facts to include, which facts to emphasize, and how to ar-

Practice – Reflective Writing Across the Curriculum, 15 LEGAL WRITING 259 (2009) (discussing the persuasive power of storytelling).

140. These include devices such as metaphors and literary allusions. For a good overview of these devices, see OATES & ENQUIST, *supra* note 35, at 591–603. For a more detailed discussion of metaphors, literary allusions, and other so-called rhetorical figures of speech that have their roots in the classical age, see SMITH, *supra* note 138, at 195–340. *See also infra* text accompanying note 204 (regarding the role metaphor plays in elegant writing).

141. Aristotle, probably the principal architect of classical rhetoric, described rhetoric as “the faculty of observing in any given case the available means of persuasion.” ARISTOTLE, RHETORIC (c. 335–30, B.C.E.), *reprinted in* POETICS AND RHETORIC 93, 105 (W. Rhys Roberts trans., Barnes & Noble classics ed., 2005). He then identified *ethos*, *logos*, and *pathos* as the three essential “modes of persuasion.” *Id.* at 104–09. In simple terms, *ethos* involves establishing credibility with the audience, *logos* involves persuasion through the use of rational argument, and *pathos* involves persuasion through the writer’s ability to influence the emotions of the audience. For a general overview of these concepts, see SMITH, *supra* note 138, at 94–101.

142. The literature discusses *pathos* primarily as a tool for making writing more *persuasive*, rather than a tool for making it more *engaging*. *See, e.g.*, ARISTOTLE, *supra* note 141, at 104–09; SMITH, *supra* note 138, at 84, 87–119. Thus, *pathos* is more closely associated with what I have referred to as the *effectiveness* of a document (*see supra* text accompanying notes 23–29), rather than the quality of its writing *per se*. Nevertheless, even a non-persuasive document that connects with the reader at an emotional level (e.g., through effective storytelling) is usually more engaging because the emotional connection keeps the reader attuned to the writer’s message, even if the writer’s purpose is merely to convey information rather than to persuade.

143. In fact, for Aristotle, *pathos* was only tangentially relevant to *writing* at all, as he was primarily concerned with “the modes of persuasion furnished by the spoken word . . .” ARISTOTLE, *supra* note 141, at 105.

144. *See* SMITH, *supra* note 138, at 105 (“Undoubtedly, the most effective way for an advocate to evoke emotions based on the facts of the matter is to present the facts in the context of a compelling story.”); John C. Shepherd & Jordan B. Cherrick, *Advocacy and Emotion*, 3 J. ASS’N LEGAL WRITING DIRECTORS. 154, 156 (2006) (“The emotions that underlie human conflict are contained in the facts or the ‘story’ of your case.”); Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client’s Story Using the Characters and Paradigm of the Archetypal Hero’s Journey*, 29 SEATTLE U. L. REV. 767, 771 (2006) (“[A]ny decent trial lawyer already knows that storytelling is a critical part of effective advocacy.”).

range the factual presentation.¹⁴⁵ Of course, simply omitting key facts can backfire because the writer's credibility (i.e., *ethos*) suffers if the reader gets the sense the writer is hiding something.¹⁴⁶ But even if two stories are based on the exact same events, they can make significantly different impressions on the reader depending on how the writer organizes the facts, as well as which facts are emphasized or de-emphasized.¹⁴⁷

The writer's choice of language can also influence the reader's emotional response. By employing emotive words that resonate with the reader's deeply held feelings and values, the writer can make the reader more sympathetic to the writer's message. This technique plays an important role in making Justice Brandeis's concurrence in *Whitney v. California*¹⁴⁸ so powerful. Brandeis's references to the founding fathers as "courageous, self-reliant men" and as "[t]hose who won our independence by revolution," and his liberal use of emotive words such as "free men," "liberty," and "democracy," serve to engage and persuade the reader by evoking feelings of patriotism and civic duty.¹⁴⁹ They also inspire a feeling of community between the writer and the reader by calling attention to their shared heritage and their shared political values.

In addition to these straightforward devices for incorporating pathos into a document, commentators have also discussed some subtler ways the legal writer can engage the reader by influencing the reader's emotions. For example, the legal writer can take advantage of *pathos* by tapping into certain narrative myths, metaphors, and archetypes that resonate with the reader, such as the story of a hero on an epic journey or quest.¹⁵⁰ A growing body of literature has discussed the important role these narrative structures play in people's understanding of the world, and in how lawyers and judges inter-

145. See SMITH, *supra* note 138, at 84–85 (describing how the legal writer can affect the emotions of the reader through the strategic inclusion, emphasis, and organization of the facts presented).

146. EDWARDS, *supra* note 41, at 338 (explaining that omitting material facts from a brief "will only damage your credibility before the judge, causing the judge to wonder how much she can rely on the other facts you assert").

147. SCALIA & GARNER, *supra* note 32, at 93–96 (discussing the importance of strategic emphasis and juxtaposition in crafting a persuasive statement of the facts).

148. 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring).

149. *Id.* at 375–78.

150. See Robbins, *supra* note 144, at 790–800 (discussing the archetype of the heroic journey and how it can be incorporated into persuasive legal writing).

pret legal arguments.¹⁵¹ By incorporating these types of structures into clients' stories, these commentators argue, the legal writer can harness the powerful emotions that archetypal narratives evoke in us.¹⁵² Ruth Anne Robbins, for example, argues that "[b]ecause people respond—instantively and intuitively—to certain recurring story patterns and character archetypes, lawyers should systematically and deliberately integrate into their storytelling the larger picture of their clients' goals by subtly portraying their individual clients as heroes on a particular life path."¹⁵³ Of course, some clients are more easily cast as heroes than others.¹⁵⁴ But Robbins's general point about the psychological effect of tapping into narrative archetypes is well taken.

A lawyer seeking to employ *pathos* in a legal document needs to be judicious, however. Blatant emotional appeals can be counter-productive if they make judges feel like they are being manipulated.¹⁵⁵ And sometimes the use of *pathos* is simply not productive. For example, *pathos* is less effective in cases where the law is relatively clear-cut than in cases where the law is reasonably subject to interpretation.¹⁵⁶ Likewise, since *pathos* is primarily a tool of persuasion,

151. See, e.g., Robbins, *supra* note 144, at 790–800; see generally Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883 (2010) (exploring some of the cultural archetypes that influence legal analysis).

152. See Greig E. Henderson, *The Cost of Persuasion: Figure, Story, and Eloquence in the Rhetoric of Judicial Discourse*, 75 U. TORONTO Q. 905, 916 (2006) ("Our first hearing of 'once upon a time' and 'they lived happily ever after' begins the process whereby a grammar of narrative is embedded into our psyches along with a storehouse of images, archetypes, stereotypes, myths, formulas, plots, and so forth. Narrativity, the innate capacity to generate and comprehend stories, is at the core of human signification. Story is inescapable.").

153. Robbins, *supra* note 144, at 768–69.

154. In fact, given the realities of litigation, it is likely the exceptional case that lends itself readily to portraying the client as a heroic figure. It may be true, as one old advertising campaign used to proclaim, that life itself would be impossible without chemicals, but that doesn't necessarily make it any easier to sell to a jury the notion that one's chemical-company client is engaged in some kind of heroic quest. Thus, litigators more commonly rely on archetypes like the *villain* and the *careless bumbler* in pitching their cases to juries. In other words, rather than trying to portray their own clients as heroes or saints, lawyers tend to focus on portraying the opposing party as either malevolent or incompetent.

155. See SMITH, *supra* note 138, at 105 ("[J]udges may view overt emotional arguments as inconsistent with their role in the legal system and, thus, as inappropriate."); SCALIA & GARNER, *supra* note 32, at 32 ("[O]vert appeal to emotion is likely to be regarded as an insult."); Kathryn M. Stanchi, *Feminist Legal Writing*, 39 SAN DIEGO L. REV. 387, 396–97 (2002) (arguing that judges can be insulted by obvious emotional appeals because they imply that the judges are susceptible to irrational arguments).

156. See SMITH, *supra* note 138, at 103 ("If the law on a legal issue and its application to the matter at hand are clear, the emotional facts and values implicated by the matter will be less significant in the decision-making process If, on the other hand, the law on a legal issue

it is generally not as useful where the central purpose of the document is merely to convey information rather than to persuade, as in an office memorandum.¹⁵⁷ But the appropriate use of *pathos* in a brief—even an appellate brief¹⁵⁸—can make an argument more compelling, particularly when the brief appeals to the judge’s sense of justice and fairness.¹⁵⁹ Thus, in determining whether to take advantage of *pathos*, the legal writer should evaluate the context of a document, taking into account the purpose of the document, as well as the needs, interests, and background of the intended audience.

Finally, in order for a legal document to be appropriately engaging, it is important that the document strike a proper *tone*. This is a difficult concept to define, but essentially it involves making sure that the subject matter of the document and writing style are in sync, so that they reinforce each other’s effect on the reader.¹⁶⁰ Suppose, for example, that a plaintiff’s lawyer sends a demand letter to the defendant that is otherwise well written (i.e., is clear and concise), but its tone is too matter-of-fact or even friendly. The letter would more effectively engage the reader if its tone were more serious so that it evoked some concern on the defendant’s part as to the consequences of not settling. Otherwise, the tone interferes with the content of the letter, and the writer’s message gets diluted. Or imagine a defendant’s brief that treats a sensitive topic such as the plaintiff’s grievous injuries in an insensitive manner. Because the tone of the brief is inappropriate, the reader (i.e., the judge) may take offense to it and pay less attention to the writer’s central message. In both of these cases, the writer’s failure to make the writing style appropriate to the subject matter of the document may cause the reader to disengage.

or its application to the matter at hand is unclear, then pathos will play a significant role in the decision-making process.”).

157. BRONSTEEN, *supra* note 35, at 132 (the tone of a legal memorandum should be “objective and dispassionate”). To be sure, a good memorandum should inform the reader whether the facts of the case are likely to have an emotional impact on the jury or the judge, so that the lawyer or client reading the memorandum can make a rational assessment of potential damages. But it is not the purpose of an advisory memo to stir the passions of the *reader* through the use of *pathos*; that is likely to be counterproductive if the goal is to enable the decision-maker to calmly and rationally assess the options. So while a memorandum does need to evaluate the potential role *pathos* will play in a case, it does not itself need to connect with its intended audience at an emotional level.

158. See Shepherd & Cherrick, *supra* note 144, at 161–65; Chestek, *supra* note 131, at 130–36.

159. SCALIA & GARNER, *supra* note 32, at 26–27.

160. For more on the topic of *tone* in legal writing, see Bret Rappaport, *Using the Elements of Rhythm, Flow, and Tone to Create a More Effective and Persuasive Acoustic Experience in Legal Writing*, 16 LEGAL WRITING 65, 99–107 (2010).

3. *The tension between engagement and clarity*

Clarity and engagement are both fundamental qualities of good legal writing, yet at times these qualities may conflict. When they do, the skillful legal writer needs to find an appropriate accommodation between them. Consider, for example, the use of repetition. As discussed in Part I, repetition is a device that writers sometimes use to ensure that their message is clear to the reader.¹⁶¹ Yet it can also make writing less engaging if the writer gets bored hearing the same message repeatedly.¹⁶² Likewise, the use of simple sentences and plain words helps to ensure that the writer’s message is clear.¹⁶³ But at the same time, one way to make writing more engaging is to vary linguistic patterns, such as sentence structure and word use.¹⁶⁴

Certain narrative techniques that make writing more engaging can also conflict with the goal of clarity. Consider, for example, how writers present factual accounts. The simplest and most straightforward way to present facts is chronologically. When the facts are presented in a linear time sequence, the story is easy to follow. But writers sometimes present stories in a non-linear fashion (i.e., out of chronological sequence) in order to emphasize certain facts and create an interesting narrative.¹⁶⁵ Think, for example, of the movie *Pulp Fiction*,¹⁶⁶ where Quentin Tarantino divides the story into a number of discrete scenes, but then presents the scenes out of chronological order. The result is an interesting and compelling story: by challenging the viewer to figure out exactly what is happening and when, Tarantino adds intrigue to the plot and keeps the audience engaged. But while the technique helps to make the movie engaging, it also detracts somewhat from the clarity of the plot because it makes the storyline more difficult to follow. So when telling stories, the legal writer needs to strike a balance between simple but dull chronological presentations of the facts and more complicated and interesting narrative accounts that may not be quite as clear.¹⁶⁷

161. See *supra* text accompanying note 65.

162. See LECLERCQ, *supra* note 41, at 52 (“[R]epetition results in lengthy documents and uninteresting reading . . .”).

163. See *supra* text accompanying notes 40–42.

164. See *supra* text accompanying notes 104–109.

165. For a more detailed discussion of this narrative technique, see FAJANS ET AL., *supra* note 87, at 200–05.

166. PULP FICTION (Miramax Films 1994).

167. FAJANS ET AL., *supra* note 87, at 395 (“Uncertainty of meaning often creates rich and complex layering in fiction, but it produces costly and time-consuming litigation in legal documents, especially rule-making documents.”).

In striking an appropriate balance between the qualities of clarity and engagement, the legal writer should carefully evaluate the *context* of the document, looking to its purpose¹⁶⁸ as well as the needs, interests, and background knowledge of the intended audience. When in doubt, the legal writer should err on the side of clarity. As discussed in Part II,¹⁶⁹ a document is of little use to a legal reader if the reader does not understand what the writer is trying to say.¹⁷⁰ But at the same time, a justifiable aversion to legalese and turgid legal prose should not push legal writers into a reactionary mode, whereby they completely abandon stylistic interest in the name of clarity.¹⁷¹ Writing that is engaging holds the reader's attention because it makes the job of reading less arduous, and it also stimulates the reader's own thought processes.

III. ELEGANCE — THE HALLMARK OF GREAT LEGAL WRITING

Legal writing that is clear, concise, and engaging is good writing. As discussed in the previous sections, such writing facilitates a reader's ability to make professional decisions.¹⁷² Yet there is something about the very best examples of legal writing that goes beyond these three fundamental qualities. The best legal writing is not just writing that is especially clear, concise, and engaging; rather, what characterizes great legal writing is a separate, aesthetic quality, which I will refer to as *elegance*.¹⁷³ It is because of this aesthetic quali-

168. For a discussion of the principal purposes of legal writing, see OATES & ENQUIST, *supra* note 35, at 4–5 (describing the principal purposes of legal writing as explaining, persuading, and memorializing). I am indebted to Brian Simpson for his suggestion that *justification* may be another basic purpose of legal writing. Judicial opinions exhibit this purpose. One could argue that the purpose of a judicial opinion is to *persuade* the reader that the court is correct; however, that seems too strong because the decision has already been made and there is no further need to convince the reader. Alternatively, one could argue that the purpose of a judicial opinion is merely to *explain* the court's decision; however, that seems too weak because something more is going on besides a dispassionate effort to educate. What the judge is really attempting to do is *justify* the decision of the court to the reader—an objective that is related to persuasion and explanation, and yet different.

169. See *supra* text accompanying notes 33–34.

170. See GARNER, *supra* note 57, at 40.

171. See *id.* at 46 (stressing the importance of writing style and quoting Voltaire for the proposition that “every style is good save that which bores”).

172. See *supra* text accompanying note 30.

173. I use the term “elegance” in order to capture the artistic quality of the best writing. Some commentators use the term *eloquence* to refer to this aesthetic quality. See, e.g., OATES & ENQUIST, *supra* note 35, at 593 (“Eloquent writing . . . is more than clear and energetic: it is memorable, striking, even poetic because the writer has paid attention to the sound, rhythm, and imagery of language.”). But strictly speaking, “eloquence” is not concerned with the aes-

ty that we often refer to the finest examples of writing as being "beautifully written." As Cicero said of great oratory, "One thing there will certainly be, which those who speak well will exhibit as their own; a graceful and elegant style, distinguished by a peculiar artifice and polish."¹⁷⁴ Great legal writing, therefore, is writing that, in addition to facilitating legal decision-making, also exhibits an artistic flair.

The value of elegance in writing does not principally reside in its functionality.¹⁷⁵ Rather, elegance adds value to writing for the same reason that beauty is valuable in any human endeavor: it gives expression to mankind's essential creative nature. As the noted psychologist Carl Seashore observed, "The pursuit of beauty is one of the most universal and most persistent efforts of mankind in all ages and all cultures."¹⁷⁶ Likewise, George Santayana, the well-known, twentieth-century philosopher, described the pursuit and appreciation of beauty as a fundamental and pervasive human drive, and an integral part of human nature:

In all products of human industry we notice the keenness with which the eye is attracted to the mere appearance of things: great sacrifices of time and labour are made to it in the most vulgar manufactures; nor does man select his dwelling, his clothes, or his companions without reference to their effect on his aesthetic senses. Of late we have even learned that the forms of many animals are due to the survival by sexual selection of the colours and forms most attractive to the eye. There must therefore be in our nature a very radical and wide-spread tendency to observe beauty, and to value it. No account of the principles of the mind can be at all adequate that passes over so conspicuous a faculty.¹⁷⁷

thetic. Rather, it entails persuasiveness, forcefulness, and fluency. See 1 SHORTER OXFORD ENGLISH DICTIONARY 808 (5th ed. 2002) (defining *eloquence* as "[t]he fluent, forceful, and apt use of language"); WEBSTER'S COLLEGIATE DICTIONARY 375 (11th ed. 2003) (defining *eloquence* as "the quality of forceful or persuasive expressiveness"). So I think "elegance" is a more appropriate term to describe the artistic quality of great writing; "eloquence" is more closely related to the quality of engagement discussed in Part II than to the quality of elegance.

174. MARCUS TULLIUS CICERO, *On the Character of the Orator*, in ON ORATORY AND ORATORS 19 (J.S. Watson trans., 1878) (c. 55 B.C.E.).

175. But see *infra* text accompanying notes 194–197 (noting that elegant writing may be more persuasive).

176. Carl E. Seashore, *In Search of Beauty in Music*, 28 THE MUSICAL Q. 302, 302 (1942).

177. GEORGE SANTAYANA, *THE SENSE OF BEAUTY* 5–6 (1955).

Thus, it should not be surprising that we would value beauty in writing, just as we do in all of our creative endeavors. A utilitarian object such as a chair or a watch is not considered museum-worthy merely because of its functional qualities; instead, it is principally the artistic quality of the design that makes it a great watch or a great chair. So too with writing: great writing transcends its functional purpose and exhibits an artistry not found in ordinary writing. As Joseph Williams puts it,

Anyone who can write clearly, concisely, and coherently should rejoice to achieve so much. But while most of us prefer bald clarity to the density of institutional prose, others feel that relentless simplicity can be dry, even arid. It has the spartan virtue of unsalted meat and potatoes, but such fare is rarely memorable. A flash of elegance can not only fix a thought in our minds, but give us a flicker of pleasure every time we recall it."¹⁷⁸

But even if we grant that literature and perhaps even some works of prose can be beautiful or elegant, and that this quality is the hallmark of great writing generally, is there really such a thing as a beautifully written brief or legal opinion? And even if elegance is attainable in legal writing, it is really a worthy goal for the legal writer, given the practical nature of the profession? After all, lawyers and judges write documents to aid professional decision-making, not to entertain audiences or create great works of literature.

While these are certainly worthwhile questions, an examination of some of the great writing in the field demonstrates that elegance—while definitely not commonplace—is attainable in legal writing, and that it has value, at least in certain contexts. Three well-known First Amendment cases help to illustrate this point.

The first is Justice Jackson's opinion in *West Virginia Board of Education v. Barnette*.¹⁷⁹ In that case, the Court upheld an injunction preventing enforcement of a state regulation requiring school children to salute the American flag. Writing for the majority, Justice Jackson paints a stark picture of the dangers inherent in state-coerced nationalism and the repression of dissenting views:

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as evil men. Nationalism

178. WILLIAMS & COLOMB, *supra* note 37, at 141.

179. 319 U.S. 624 (1943).

is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security . . . and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.¹⁸⁰

Next consider Justice Brennan's still-controversial opinion in *Texas v. Johnson*,¹⁸¹ another famous case involving the American flag. The issue there was whether flag burning was constitutionally protected speech. The Court held that it was. Writing for the majority, Justice Brennan delivers a powerful defense of free speech:

We are fortified in today's conclusion by our conviction that forbidding criminal punishment for conduct such as Johnson's will not endanger the special role played by our flag or the feelings it inspires We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong And, precisely because it is our flag that is in-

180. *Id.* at 640–41.

181. 491 U.S. 397 (1989).

volved, one's response to the flag burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.¹⁸²

Finally, consider Judge Easterbrook's dissenting opinion in *Miller v. Civil City of South Bend*.¹⁸³ In that case, the majority held that non-obscene nude dancing performed as entertainment was subject to protection under the First Amendment as a form of expression.¹⁸⁴ In his dissent, Judge Easterbrook takes issue with the majority's characterization of nude dance as a legitimate form of expression.¹⁸⁵ While not as emotionally charged as the Jackson and Brennan opinions, Easterbrook's dissent is nevertheless an elegant piece of judicial prose:

Pervading this opinion is a belief that states may draw no lines where art is concerned. Sophisticates go to the museum and see Renoir's Olympia or to the opera and see a soprano strip during the Dance of the Seven Veils in Strauss' Salome. If the First Amendment protects these expressions, the argument goes, Joe Sixpack is entitled to see naked women gyrate in the pub. Why does this follow? That a dance in Salome expresses something does not imply that a dance in JR's Kitty Kat Lounge expresses something, any more than the fact that Tolstoy's Anna Karenina was a stinging attack on the Russian social order implies that the scratching of an illiterate is likely to undermine the Tsar. Rembrandt applied paint to canvas; a bucket of paint hurled at a canvas also deposits paint. A conclusion that Rembrandt's paintings are speech would not imply that all paint is expressive. Juvenile delinquents who deface subway cars with spray paint may be "expressing themselves" in a col-

182. *Id.* at 418–20.

183. 904 F.2d 1081, 1120–31 (7th Cir. 1990) (en banc) (Easterbrook, J. dissenting), *rev'd sub nom.* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

184. *Id.* at 1130–31.

185. *Id.* at 1131.

loquial sense, but they are not communicating ideas beyond their disdain for the sensibilities of others. The First Amendment does not let a government draw lines based on the viewpoint the performer expresses; it does inquire whether particular “entertainment” is “expression” in the first place. The Constitution does not protect “the freedom of entertainment.” “Speech”—by implication “expression” of thoughts through conduct—is the foundation for its application.¹⁸⁶

Jackson, Brandeis, and Easterbrook are all widely regarded as exceptional writers. And the excerpts set out above unquestionably exemplify writing that is clear, concise, and engaging. But what sets these opinions apart as models of great legal writing is the elegant manner in which they are written.¹⁸⁷ They have a literary quality¹⁸⁸ that is lacking in ordinary documents—even those that are considered very well written. Even if you do not agree with one or more of the results, you find yourself wanting to read the language of the opinions more than once, not because you don’t understand it the first time, but because you want to pause and admire the craftsmanship of the writing.¹⁸⁹ There is something about the cadence of the sentences, the juxtaposition of the words, and the vividness of the descriptions that, while difficult to analyze, appeals to our aesthetic sensibilities.¹⁹⁰

186. *Id.* at 1125 (citation omitted).

187. One could object here that elegance is subjective, and that people will sometimes disagree as to what constitutes an example of elegant writing. But that objection does not undermine the argument that elegance is the hallmark of great legal writing. People may occasionally disagree as to whether a particular object such as a vase or a chair is elegant too. But nevertheless, the reason why a particular vase or chair ends up as a museum piece is precisely because a majority of people (or at least a majority of those who make decisions about these types of things) regard the object as beautiful, even if some others disagree. So elegance can still be the distinguishing characteristic of great legal writing (that is, an essential part of what it *means* for a piece of writing to be considered great), even if people sometimes disagree as to whether a particular piece of writing deserves that accolade.

188. For a comprehensive discussion of the relationship between legal opinions and literature, see RICHARD A. POSNER, *LAW & LITERATURE* 329–85 (3d ed. 2009).

189. See Henderson, *supra* note 152, at 906 (“[A]ny piece of language that calls attention to itself is drawing upon the literary function by making us conscious of the words themselves and thereby forcing us to prolong and intensify our concentration.”).

190. As Strunk, Jr. & White put it: “Who can say confidently what ignites a certain combination of words, causing them to explode in the mind? Who knows why certain notes in music are capable of stirring the listener deeply, though the same notes slightly rearranged are impotent? These are high mysteries.” STRUNK, JR. & WHITE, *supra* note 35, at 66.

Opinions such as these demonstrate that elegance in legal writing is attainable,¹⁹¹ and that it is a worthy goal, at least with respect to certain types of legal writing, such as important judicial opinions.¹⁹² After all, writing (even legal writing) is a creative endeavor, and creativity by its very nature opens up the possibility of artistry. As J.B. White puts it, “the law is an art, a way of making something new out of existing materials—an art of speaking and writing.”¹⁹³

Furthermore, elegance may make writing more persuasive. As discussed above, the pursuit of elegance is a pervasive human quest, common to all of our creative endeavors.¹⁹⁴ Even in such seemingly unlikely fields as physics and mathematics, scholars look to elegance as an important criterion for evaluating their fields’ greatest discoveries.¹⁹⁵ As the physicist Hans Albert Einstein once observed of his famous father, “He had a character more like that of an artist than of a scientist as we usually think of them. For instance, the highest praise for a good theory or a good piece of work was not that it was correct nor that it was exact but that it was beautiful.”¹⁹⁶ Just as elegance can make a scientific or mathematical theory more compelling, it can sometimes make a legal document more compelling as well.¹⁹⁷

It is beyond the scope of this Article to analyze precisely what it is that makes writing elegant.¹⁹⁸ Ever since Plato, philosophers have

191. See DERNBACH ET AL., *supra* note 35, at 191 (“The law is a literary profession; legal writing should and often does approach the level of good literature. Many judicial opinions, for example, are remembered not only for their ideas but also for the way in which the ideas are expressed.”).

192. It is not entirely coincidental that I chose three First Amendment cases to illustrate the quality of elegance. The lofty ideas that we associate with First Amendment jurisprudence lend themselves well to elegant descriptions, in a way that more mundane topics may not.

193. WHITE, *supra* note 113, at xiv.

194. See *supra* text accompanying notes 176–177.

195. See, e.g., H. E. HUNTLEY, *THE DIVINE PROPORTION: A STUDY IN MATHEMATICAL BEAUTY* 75–76 (1970) (“That the feeling for beauty, however, can produce a mental ferment and generate new ideas in mathematics, and can serve as a guide to truth is an affirmation that many high ranking mathematicians endorse.”); A. ZEE, *FEARFUL SYMMETRY: THE SEARCH FOR BEAUTY IN MODERN PHYSICS* 3 (2007) (“The reader may perhaps think of physics as a precise and predictive science and not as a subject fit for aesthetic contemplation. But, in fact, aesthetics has become a driving force in contemporary physics.”); *IT MUST BE BEAUTIFUL: GREAT EQUATIONS OF MODERN SCIENCE* xi–xvi (Graham Farmelo ed., 2002) (describing how some great scientists such as Einstein and Dirac have refused to accept theories that could not be expressed as beautiful equations).

196. JAMES W. MCALLISTER, *BEAUTY AND REVOLUTION IN SCIENCE* 96 (1996).

197. See ENQUIST & OATES, *supra* note 23, at 147 (“An eloquent brief is a more persuasive brief.”).

198. I am grateful to Linda Edwards for her helpful suggestions as to what contributes to elegance in expository writing.

expounded on the nature of beauty, yet still it remains an elusive concept.¹⁹⁹ Nevertheless, we can get some guidance from the mathematicians and scientists who have written on this topic. They tend to associate elegance with simplicity and symmetry,²⁰⁰ and it is likely that elegance in writing is closely associated with those traits as well. Indeed, Joseph Williams, who has provided perhaps the most thorough account of elegant expository writing, argues that the main factor contributing to elegance in a sentence is "a balance and symmetry among its parts, one echoing another in sound, rhythm, structure, and meaning."²⁰¹ He then goes on to show how great writers achieve symmetry and balance through devices such as coordination of sentence parts and climactic emphasis.²⁰²

It may also be useful to look to poetry for guidance as to the nature of elegance in writing, for it is in poetry that we most often discover writing that we think of as beautiful or elegant. And thus some of the traits normally associated with elegance in poetry probably contribute to elegance in prose as well. For example, the ways that individual words sound to us by virtue of literary devices such as rhyme, alliteration, and onomatopoeia, and the manner in which words are combined and emphasized²⁰³ to create rhythms in sentences, give elegant writing a sort of auditory appeal that is similar to the appeal of music.²⁰⁴ Likewise, the mental imagery elegant writing creates through its use of vivid words and metaphor²⁰⁵ gives elegant writing a sort of visual appeal that resembles the appeal of the

199. For a brief overview of the history of aesthetics and a summary of more recent developments in the field, see Peg Zeglin Brand, *Symposium: Beauty Matters*, 57 J. AESTHETICS & ART CRITICISM 1-10 (1999). For a more comprehensive survey of the field, see WLADAYSHAW TATARKIEWICZ ET AL., HISTORY OF AESTHETICS (2005).

200. See, e.g., ZEE, *supra* note 195, at 8-21 (discussing symmetry and simplicity as the hallmarks of elegance in science). Curiously, this notion of elegance could also have a bearing on contract drafting. One could make a reasonable case that a contract that is simple and symmetrical, yet at the same time precise and comprehensive enough to capture the parties' intent, is elegant in the same way that a scientific or mathematical theory is elegant.

201. WILLIAMS & COLOMB, *supra* note 37, at 141.

202. *Id.* at 141-52.

203. For a thorough discussion of emphasis, see *id.* at 82-98.

204. See Rappaport, *supra* note 160, at 67-68 (tracing the common connections between music and writing and suggesting that much of the appeal of great writing can be attributed to the way the words "sound" to the reader by virtue of their rhythm, flow, and tone).

205. See WILLIAMS & COLOMB, *supra* note 37, at 156-60 (discussing the role metaphor plays in elegant writing).

visual arts.²⁰⁶ In this way, elegant prose, similar to beautiful poetry, exhibits a sensual quality that we find aesthetically pleasing.

Finally, it is important to consider when and to what extent elegance is appropriate in legal writing. For while it is easy to appreciate the value of elegance in a Supreme Court opinion on a matter of considerable social significance, justifying the quest for elegance in a typical office memorandum is an entirely different matter. Accordingly, the legal writer needs to evaluate the *context* of a given document in order to determine whether elegant writing is appropriate for that document. In the context of a typical office memorandum, for example, the principal goal is to convey information in an expeditious manner in order to help the client or the senior lawyer make wise decisions. Generally, the client is not interested in funding a literary work and does not want to spend extra money to enable a lawyer to produce a memorandum that is elegant. Therefore, in that context, elegance must give way to more practical considerations, such as cost.

On the other hand, a lawyer does not need to consciously stunt a natural aptitude for elegant prose. The point is simply that the writer should consider the context of the document in determining whether to spend time revising the document to make it more elegant. In most situations, the answer will be “no” because of cost concerns. Occasionally though (e.g., in an appellate brief concerning a matter of significant public interest), the context may warrant an effort on the part of a particularly talented legal writer to imbue the document with a touch of elegance.²⁰⁷

CONCLUSION

This Article has argued that readers judge a document to be well written if the writing advances the readers’ purpose in reading the document. In the case of legal readers, that purpose is to glean information that will help the reader make professional decisions. Thus, good legal writing is writing that facilitates professional deci-

206. This similarity to the visual arts may seem more attenuated than the similarity to music. But it is apparent that certain words conjure up images in our minds (e.g., “red rose”), and these images can affect our aesthetic sensibilities in much the same way that images coming directly from our eyes affect our aesthetic sensibilities.

207. There are benefits for the legal writer as well. Employing one’s creative talents in this manner can not only enhance the quality of a brief, but also help to make the practice of law a more meaningful and rewarding experience.

sion-making by making it easier for legal readers to obtain information from legal documents.

There are three fundamental qualities that enable writing to do this: clarity, conciseness, and engagement. This Article has examined why each of these qualities is essential to legal writing, and it has looked at how legal writers can incorporate these qualities into their writing. Lastly, this Article has examined what it is that characterizes the very best legal writing. It has argued that great legal writing is not merely writing that is particularly clear, concise, and engaging; rather, great legal writing exhibits a fourth fundamental quality—elegance—that is aesthetic in nature. Thus, the difference between great legal writing and good legal writing is one of kind, and not merely one of degree.

An additional, recurring theme of this Article is the need for legal writers to be cognizant of contextual considerations, such as the nature of the intended audience and the purpose(s) of the document in question. Contextual considerations guide the writer’s choices. They determine how the writer should balance among competing interests when the writer’s various goals conflict. For example, the writer may have to strike a balance between plain language and the use of precise technical terms when determining what will be clearest to the intended audience. Likewise, the writer may have to balance between varied sentence structures that make writing more engaging and simple sentence structures that make it clearer. It is largely these contextual considerations that help the writer determine what is appropriate for any given legal document.

While this Article has not focused on writing pedagogy directly, it is important to consider briefly two pedagogical implications of this analysis. One problem with the traditional method of teaching legal writing in law school is that it tends to inundate students with detailed organizational formats (e.g., IRAC) and usage rules (e.g., “avoid the passive voice”) without providing them an adequate conceptual framework around which students can organize the information they acquire. Students learn specific techniques to improve their writing, but they tend not to explore the fundamental goals that these techniques advance. A better approach would be to organize instruction around the type of conceptual framework set out in this Article, which gives structure to the individual formats and rules. In other words, instructors should concentrate their efforts on getting students to strive for writing that is clear, concise, and engaging, and they should organize their teaching of specific techniques around those fundamental goals. Doing so will make it

easier for students to understand and apply the specifics, and it will also make it easier for them to balance competing interests when their various goals conflict. Learning to write well is not a mechanical process. Writers often have to make difficult choices in their writing, as this Article has discussed throughout, and the rules will not always guide those choices. Stepping back to examine the big picture helps writers make sense of the specific rules they learn and also provides them a better understanding of when it is appropriate to disregard or modify these rules in order to advance the broader goals of legal writing.²⁰⁸

The other main pedagogical implication of the analysis set out in this Article is that it supports a “learn-by-example” approach to legal-writing pedagogy. Writers do not become proficient at their craft by memorizing a lot of picayune rules, or by applying checklists of “do’s” and “don’ts” to their writing.²⁰⁹ They become proficient at writing primarily by reading the works of good writers and by practicing their own writing.²¹⁰ Focusing students on the fundamental goals of legal writing—i.e., clarity, conciseness, and engagement—while at the same time exposing them to examples of excellent writing, allows students to analyze for themselves the tools masters of the craft employ to achieve these fundamental goals.²¹¹ And the lessons learned that way are likely to be more meaningful and enduring than the lessons learned by memorizing rules of grammar and usage.²¹²

208. See BRONSTEEN, *supra* note 35, at 36 (“[I]n many cases, a thought can be expressed most clearly by violating a traditional grammar rule.”).

209. See FISH, *supra* note 19, at 14–15, 20–21 (learning how to craft clear and meaningful sentences is not primarily a matter of learning rules, but rather of coming to appreciate the broader perspective of how the various constituents of sentences are logically related).

210. SCALIA & GARNER, *supra* note 32, at 61–64 (observing that one of the best ways to learn how to write well is to read great writing, including writing outside the field of law); ZINSSER, *supra* note 60, at 34 (“Make a habit of reading what is being written today and what was written by earlier masters. Writing is learned by imitation. If anyone asked me how I learned to write, I’d say I learned by reading the men and women who were doing the kind of writing I wanted to do and trying to figure out how they did it. But cultivate the best models.”).

211. It is an open and important question whether this is best accomplished by exposure to examples of good *legal* writing, to examples of good writing generally, or to some combination of the two. In an interview with Bryan Garner, Judge Frank Easterbrook recommended that students of legal writing read works of fiction from authors such as Hemmingway and Faulkner, as well as works of prose from sources such as *The Atlantic* or *Commentary*. See GARNER, *supra* note 57, at 16–17.

212. See WILLIAMS & COLOMB, *supra* note 37, at 160 (“You won’t acquire an elegant style just by reading this book. You must read those who write elegantly until their style runs along your muscles and nerves. Only then can you look at your own prose and know when it is elegant or just inflated.”).

In sum, understanding the fundamental goals of legal writing is important because it helps legal writers focus on the overarching objective of legal writing: to make it easier for readers to obtain from legal documents information that will assist them with their professional decision-making. The ability to write in such a manner is one of the most important skills a lawyer can possess, and developing that skill should be one of the principal objectives of a law school education.

ARTICLE 5

THE ART AND CRAFT OF WRITING JUDGMENTS



AFSA

The Arbitration Foundation of Southern Africa
NPC

THE ART AND CRAFT OF WRITING JUDGMENTS

NATIONAL JUDICIAL ACADEMY, BHOPAL
DATED 07.02.2023

INTRODUCTION

- A judgment is the statement given by the Judge, on the grounds of a decree or order. It is the outcome of the proceedings in the Court.
- The writing of a judgment is one of the most important and time-consuming tasks performed by a Judge.
- The making and the writing of a judgment and the style in which it is written, varies from Judge to Judge and reflects the characteristic of a Judge. Every Judge, of every rank has his own style of writing judgment.
- A judgment is distinct from a formal order as it gives reasons for arriving at a conclusion. In United States it is called the 'opinion', the explanation given by a Judge for the order finally proposed or made.

THE STAKE HOLDERS

- A judgment is not written only for the benefit of the parties. It is also written for benefit of the appellate court, members of legal profession, other judges, students of law, and civil society.
- The losing party is the primary focus of concern. The winner is not much interested in the reasons for success, as he is convinced of the righteousness of the cause, anyway.
- The judgments and orders written by the courts also uphold the intellectual integrity of the system of law, impartiality, and logical reasoning.
- The Judges must give their reasoning honestly to the best of their ability without any fear, bias, prejudice or personal perceptions and any concern that the appellate Court may reach to a different conclusion.
- The Judge must state the facts explicitly, precisely, and consciously as they are found on record and give reasons with sufficient and honest reasoning without any bias, prejudices, or perceptions for the decision.
- The judgment is a reflects the conscience of a Judge, who writes it, and evidences his impartiality, integrity, and intellectual honesty. The judgment writing also provides opportunity to the judicial officer to demonstrate his ability and worthiness to be a participant in the high tradition of moral integrity honesty and social utility.

THE OPENING STATEMENT

- A judgment must begin with clear recital of facts of the case, cause of action and the way the case has been brought to the Court. A Judge must have essential facts in mind, and its narration should be brief but without any mistake.
- The importance of first paragraph of the judgment cannot be overemphasized. It must answer the questions as to how, when, where, what and why, which is an advice given to journalist when she joins the profession.
- Ordinarily a brief statement of fact is sufficient if it indicates the context of the dispute so that legal principle/s chosen for decision can be understood. At times, however, it may be necessary for judgment to record substance of factual context and the details of evidence placed before the Court.

THE ISSUES/ CHARGES

- The judgment must quote the issues/ or charges immediately after the narration of facts. It is always advisable to decide preliminary issues like limitation, valuation, or authority of Court before going into the merits of the case.
- The formulation of issues, should be initiated as early in the proceedings as possible. Once the parties are clear in their mind about the essential questions, they may shorten the proceedings.

THE EVIDENCE

- The judge must give the details of the evidence led before it. However, only the cogent relevant and admissible evidence must be narrated and that too very briefly giving the purpose for such evidence was led.
- The documents and exhibits admitted in evidence after they are proved on record must find their mention along with oral evidence by which they were proved.

THE CONTENTIONS

- A Judgment must briefly state the contentions of the counsels on the points of determination. As far as possible all the contentions raised by the counsels except those, which are frivolous, must be mentioned on the record.
- After the Judge has met with all the contentions he must record that no other point was pressed.

THE DISCUSSION OF EVIDENCE

- Before deciding an issue or recording finding on a charge, the relevant evidence must be discussed.
- Every Judge has his own style of discussing the evidence. It is, however, always better to discuss the evidence before giving an opinion to rely upon it.

THE REASONS

- “...The life of the law has not been logic: it has been experience. The felt necessities of the time the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”

Justice Oliver Wendell Holmes (Common Law, p.1)

THE FINDINGS

- The reasons are the soul of a judgment. The findings recorded by the Judge must be based on the reasons and reasoning to support or to explain such findings.
- There is no rigid rule, as to how a finding may be recorded. The Judge, however, should give his reasons. It is not sufficient to say that he believes the evidence or agrees with the argument.
- An elaborate argument does not always require elaborate reasons to accept or not to accept the point.
- The reasons even if they are brief must satisfy the logical mind.

THE LOGICAL REASONING

- The logical reasoning, however, must follow in reaching to a conclusion.
- A Judge is not free from partiality and bias. There may be a lurking or sub-conscious bias, which may not be known to the Judge himself.
- The bias may have arisen because any factor, which ordinarily affect the life of the human being.
- With experience a Judge may identify such bias and may win over it.
- The best way to overcome the judgment to be affected by such outside and unknown factors is to follow logical reasoning.

THE PROCESS TO ARRIVE AT A CONCLUSION

- The method of arriving at a conclusion is the most important part of judgment writing. The process by which the conclusion is arrived, and the statement in the judgment of that process, tests a judge of his ability, impartiality, and integrity.

THE PROCESSES TO ARRIVE AT A CONCLUSION

- (i) **Analogical process** is a form of inductive process. It uses common sense, science, philosophy and humanities, but it is only an auxiliary method. It is also known as a case-based method.
- (ii) **Inductive process**, means following some degree of certainty. The conclusion contains more information than provided in the premises.
- (iii) **Syllogistic or deductive process**, means following a deductive scheme of a formal argument consisting of a major and minor premise and a conclusion.
- (iv) **Inferential process**, relies mostly upon evidence to reach a conclusion. It follows one valid conclusion to the other, forming an unbroken chain.
- (v) **Intuitive process**, is a psychological process by which the conclusion is arrived at more by intuition rather than reasons.

In all these methods, in case what is being done is to arrive at a truth, the method is justified.

NEUTRALITY AND IMPARTIALITY

- There is a difference between neutrality and impartiality.
- The neutrality means the Judge is non-partisan and non-aligned.
- Impartiality requires a Judge to rise above all values and perspectives. It requires a judge or adjudicator to be fair and give equal treatment in the proceedings to all rivals or disputants.
- Impartiality also requires cool reason, uncontaminated thinking, without being influenced by personal commitments, biases and preconceptions.

RATIONALITY

- Rationality is a term related to the idea of reason. It has dual aspects. One aspect associates it with comprehension, intelligence or inference drawn in an orderly way such as syllogism. The other aspect associates it with explanation, understanding and justification.
- A logical argument is rational if it is logically valid.
- Rationality is however, a broader term than being logical. It also includes uncertain but sensible arguments based on probability, expectation, and personal experience whereas the logic deals with provable facts and demonstrably valid relations between them.

THE OPERATIVE PORTION

- A Judge must clearly write the operative portion of the judgment, which pronounces his conclusion over the issues brought before him.
- He must give clear and precise direction and the way the directions must be obeyed in conformity with the prayers made in the plaint.
- The operative portion of the order should as far as possible be self-executing and self-contained.

THE LANGUAGE

- Plain and simple language has always been preferred and appreciated in writing judgments. Brevity, simplicity, and clarity are the hallmarks of the good judgment.
- It is better to avoid invidious examples, jargons, unnecessary quotations, and lecture. A controlled judgment without any legalese, sharp criticism, pinching comments, and sarcasm invokes respect to the court.
- Short sentences and para phrasing, head notes and subheading, wherever it is necessary, is a recommended style of writing a judgment.
- A judge should keep a dictionary, preferably legal, a grammar book and a thesaurus of the language in which the judgment is written close to him, when writing judgment.

THE BREVITY

- Brevity is the virtue of a wise man and is familiarized by those, who have clarity in mind.
- No one likes to read long and verbose judgments.
- Brief opinions are comfortable in reading.

THE DESIGN AND STRUCTURE

- The judgment must be designed and structured so that readers find their way through it easily and quickly.
- There is no such thing as skillful writing. There is only good rewriting.
- It is necessary to revise the judgment. A revised judgment takes care of errors and reassures the Judge of the correctness of his opinion.

THE HUMILITY AND CHARACTER

- The language employed by a Judge speaks of his character.
- A humble Judge with human personality avoids using intemperate and unparliamentary language. It is always better to avoid using words 'I', 'can' and 'must' in the judgments.
- Judges should see that their pronouncements are judicial in nature and do not normally depart from sobriety, moderation, and reserve. They should refrain from sarcasm, and factiousness.

HIDING/ MASKING PARTY NAMES

- With the growing enlightenment of the society the Supreme Court has in *Bhupinder Sharma vs. State of HP (2003) 8 SCC 551* and *State of Karnataka vs. Puttaraja (2004) 1 SCC 475*, keeping in view the object of preventing social victimization or ostracism of the victim of a sexual offence found it appropriate that in the judgments, be it Supreme Court, High Court or District Courts the name of victim should not be indicated. It is sufficient to refer to her as victim.
- Similarly, the victims of sexual harassment, molestation, children in conflict with law or victims of offences under POSCO Act or in divorce and custody cases it is advisable to hide party names.
- The software 'Case Information System 2.1' used by the courts in India also provides for hiding party names in public display of cases and in open domain and to mention them as XXX for public access of the websites.

THE DISPARAGING REMARKS

- The primary purpose of pronouncing a verdict is to dispose of the matter in controversy between the parties before it.
- A judge, is not expected to drift away from pronouncing upon a controversy, and to sit in judgment over the conduct of the judicial or quasi-judicial authority, or the parties before him and indulge in criticism and commenting thereon unless such conduct comes, of necessity under review and the expression becomes part of reasoning to arrive at a conclusion necessary to decide the main controversy.

THE STYLE

- The style of judicial writing is constantly changing.
- The Latinism and legal clichés are the days of past.
- It may not be wise to use metaphors and idioms, or to give examples to prove a point.
- The judges avoid using words or expression showing gender, caste or creed bias, and their personal preferences.

TIMELINES IN PRONOUNCING JUDGMENTS

- In *Anil Rai vs. State of Bihar (2001) 7 SCC 318*, the Supreme Court took notice of the observations of the Arrears Committee constituted by Govt. of India on the recommendation of Chief Justices Conference. The Committee recommended that the reserved judgments should ordinarily be pronounced within a period of six weeks from the date of conclusion of the arguments.

ALTERATIONS/ ADDITIONS AFTER PRONOUNCEMENT

- The judgment once pronounced cannot be altered or added to, save as provided in law. Sections 114, in exceptional cases under Section 151 and under Section 152 and 153 A of C.P.C provides for the amendment of the judgments, decree or order. Such corrections are restricted to mistakes in spelling of words, arithmetic or ministerial and cannot be invoked to modify alter or add to the terms of the original order or decree to pass an effective judicial order after the judgment of the case. Order 20 Rule 3 C.P.C permits alterations and additions to a judgment so long as it is not signed.

THE EPILOGUE

- Diversity of opinion in judgment writing is the strength of the common law judicial tradition. It provides never ending stream of ideas and ways of communicating them.
- The experimental variety helps to develop the law. It is the privilege of each succeeding generation of judges to nurture the proud heritage and advance this precious legacy.

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ARTICLE 6

JUDGMENT WRITING

Justice Roslyn Atkinson



AFSA

The Arbitration Foundation of Southern Africa
NPC

Judgment Writing

Delivered by the Honourable Justice Roslyn Atkinson, Supreme Court of Queensland, to the AIJA Conference, Brisbane, 13 September 2002.

To any of us sitting in judgment on others, whether as judge or magistrate, judgment writing often feels like the bane of our existence but it is, of course, the ultimate reason for our existence. In *The Eumenides*, the Greek playwright Aeschylus wrote in 458 B.C. :

“Fair trial, fair judgment ...
Evidence which issued clear as day ...
... [Q]uench your anger; let not indignation reign
Pestilence on our soil, corroding every seed
‘Til the whole land is sterile desert...
...[C]alm this black and swelling wrath.”

It is said that this play is the oldest surviving courtroom drama in world literature.¹ Much of literature, as in life, deals with the tension between the desire for people to take justice into their own hands, exact revenge or engage in self-help, as opposed to the processes of the law which, importantly from our point of view, are determined by a fair trial and fair judgment.

A judgment therefore has a significant social and civic function. But what I am more concerned with today is the everyday task of judgment writing: something we do day in, day out.

Some judgments almost write themselves. They are purely mechanical and can be dealt with quickly. Others are more complex and require deeper thought. All of us are constantly striving to write better, clearer judgments. How do we do it?

The first matter to consider is the purpose of the judgment. To my mind there are four purposes for any judgment that is written:

- (1) to clarify your own thoughts;
- (2) to explain your decision to the parties;
- (3) to communicate the reasons for the decision to the public; and
- (4) to provide reasons for an appeal court to consider.

May I deal with these purposes in reverse order:

(1) Reasons for an appeal court to consider.

This is the least important reason for a judgment to be written but often is one that worries new judges and magistrates the most. Once you have been writing judgments for a while you come to welcome the clarification or expansion of the law by an appeal court or the identification of errors that you have made so that you don't repeat those errors. It

¹ R.E. Messick, “*The Origins and Development of Courts*” (2002) 85 *Judicature* 175 at 175.

takes an immense burden from a judicial officer to know that if you get it wrong it can be corrected on appeal. This is not to underestimate the very human failing we all have of being disappointed when a matter goes on appeal or worse, is overturned on appeal.

This is probably the source of the story I read about a lawyer who died and found herself in heaven. The lawyer was unhappy with the standard of the accommodation. She complained to Saint Peter who told her that her only recourse was to appeal to the Small Claims Court against the very modest accommodation she had been assigned. The lawyer immediately advised Saint Peter that she intended to appeal. Saint Peter referred her to one of his clerks who told the lawyer that she would be waiting at least three years before her appeal could be heard. The lawyer protested that a three year wait was unconscionable. These words fell on deaf ears. The lawyer was then approached by the devil who told her he'd be able to arrange an appeal to be heard in a few days if the lawyer was willing to change the venue to hell. When the lawyer asked why appeals could be heard so much sooner in hell she was told, "We have all the magistrates".

So an important reason for writing judgments, if the least important, is so that your findings of fact and legal reasoning are revealed for an appellate court to consider.

(2) *Information to the public.*

Courts, unlike politicians and almost every other organ of our society, do not commonly issue press releases quoting from the interesting and spicy parts of a judgment, putting the appropriate spin on it with a phone number to ring to get more background information on why the judge or magistrate chose to make the decision the way he or she did. We communicate to the public through the judgments that we write. In order to communicate, a judgment must be clear, precise, and say everything that needs to be said as to why a decision was reached and no more.

(3) *Communicating with the parties*

The parties and their lawyers, if they have them, need to know how and why a decision has been reached. It is particularly important that the losing party knows why he or she has lost the case. It is natural for someone who loses to feel disenchanted with the legal process so it is important that the reasons for judgment show that the losing party has been listened to, that the evidence has been understood, the submissions comprehended and a decision reached. This is particularly important in the case of an unrepresented litigant.

(4) *To clarify your own thoughts*

I have left this to the last because it seems to me to be the most important secret to good judgment writing. We have all read poor judgments. We can list their faults. They tend to be wordy, unclear, pompous and dull². Mark Twain, that great story teller, said that

² R. Wydick, *Plain English for Lawyers*, 4th ed (Durham, Carolina Academic Press 1998) at 3 quoted by Chief Justice Beverly McLachlin, "Legal Writing: Some Tools" (2001) 39 Alberta Law Review 695 at 698.

most cases were “chloroform in print”³. How do we avoid those outcomes? How do we become concise, clear, interesting and accessible?

In my view the secret is clarity. If your ideas are clear then you will be able to express them clearly.

Clarity of thinking and therefore expression has two stages: first structure and then style.

Structure

I have a simple acronym for the structure of judgments. It is an acronym that is easy to remember because it is something that all of us get in our role as decision makers and that is – FLAC. What is FLAC other than having to put up with the usual lawyer jokes which transform into judge jokes or magistrate jokes once you are elevated to that position. You know the sort I mean.

“What do you call an lawyer with an IQ of 40?” “Your Honour”.

“What do you call a lawyer with an IQ of 50”? “Your Worship”; or

A red faced magistrate convened court after a long lunch. The first case involved a man charged with drunk driving who claimed it simply wasn’t true. “I am as sober as you are, your Worship”, the man claimed.

The magistrate replied, “Clerk, enter a guilty plea. The defendant is sentenced to 30 days.”

So I’m not talking about that kind of FLAC, I’m talking about the structure of a judgment.

F for facts;
L for law;
A for application, and
C for conclusion.

That basic structure of a judgment, modified to suit a particular situation, will ensure that you order your own thoughts in reaching a just, and indeed one might say, often inevitable conclusion.

F for facts, of course, refers to the resolution of facts in issue in the case. In a civil case the facts in issue are determined by the pleadings. The pleadings will reveal what facts are not in dispute and what facts have to be determined. It is important for the decision maker to resolve each of the facts in issue.

At this point the judge or magistrate is telling the story of the case. As Lord Denning effectively showed in many of his judgments, the recitation of the facts which are decided need not be dull. It is the facts that have brought the parties to court, the facts they have been unable to resolve for themselves. What makes our work so fascinating is the variety

³ M. Twain, *Roughing It*, (1901) at 132 quoted by J.D. Gordon, “*How not to Succeed in Law School*” (1991) 100 Yale Law Journal 1679 at 1688.

of facts that are brought to us to resolve, the working and private lives of citizens into which we have a brief but deep insight. This makes our work interesting and important. There is no reason why we can't communicate our decisions on the facts in an interesting way.

To illustrate my point, these are the opening paragraphs of the judgment of Lord Denning in *Beswick v Beswick* [1966] 1Ch 538, a case which concerned the enforceability by third parties of contracts entered into for their benefit:⁴

“ LORD DENNING M.R. Old Peter Beswick was a coal merchant in Eccles, Lancashire. He had no business premises. All he had was a lorry, scales and weights. He used to take the lorry to the yard of the National Coal Board, where he bagged coal and took it round to his customers in the neighbourhood. His nephew, John Joseph Beswick, helped him in the business.

In March, 1962, old Peter Beswick and his wife were both over 70. He had had his leg amputated and was not in good health. The nephew was anxious to get hold of the business before the old man died. So they went to a solicitor, Mr. Ashcroft, who drew up an agreement for them. The business was to be transferred to the nephew: old Peter Beswick was to be employed in it as a consultant for the rest of his life at £6 10s. a week. After his death the nephew was to pay to his widow an annuity of £5 per week, which was to come out of the business.”

In contrast, the equally eminent, but perhaps somewhat less interesting, Lord Justice Salmon said:⁵

“ Throughout this judgment I will, for the sake of clarity, refer to A, B, and C. A is the late Mr. Peter Beswick and also the plaintiff standing in his shoes in her capacity as administratrix. B is the defendant and C is the plaintiff in her personal capacity.”

The second aspect of FLAC is the law. It is important to the resolution of any legal dispute that we set out the relevant statute and case law. We set it out because in clarifying for ourselves the right decision to come to we have to know what the law is and to be able to state it clearly and persuasively. In this part of the judgment it is important to deal with each of the contentions put forward by the parties or their representatives.

The third task is to apply the law to the facts. The parties and the public will accept the decision much more willingly if they can see that the decision is the result of the objective application of law to the facts that have been found.

This leads, of course, to the conclusion. The conclusion should be the inevitable result of the application of the law to the facts.

⁴ At 549.

⁵ At 563.

When considering the facts and the law and the application of the facts to the law it is important to clarify in your own mind exactly what it is that you have to decide. This will save you a lot of time and energy and probably over a life time of magistrates, many forests.

Within this basic structure it is useful, before you deliver the judgment to write down each of the points in the judgment in summary form so that you can structure the judgment in a clear and logical way. This is so whether the judgment is going to be given orally, immediately or soon after the hearing of the case, or in writing after being reserved.

Style

As well as the structure that I have discussed there are a number of basic rules of good writing which is as much an element of the skill of judgment writing as the force of your legal reasoning. I use a simple book on style by Strunk and White called “The Elements of Style”.⁶ It informs you as to the correct rules of grammar, syntax and punctuation, when you are in any doubt. It also sets out elementary principles of composition, matters of form, words and expression, expressions commonly misused and an approach to style. Here is a list of them in no particular order.

1. *Avoid the use of clichés.* I always think a good way to remember this one is to say to yourself to bite the bullet and avoid trite clichés like the plague⁷.
2. *Be precise and to the point.* Perhaps you do not have to be as concise as Judge Murdoch sitting in the US Tax Court. It is reputed that a taxpayer testified, “As God is my judge, I do not owe this tax”. Judge Murdoch replied, “He is not, I am; you do”⁸.

Another example comes from *Denny v Radar Industries*.⁹ The judgment in the case contains very few words beyond the following:

“The appellant has attempted to distinguish the factual situation in this case from that in [a prior case]. He didn’t. We couldn’t. Affirmed.”

3. *Use the active voice rather than the passive.* The active is usually more direct and vigorous than the passive: “I shall always remember my first day as a Magistrate”. This is much better than “My first day as a Magistrate will always be remembered by me”. The latter sentence is less direct, less bold and less concise. If the writer tries to make it more concise by omitting “by me”, “My first day as a Magistrate will always be remembered”, it becomes indefinite: is it the writer or some undisclosed person or the world at large who will always remember your first day as a Magistrate? This rule, like all others, is not an

⁶ W. Strunk and E.B. White, *The Elements of Style*, 4th Ed (Sydney, Allyn and Bacon, 2000)

⁷ J.D. Gordon (supra) at 1691.

⁸ J.D. Gordon (supra) at 1691, footnote 16.

⁹ 184 NW 2d 289 (Mich. Ct. App. 1971) quoted by J.D. Gordon (supra) at 1691.

invariable rule of practice but whenever you use the passive you should consider the use of the active voice instead.

4. *Be particular rather than vague.* In his *Philosophy of Style*, Herbert Spencer gives two sentences to illustrate how the vague and general can be turned into the vivid and particular:¹⁰

“In proportion as the manners, customs and amusements of a nation are cruel and barbarous, the regulations of its penal code will be severe.”

“As men delight in battles, bull fights, and combats of gladiators, so will they punish by hanging, burning, and the rack.”

5. *Try not to use language that excludes.* Like it or not, and I assume there is no-one here who would own to regretting it, one half of the population is female. This realisation has an inevitable effect on the language we use. The objective test, for example, is no longer likely to be that of the reasonable man on the Clapham omnibus or even of the woman driving it but of the reasonable person. Judges and magistrates, legal practitioners, clients and witnesses are all entitled to the basic etiquette of not being addressed as if they were all of the one sex and that sex were male. Unless it be relevant, it is always preferable to use terms which apply equally to men and women rather than using terms that distinguish between them.

6. *Use simple and direct prose rather than abstruse wording.* We are all familiar with the scenes from “Yes Minister” where Sir Humphrey puts a proposition to the minister, Jim Hacker, which, while technically correct, is incomprehensible. For example, in one episode Sir Humphrey said:

“If there had been investigations, which there haven’t, or not necessarily, or I’m not at liberty to say whether there have, there would have been a project team, which had it existed, on which I cannot comment, would not have been disbanded, if it had existed, and the members returned to their original departments, if indeed there had been any such members.”

In another episode a frustrated Jim Hacker says to Sir Humphrey:

“When you give your evidence to the think tank, are you going to support my view that the civil service is over manned and feather bedded, or not? Yes or no? Straight answer!”

Sir Humphrey replies:

“Well minister, if you ask me for a straight answer, then I shall say that, as far as we can see, looking at it by and large, taking one thing with another in terms of the average of departments, then in the final analysis it is probably true to say, that at the end of the day, in general terms, you would probably find that, not to put too

¹⁰ Quoted by W. Strunk and E.B. White (supra) at 22.

fine a point on it, there probably wasn't very much in it one way or the other as far as one can see, at this stage."

In other words, "No".

In the end Jim Hacker is promoted to Prime Minister and becomes more adept at understanding what Sir Humphrey means:

"Prime Minister, I must strongly protest in the strongest possible terms, my profound opposition to a newly instituted practice which imposes severe and intolerable restrictions upon the ingress and egress of senior members of the hierarchy and which will in all probability, should the current deplorable innovation be perpetuated, precipitate a constriction of the channels of communication and culminate in a condition of organisational atrophy and administrative paralysis which will render effectively impossible a coherent and co-ordinated discharge of the function of government within her Majesty's United Kingdom of Great Britain and Northern Ireland".

Hacker replies, or rather translates:

"You mean you've lost your key?"

7. *Avoid obvious errors.* Judgments are usually expressed in formal written rather than colloquial oral language.¹¹ It is as well to avoid obvious grammatical errors than will make others think less of your work. A number of frequent errors can be seen in the following rather amusing list:¹²

1. Subjects and verb always has to agree.
2. Make each pronoun agree with their antecedent.
3. Just between you and I, case is important too.
4. Being bad grammar, the writer will not use dangling participles.
5. Join clauses good, like a conjunction should.
6. Don't write run-on sentences they are hard to read, you should punctuate.
7. Don't use no double negatives. Not never.
8. Mixed metaphors are a pain in the neck and ought to be thrown out the window.
9. A truly good writer is always especially careful to practically eliminate the too frequent use of many adverbs.
10. In my opinion, I think that an author when she is writing something should not get accustomed to the habit of making use of too many redundant unnecessary words that she does not actually really need

¹¹ Huddleston and Pulham, *The Cambridge Grammar of the English Language* 2002, pp 6-13.

¹² Robert Leflar "28 *Matters that Writers Ought to be Appraised Of*" in Robert Leflar, ed., *Appellate Judicial Opinions* (St Paul, West Publishing, 1974) at 194-195 quoted by Chief Justice McLachlin (supra) at 699.

in order to put her message across to the reader of what she has written.

11. About them sentence fragments. Sometimes all right.
12. Try to not ever split infinitives.
13. Its important to use your apostrophe's correctly.
14. Do not use a foreign term when there is an adequate English *quid pro quo*.

8. *Try to be interesting.* Clear thinking is the key to clear writing. A clearly expressed judgment demonstrates the interest of the subject matter and the exposition of legal reasoning. As for being entertaining, not all of us can aspire to the wit and directness of by now famous Samuel B. Kent, United States District Judge of the Southern District of Texas in Galveston. His many decisions can be found on the internet. In *Bradshaw v Phillips*,¹³ his Honour first sets out the facts. It was an ordinary personal injury case where the plaintiff was injured in the course of his employment while working as a seaman. The defendant applied for summary judgment because of a statute of limitation. Having set out the facts his Honour went on to say:¹⁴

“Before proceeding further, the court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, and which leads the court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact – complete with hats, handshakes and cryptic words – to draft their pleadings entirely in crayon on the backsides of gravy stained paper placemats, in the hope that the court would be so charmed by their childlike efforts that their utter dearth of legal authorities and their briefing would go unnoticed. Whatever actually occurred, the court is now faced with the daunting task of deciphering their submissions.

With big chief tablet readied, thick black pencil in hand, and a devil-may-care laugh in the face of death, life on the razor's edge sense of exhilaration, the court begins.”

The court then went on to set out the law in relation to summary judgment, what the arguments of the parties were and then the application of the law to the facts. Finally the court concluded that the statute of limitation applied and summary judgment was granted. His Honour concluded:¹⁵

“After this remarkably long walk on a short legal pier, having received no useful guidance whatever from either party, the court has endeavoured, primarily based on its affection for both counsel, but also out of its own sense of morbid curiosity, to resolve what it

¹³ 147 F. Supp. 2d 668 (S.D. Tex. 2001).

¹⁴ At 670.

¹⁵ At 672.

perceived to be the legal issue presented. Despite the waste of perfectly good crayons seen in both parties' briefing (and the inexplicable odour of wet dog emanating from such) the court believes it has satisfactorily resolved this matter. Defendant's motion for summary judgment is granted."

The judge went on however, to sound a note of caution. There were two defendants in this matter so the plaintiff retained a cause of action against the remaining defendant, Unity Marine Corporation. The plaintiff's lawyer was cautioned against treating this defendant too lightly, as his Honour said:¹⁶

"[I]t is well known around these parts that Unity Marine's lawyer is equally likable and has been writing crisply in ink since the second grade. Some old timers even spin yarns of an ability to type. The court cannot speak to the veracity of such loose talk, but out of caution, the court suggests the plaintiff's lovable counsel had best upgrade to a nice, shiny number 2 pencil or at least sharpen what's left of the stubs of his crayons for what remains of this heart stopping, spine tingling action.

In either case, the court cautions plaintiff's counsel not to run with a sharpened writing utensil in his hand – he could put his eye out."

Format of judgments

It is useful for all Australian decision-makers, whether judges, magistrates or tribunal members, to follow the Guide to the Uniform Production of Judgments which the AIJA has produced and which is now in its second edition. Its essential points include:

1. That all judgments be published with a cover sheet attached to the front of them which, as relevant to the individual circumstances, adopts the sequence and general format set out in the Guide. I have set out the sample format of a judgment coversheet in Annexure A to this paper.

Of particular importance are the catchwords which give a summary classification of the matters dealt with in a case. Catchwords should proceed from law to facts and from the general to the particular. They should be as short and precise as possible, show the questions involved in the decision in the case and, where important to that decision, the actual determination. The key titles and sub-titles used within them should follow the scheme employed by the Australian Digest.

2. That all judgments should follow a standard format.
3. That all judgments should follow the conventions set out in the general style guide which is Annexure B to the AIJA Guide.

Conclusion

¹⁶ At 672.

Most of us conscientiously try to write fair, clear, and where possible, interesting judgments. They are, after all, as Aeschylus shows in *The Eumenides*, a means of achieving an objective that is universal: the just resolution of conflict¹⁷ which is the core business of each of our courts.

¹⁷ R.E. Messick (*supra*) at 181.

ARTICLE 7

BELOVED STORYTELLERS (PART ONE): DENNING THE MASTER STORYTELLER



AFSA

The Arbitration Foundation of Southern Africa
NPC

Beloved Storytellers (Part One): Denning the Master Storyteller



Alfred Thompson Denning--England's Lord Denning to the legal world—died in the final year of the 20th Century at the age of 100. Before retiring in 1982, he had served on the bench for 38 years, the last 20 as Master of the Rolls, the head of England's Court of Appeal. At a memorial service held in Westminster Abbey, the Lord Chief Justice of England hailed Denning as "the best-known and the best-loved judge in the whole of our history."

Lord Denning was most renowned for his clarity of expression. His judicial opinions (the English call them "judgments") were regarded as models of lucidity. He wrote in short, crisp sentences intended to make the law accessible to lay people. A biographer referred to his writing style as "pungent English."

Many law students encounter their first Denning opinion in Contracts in a case involving Anglia Television's suit against the American actor Robert Reed for backing out of an agreement to star in a made-for-television movie. Lord Denning sets the stage in the opening sentences of his opinion:

Anglia Television Ltd. were minded in 1968 to make a film of a play for television entitled "The Man in the Wood." It portrayed an American married to an English woman. The American has an adventure in an English wood. The film was to last for 90 minutes. Anglia Television made many arrangements in advance. They arranged for a place where the play was to be filmed. They employed a director, a designer and a stage manager, and so forth.

Due to Denning's storytelling style of writing, the reader immediately understands the setting for the lawsuit. Law students can see the issue coming: May Reed be held liable for expenses that Anglia incurred before he had agreed to be the leading man?

A Canadian law professor, [Cameron Harvey](#), read every one of Denning's judgments in preparing an article on his distinctive writing style. Here are the opening lines of some of Professor Harvey's favorites. See how quickly the reader is drawn into the story:

To some this may appear to be a small matter, but to Mr. Harry Hook, it is very important. He is a street trader in the Barnsley market. He has been trading there for some six years without any complaint being made against him; but, nevertheless, he has now been banned from trading in the market for life. All because of a trifling incident.

Broadchalke is one of the most pleasing villages in England. Old Herbert Bundy, the defendant, was a farmer there. His home was a Yew Tree Farm. It went back for 300 years. His family had been there for generations. It was his only asset. But he did a very foolish thing. He mortgaged it to the bank. Up to the very hilt.

Mr. Deeble has a milk round. He sells milk to people at the doors of their houses. He runs his business from a dairy building where he keeps his equipment, refrigerator, spare milk bottles, and so forth, and a stable where he keeps his horse and float. His round is seven streets adjoining the premises. He does not actually have a shop as ordinarily understood. His lease of these premises is coming to an end, and he wants to stay on there. This depends on whether the premises come within the definition of a shop in the Leasehold Property Act.

In his autobiography, Lord Denning described his approach to judgment writing as follows:

I start my judgment, as it were, with a prologue--as the chorus does in one of Shakespeare's plays--to introduce the story.... I draw the characters as they truly are--using their real names.... I avoid long sentences like the plague, because they lead to obscurity. It is no good if the [reader] cannot follow them.... I refer sometimes to previous authorities--I have to do so--because I know that people are prone not to accept my views unless they have support in the books. But never at much length. Only a sentence or two. I avoid all reference to pleadings and orders - They are mere lawyer's stuff. They are unintelligible to everyone else. I finish with a conclusion--an epilogue--again as the chorus does in Shakespeare. In it I gather the threads together and give the result.

ARTICLE 8

SOUTH AFRICAN CONSTITUTIONAL LAW STYLE GUIDE FOR AUTHORS



AFSA

The Arbitration Foundation of Southern Africa
NPC

STYLE GUIDE FOR AUTHORS

The style adopted for this book is based on other publications by Juta and on the house style applicable to judgments of the Constitutional Court.

Page layout, font and type

Font: Sabon Next LT 12pt

Contributors should use the SACL Chapter Template and apply the prescribed styles for all headings, paragraph text, quotations and footnote text.

All headings and subheadings must be numbered. The numbering adopts the chapter number, followed by a decimal point and the heading or subheading number. For example, in chapter 7, each heading in the chapter will be numbered as follows: [7.1], followed by [7.2], [7.3], etc, ditto subheadings [7.3.1], [7.3.2], etc.¹ This will enable ease of reference to the work.

Authors' degrees and designations will not appear in each chapter but will be included in short biographies at the front of the book.

Lists and bullet points

Please use 'first' (not firstly); thereafter 'secondly', 'thirdly'.

Bullet points may be used for any list, whether it consists of words, phrases or full sentences. Full sentences should start with a cap and end with a full stop. Where it seems appropriate, however, words and phrases may begin with lowercase and end with a semi-colon. In that case, add a full stop right at the end of the list.

Italics may be used with bullet points where appropriate, eg:

¹ Please refer to the model chapter for any further numbering conventions.

- *Constitutional matters.* Such matters are . . .
- *Non-constitutional matters.* This category would include . . .

Spelling and the use of capital letters

Use the s-form of English spelling (emphasise, recognise).

Capital letters should be used for all proper names (Constitutional Court, Supreme Court of Appeal, Judicial Service Commission), for Parliament and the Constitution (in the sense of a particular document, otherwise use l/c) and for titles such as Chief Justice, President, Judge President and Premier. Abbreviations should not be used.

When in doubt, use lowercase – eg references to the commission, the committee, the municipality, a province, etc.

Courts

When referring to courts, other than the Constitutional Court, use the name that is provided by section 6(1) of the Superior Courts Act 10 of 2013.

Names of the High Court Divisions as of 22 February 2023:

- High Court of South Africa, Eastern Cape Division, Makhanda
- High Court of South Africa, Eastern Cape Local Division, Bhisho
- High Court of South Africa, Eastern Cape Local Division, Mthatha
- High Court of South Africa, Eastern Cape Local Division, Gqeberha
- High Court of South Africa, Free State Division, Bloemfontein
- High Court of South Africa, Gauteng Division, Pretoria
- High Court of South Africa, Gauteng Local Division, Johannesburg
- High Court of South Africa, Mpumalanga Division, Mbombela
- High Court of South Africa, Mpumalanga Local Division, Middleburg
- High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg
- High Court of South Africa, KwaZulu-Natal Local Division, Durban
- High Court of South Africa, Limpopo Division, Polokwane
- High Court of South Africa, Limpopo Local Division, Lephalale
- High Court of South Africa, Limpopo Local Division, Thohoyandou
- High Court of South Africa, Northern Cape Division, Kimberley
- High Court of South Africa, North West Division, Mahikeng
- High Court of South Africa, Western Cape Division, Cape Town

However, it might be necessary, for historical correctness and contextual purposes, to refer to a court by one of its previous names, such as “Western Cape High Court, Cape Town” or “KwaZulu-Natal High Court, Pietermaritzburg”. When this occurs it might be necessary to use a footnote the name stating “Now known as the XYZ Court” for purposes of clarity. This approach does not apply to the Appellate Division or to orders. We still refer to the “Appellate Division” for old cases (though of course since 1997 it has been the Supreme Court of Appeal), and the order must always refer to the name of the court at the time the order is handed down.

The names of courts are never abbreviated. You must always write “the Supreme Court of Appeal”, “the Competition Appeal Court”, “the High Court”, and never “SCA”, “CAC” or “HC”.

When a particular court is being referred to, its name must be capitalised, e.g. “The Labour Court upheld the review. The Court held that he had failed to establish that he was an ‘employee’.”

Where a court is being referred to by a description rather than by its name, it should not be capitalised, e.g. “the court of first instance”, “the trial court”. And when “court” is being used as a common noun, it should not be capitalised, e.g. “The courts in this country do not allow frivolous litigation.”

Authors should no longer refer to the “full bench” of the High Court² but may refer to the Full Court, in which case it should be capitalised.

The apostrophe is always after the “s” in Magistrates’ Court. When referring to magistrates’ courts, the town/city name should appear first, e.g. Bellville Magistrates’ Court and not Magistrates’ Court, Bellville.

Numbers, dates, percentages, etc

Use words for numbers between one and ten and for approximations (about two hundred years, a thousand ways).

Use figures for numbers higher than ten. The same applies to numbers in tables and graphs, ages and percentages (5 years old, 30%) and measurements and quantities and amounts (6 cm, 40 km, R5 million).

A space (not a comma) is used in large numbers, as for instance in 12 345. A point (not a comma) is used for decimal places.

² A full bench consists of two judges.

A sentence should never begin with figures, ie either recast the sentence or put the number into words.

Dates and centuries: on 4 July 1978; in the 1980s; in the twentieth century.

Quotations

All quotations should be reproduced exactly, including all original italics and original punctuation, even if the original forms do not comply with the house style of SACL.

Short quotations should appear in single quotation marks. Use double ones for a quote within a quote. (Avoid a quote within a quote within a quote as far as possible, but if it is unavoidable use single quotation marks again.)

Short quotations appear as part of the text. The full stop should be *outside* the closing quotation mark if the quote is less than a full sentence, and *inside* if it is a full sentence.

Long quotations, ie quotations of more than 50 words, which is roughly about one sentence or more than three lines, should be isolated from the text by being indented from the margin (1 cm) and should be in a smaller font (11 pt) than the rest of the text. No quotation marks are used, but single quotation marks would be used for a quote within a long quote; and double quotation marks for quote within a quote within a long quote.

It is permissible to isolate a shorter quotation for emphasis, in which case it is treated as a long quotation.

Whenever a quotation (short or long) is introduced with a colon, the quotation itself should begin with a capital letter. Where no colon is used, the quotation should start with lower case. Use square brackets to indicate an alteration where necessary.

Ellipses should not be used at the start of a quotation (short or long) but must be used in the middle and at the end of a quotation to indicate missing words. Use three dots for any missing word/s and a fourth dot to show any missing full stop. (The placement of the dots indicates where the full stop appeared, as in . . .)

Square brackets are used for all editorial changes and interpolations, eg changing lower case to a capital after a colon: '[T]he most essential qualities are judicial independence and impartiality.' Authors must indicate emphasis in square brackets (eg '[own emphasis]') at the end of a sentence where they have italicised text for emphasis.

Footnotes and cross-references

Footnotes and not endnotes should be used. Footnotes should generally follow the punctuation ie be after parentheses, commas and full stops. The exception is where the footnote relates to a specific word or phrase in the middle of a sentence or part of a sentence. They should be in 10pt font and numbered sequentially from 1 at the start of each chapter.

Leave a single space between the footnote number and the text of the footnote. End every footnote with a full stop.

Abbreviations such as eg, ff, cf, ibid and loc cit save space and may be used freely in footnotes – even at the start of the sentence as far as the last three are concerned (Cf, Ibid, Loc cit). No italics or punctuation for any of these, please (eg not e.g.).

For cases and academic authorities, the full citation must be used in every new instance, as cases will be hyperlinked in the electronic version and because this avoids the need to replace pages of the loose-leaf version simply to correct cross-references.

For an immediately consecutive reference to the same item, use ibid (no italics) with or without a pinpoint reference, as appropriate: Ibid at 45. or: Ibid. or: Ibid at para 34. However, if an authority is cited further below the initial citation and not consecutively, the full citation/reference must be used again.

REFERENCING

The Constitution

Always say “the Constitution”, without any need to give its full title or define this shorter form.

When referring to a particular section, say “s # of the Constitution” rather than “Constitution s #”. If the section is in the Bill of Rights, you can say “s # of the Bill of Rights”, with no need to define that term.

The interim Constitution, similarly, is always called simply “the interim Constitution”.

Cases

All case names should appear in italics and the citation in roman. The case name and citation should be given as it appears in the relevant law report in the fn (an abbreviated citation can be provided in text), save that you should remove any additional parties described as ‘another’ or ‘others’, ie delete ‘*and Others*’ or ‘*and Another*’ from case citations.

Give two citations for cases. The first citation should be the SALR citation (if reported) and the second the SAFLII citation. For the first citation, our preferred law reports are the SALR and any other reports from the Juta stable, so the Juta citation should be given where possible. Otherwise cite law reports such as the BCLR, All SA and so on as the second citation.

For unreported cases the neutral citation should be used whenever possible. For older cases where a neutral citation is not available, use one of the following:

Jones v Dlamini (NPD) unreported case 98/05 (3 August 2002).

In addition, the placement of the word ‘unreported’ may be varied in accordance with the structure of the sentence, eg ‘see the unreported case of *Jones v Dlamini* (NPD) case no 98/05 of 3 August 2006’.

NB: The first reference to a case in a footnote should be a full one, ie include the *case name* as well as the details of the law report *even if you have also given the case name in your text*. Thereafter give the case name with ‘note x above’. This method makes it easier for readers to follow one’s footnotes:

18 *Van Rooyen v The State* 2002 (5) SA 246 (CC).

... and later on:

25 *Van Rooyen v The State* (note 18 above) para 84.

Where a case has a long or elaborate name and you will be referring to it more than once, it is worth giving a shortened form in brackets immediately after the first reference: (hereafter *Pharmaceutical Manufacturers Association*). Thereafter use that shorter name with ‘note x above’. Please stick to the shortened form first given, ie do not start calling the case *Pharmaceutical Manufacturers* or *PMA*.

If a case is referred to as decided by multiple courts and the definition includes the name of the court then the full defined name should be italicized eg *Mazibuko High Court*. However, it is preferable to use “the High Court/Supreme Court of Appeal/Constitutional Court etc. in *Mazibuko* rather than such definitions.

When giving pinpoint references in footnotes, use paragraphs if possible: *Fedsure* (note 4 above) at para 45. ‘at’ is used with paragraph references. For several paragraphs, say ‘at paras 45-6’ or ‘at paras 45, 47 and 49-50’.

Where a judgment is not divided into numbered paragraphs, give page references with marginal letters where possible, eg *S v Meer* (note 5 above) at 741F-G and 742A.

Referring to authors of works

Authors’ names must be given as they appear on the title page of the book or on the title page of the chapter / article. (The contents page is often an unreliable guide.) For instance, John D Smith must appear as John D Smith and not as J D Smith or J Smith.

In footnotes the co-authors of any work (book, article, chapter, whatever) take an ampersand: Pillay & Smith. We cite up to three authors: Dube, Pillay & Smith. Thereafter it would be Dube et al. When referring to authors in an ordinary sentence in the text, the ampersand is not used: ‘Dube and Pillay believe that . . .’.

Books

Authors’ or editors’ names come first, then the title of the book, then the edition (only if not the first edition), then the year in brackets, then the pinpoint reference. There is no punctuation except for the full stop at the end.

Book titles take title case and italics. No ‘at’ is needed for the pinpoint reference:

3 John D Smith & Sipho Dlamini (eds) *Judges and Judging* 5 ed (2009; Juta) 115.

or

4 John D Smith & Sipho Dlamini (eds) *Judges and Judging* (5 ed, Juta) (2009) 115.

Journal articles and chapters in collections

The author comes first, then the title of the article (or chapter) within single quotation marks, then the details of the journal.

Note that the date in brackets precedes the volume number: (2010) 127 *South African Law Journal* 706. But where a periodical carries no volume number, the year is not placed in brackets: 2006 *Acta Juridica* 43.

The titles of articles and chapters appear in sentence case and roman, while the title of the larger work is in italics and title case. 'At' is used in the pinpoint reference only where necessary, as shown here:

4 Jane Dube 'A code of conduct for judges?' (2010) 127 *South African Law Journal* 706 at 716-17.

5 Siphso Dlamini 'Judicial independence' in John Smith (ed) *Judiciaries Today* (2011) 58 at 60-1.

Note that all journal names should be written out in full.

Miscellaneous examples

Contributions to LAWSA and the like:

Jane Dube 'The courts' in W A Joubert (founding ed) *The Law of South Africa* vol 14 First Reissue (1999) para 164.

Theses:

Jane Dube *Non-Judicial Activities in South Africa* (unpublished PhD thesis, Rhodes University, 2006) 334.

Newspapers:

Jane Dube 'Judicial Service Commission in hot water' *The Star* 24 May 2005 at 2.

White papers, etc:

The *White Paper on the Remuneration of Judges* (GN 3007 in GG 19606 of 17 December 1998).

The 'National Policy on the Remuneration of Judicial Officers' (published in GG 20372 of 10 May 1999).

Law Commission papers:

South African Law Commission *Report on Domestic Partnerships* (Project 118) (2006).

Legislation

At the first mention of a statute in the text of your chapter, give the short title, number and year without any commas or other punctuation: eg the Judicial Service Commission Act 9 of 1994. Thereafter variants may be used: the Judicial Service Commission Act, the Act, the JSC Act and so on. Please avoid putting the number and year into a footnote where it would just as easily go into the text.

Both in text and footnotes, abbreviations should be used for sections, subsections, paragraphs and subparagraphs (though never at the start of a sentence). Thus chapter = chap, section = s, sections = ss, paragraph = para, article = art. (Plurals: secs, paras, arts.)

Use italics as shown to avoid confusion: s 45(2)(b)(i)(aa).

Schedules: use caps for the proper name, eg Schedule 6, but not otherwise.

Delegated legislation

A proclamation is cited as follows: Proc R46 GG 24567 of 31 January 2003.

Regulations are cited by referring to the notice in which they appear, eg the Road Accident Fund regulations in GN 232 GG 24568 of 1 February 2003. A regulation is abbreviated to reg, as in reg 5(1) (but not at the start of a sentence).

Some pieces of delegated legislation should be abbreviated, others

not: Government Notice = GN General Notice = General Notice

Proclamation = Proc

Provincial Notice = Provincial Notice regulation = reg

If you are unsure whether you are dealing with a proclamation, a government notice or a general notice, consult the list of contents on the back page of the *Government Gazette* in question.

International Precedent

Use the citation used in the country of origin and do not abbreviate.

Internet references

Conventional sources (books and journals) should be cited in preference to online versions.

Online sources such as news services, websites, online journals and databases are referred to as shown below. You should always indicate the date on which the source was last accessed, but the placement of the date and the electronic reference may vary as shown.

Jane Dube 'JSC inquiry starts all over again' *Legal News Online* 5 April 2011, last accessed on 6 April 2011 from <www.legalnewsonline.co.za>.

'The courts in South Africa', last accessed from <www.justice.gov.za> on 4 March 2011.

Jane Dube 'A judicial code of conduct?' (2010) 2 *Electronic Journal of Comparative Law* 20 at 25-6, last accessed on 4 April 2011 from www.ejcl.org/179#/dube.pdf.

Jane Dube 'Report on gender transformation in the South African judiciary' *Social Studies Network Seminar Series* 4, last accessed from <www.ssn.org/semser4.html> on 23 March 2011.

Miscellaneous points of style

Prefer plain language and sentence construction. Avoid long sentence and unnecessary 'legalese'.

Acronyms should be announced in brackets after the first use of the full term. However, there is no need for such announcements when using acronyms that are very well known. For instance, having used 'United States' once, it is acceptable to start calling it 'the US' without announcing this in advance.

The abbreviation for a book chapter is ch, and chap for a chapter in legislation.

Please avoid starting a sentence with a figure, an acronym or any other kind of abbreviation. However, in footnotes certain abbreviations (cf, ibid and loc cit) are used even at the start of the sentence.

Where an entire sentence appears in parentheses, the full stop is placed *inside* the second bracket. (For example, an entire sentence is bracketed here.)

When giving starting and ending page numbers, chop off the unnecessary ones: thus 34- 5 and not 34-35. Care must be taken with teens: it is 514-15 and not 5145. However, with ones it is correct to say 20-1, 400-2 and so on.

When referring to judges in the context of their judgments or in the courtroom, use Ngcobo CJ, Nugent JA, etc and avoid ‘Judge Jones’, ‘Justice Nkabinde’ and the like. Outside the courtroom, for instance when referring to extra-curial speeches, however, judges of the High Court and Supreme Court of Appeal should be referred to as ‘Judge Jones’ or ‘Judge Nugent’; and judges of the Constitutional Court as ‘Justice Nkabinde’ or ‘Chief Justice Ngcobo’.

In all instances, avoid the use of courtroom jargon such as the making of submissions, ‘his lordship’, ‘the learned judge’, ‘with respect’ and so on.

The abbreviation Ms should be used rather than Mrs or Miss and Mx is a permissible replacement for Ms and Mr.

* * *

ARTICLE 9

SALJ HOUSE STYLE: EDITORS' GUIDE



AFSA

The Arbitration Foundation of Southern Africa
NPC

SALJ HOUSE STYLE: EDITORS' GUIDE

INTRODUCTION

The editors welcome the submission of manuscripts in English for consideration for publication, and provided that the topic under discussion has some relevance to South African law or would be of interest to the (largely South African) academic and professional readership of the *Journal*.

The *SALJ* accepts manuscripts of three types. These are:

1. Articles. Articles are the feature pieces of each part of the journal. These provide a detailed, if not seminal, analysis of the topic under discussion. Articles should not exceed 12 000 words (this number excludes references). Special permission will have to be sought from the editors to consider pieces longer than this, and this permission will not lightly be granted. All references in articles must be footnoted. Each article must be accompanied by an abstract of not more than 200 words. The abstract should summarise rather than introduce the argument of the article, and should contain appropriate key words.
2. Notes. Notes are shorter, more focused pieces. Traditionally, many notes are case notes which analyse a particular recent judgment (or judgments) of the courts. However, notes can discuss any specific issue of legal interest, and are not constrained to case notes. Notes should be between 3000 and 8000 words long. Notes longer than this will, regrettably, not be accepted. Notes do not require an abstract. All references in notes are to be placed in-text, and in brackets.
3. Book reviews. Book reviews are critical discussions of scholarly books on any topic related to law. These should be between 2000 and 5000 words long. References are in-text, in brackets.

A manuscript will be considered for publication

- only on the assurance that it has not in whole or in part or in substance been published or offered for publication elsewhere;
- on the understanding that it may be submitted in confidence to at least two expert referees for evaluation; and
- on the understanding that the editors reserve the right to make what changes they consider desirable
 - (a) to bring the manuscript into the house style of the *South African Law Journal*;
 - (b) to eliminate errors of typing, grammar, syntax, punctuation, spelling, idiom and the like;
 - (c) to eliminate ambiguity, illogicality, tautology, circumlocution and redundancy;
 - (d) to produce accuracy and coherence;
 - (e) to improve the mode of expression and style of writing; and
 - (f) to avoid possible criminal or civil liability.

Authors are required to read their manuscripts very carefully to avoid the need for the editors to exercise these rights extensively. In particular, authors are asked to acquaint themselves with the house style of the *SALJ*, and to check their manuscripts carefully against the guidelines that follow.

NOTE: Regrettably, manuscripts that do not accord with the house style of the *SALJ* will be returned to authors immediately, with a request that the manuscript be placed, to the best of the authors' ability, in house style. The quality of the piece will normally not be assessed before this has occurred. Some examples of what an article or note manuscript should look like are given at the end of this document, to give authors a basic starting point (see pages 12 and 13 below).

HOUSE STYLE

General

What follows in this document are the stylistic requirements that most commonly require the attention of *SALJ* authors and editors. This document is by definition a general guide; it is not possible to cover every possible referencing and stylistic quirk. Where this document does not provide assistance, authors are requested to consider one of the following:

- to consult previous volumes of the *SALJ*, and to see how a similar stylistic issue has been dealt with in the text;
- to consult the main *House Style for Juta Publications* which may be found on the web page where this document was accessed. This document was drawn up largely by Professor Ellison Kahn in conjunction with members of the editorial team at Juta & Co, and contains 102 pages of information pertaining to referencing, language and style;
- to contact the editors for advice (contact details may be found at the front of each part of the *SALJ*).

Matters of presentation and layout

Page layout

The page should have 1 inch (2.54 cm) margins all round (top, bottom, left, right). Line spacing should be 1.5. The text must be right-justified.

All paragraphs (including those that come after long quotations) should be indented except the very first paragraph of a piece and any paragraph appearing immediately after a heading or subheading.

Line spaces should not be left between paragraphs.

Font and type

A Times New Roman font is used by the *SALJ*. The text must be in 12 pt font. An 11 pt font must be used for all isolated or indented quotations, i.e. long quotations. Footnotes must be in 10 pt font.

Italics are used for emphasis, for case names, names of journals and titles of books, plays, operas and films, names of ships and the titles of paintings and other works of art; and for web sites and

other electronic references. They are also used to indicate paragraphs in legislation, as in s 34(1)(a). Italics are *not* used for foreign words. All italics in direct quotations are reproduced, however.

The *SALJ* does not use underlining at all. Nor is bold type to be used.

Titles of articles and notes, authors' names

All this material is *right-aligned*.

Titles of articles and notes are always in caps.

Titles of articles are in italics with case names appearing in roman. Acknowledgements are placed in a footnote to an asterisk appearing at the end of the article's title. A line is left between the title and the author's name, which is in roman caps. The author's degrees are given in a footnote to the symbol † (and in the case of a second author, ††). The author's designation appears immediately under her name, in italics and sentence case.

Titles of notes are in roman with case names in italics. A line is left between the title and the author's name, which is again in roman caps. The author's designation appears immediately under the name, in italics and sentence case. Degrees are not given but acknowledgements may be made in a footnote to an asterisk appearing after the author's name.

Headings

All headings are left-aligned (other than headings of sections of the journal).

Main headings are in caps. The headings in articles are numbered in roman numerals (e g 'I INTRODUCTION').

Subheadings and sub-subheadings in articles are in italics and sentence case (using (a), (b), (c) for subheadings, followed by (i), (ii), (iii) for sub-subheadings). Authors should avoid, wherever possible, going beyond sub-subheadings.

Lists

Bullet points may be used for any list, and should be used particularly where the list consists of phrases as opposed to full sentences. Full sentences should start with a cap and end with a full stop. Phrases may, however, begin with l/c and end with a semi-colon (and a full stop right at the end of the list).

Lengthy items consisting of whole sentences or several sentences may appear in numbered lists (using (a), (i) or whatever seems appropriate). Such items always begin with a cap and end with a full stop.

We use 'first' (not firstly); thereafter 'secondly', 'thirdly'.

Spelling, grammar and other related matters of style or convention

Spelling and capital letters

The *SALJ* uses the ‘s’ form of English spelling: recognise, emphasise, analyse, realise, organization (but assets are ‘realized’). We say ‘in so far as’ and not ‘insofar as’; ‘moneys’ and never ‘monies’.

Capital letters are used only where essential, i.e. in all proper names (South Africa, Constitutional Court) and by tradition for a few other things, such as Act, President (of the country), Parliament and the Constitution (in the sense of a particular document; otherwise lower case).

Please note: Caps are *not* used for court, appeal court, judge, judge of appeal, committee, board, council, municipality, province, premier, etc. (When in doubt, use lower case.)

The use of caps in titles and headings is dealt with below.

Numbers, dates, percentages, currencies

Use words for all numbers between one and twenty and for all approximations (about two hundred years, a thousand ways).

Numbers higher than twenty may be in figures. All numbers in tables and graphs are in figures. So are ages (5 years old), percentages (the *SALJ* uses the words ‘per cent’ in the text (10 per cent), and only uses the figure % in tables) and measurements and quantities and amounts (6 cm, 40 km, R5 million). It is advisable also to use figures where a lot of numbers appear in a piece, as a consistent style looks better. A space (not a comma) is used in large numbers, as for instance in 42 567. Where a ‘rands and cents’ figure is used, the cents should be connoted by a dot (R456.45). For other currencies, use US\$, £, €.

A sentence should *never* begin with figures, i.e. recast the sentence or use words.

Dates and centuries: on 4 July 1978; in the 1980s (*not* 1980’s – there is no apostrophe); in the twentieth century.

Dashes, hyphens etc

- (a) The *SALJ* uses the long dash — (known in the publishing trade as the ‘em rule’) where the author wishes either (i) to tack a word, phrase or clause onto the end of a sentence for emphasis, or (ii) to mark off a ‘by the way’ remark in much the same way as a parenthesis, but generally to give it greater emphasis.

Examples:

His expertise and loyalty are available — at a price.

A policy shift is necessary to protect third parties — possibly unsophisticated entrepreneurs — who enter into pre-incorporation contracts.

- (b) Where the author wishes to refer to sequences of figures to indicate continuity, or to join compounds, then a shorter en rule – should be used:

Examples:

Pollak on Jurisdiction (1967) 45–52. (This is the standard mark for all page references from ... to)

The blood–brain barrier.

- (c) In other circumstances, the short hyphen - must be used.

Examples:

Jean-Jacques.

Seven-year-old boy.

NB: Some books (especially looseleaves) have double-jointed page numbering; for example ‘A-4’ or ‘3-32’. In such cases, the short hyphen should be used, as this will indicate clearly a specific page is being referred to, and not a sequence from ... to

Quotations

Quotations are reproduced exactly, including all original italics and original punctuation, notwithstanding that the original forms may not comply with the *SALJ* style.

Quotations appear in single quotation marks. Quotations within quotations appear in double quotation marks. (Back to single for the rare quotation within a quotation within a quotation.)

Short quotations appear as part of the text. Long quotations, i.e. quotations of more than three lines **or** more than one sentence, are isolated from the text by being indented from the margin. It is permissible to isolate a shorter quotation for emphasis.

Whenever a quotation is introduced with a colon, the quotation itself should begin with a capital letter (using square brackets to indicate an alteration where necessary). If no colon is used, the quotation should start with l/c. Where the quotation begins with a capital letter, the closing full stop should normally appear inside the closing quotation mark. But if the quotation forms part of the larger sentence, the full stop should appear after the closing quotation mark.

Ellipses need not be used at the start of a quotation but must be used in the middle and at the end of a quotation to indicate missing words. We use three dots for any missing word/s and a fourth dot to show any missing full stop. (The placement of the dots indicates where the full stop appeared, so it will be or)

Square brackets are used for all editorial changes and interpolations.

Requirements for referencing standard legal sources

Cases

Broad (Pty) Ltd v Thin 2008 (4) SA 456 (SCA).

All case titles are to appear in italics.

The case name and citation should be given in full and exactly as it appears in the relevant law report the first time it is cited. However, additional parties should be left out unless it is necessary to retain them in order to make sense of the discussion (eg where the author makes mention of ‘the respondents’). Such parties are given in l/c, and in English ampersands are used (& another, & others). In Afrikaans the ampersand is not used: en ’n ander, en andere.

Double citations are neither required nor encouraged. Our preferred law reports are the SALR and any other Juta reports.

Paragraph references or page references (with marginal letters) may be given. The former are preferred. The *SALJ* does not use ‘at’ with para references, although it does with page references.

If the case is not reported in a published set of law reports (either at all, or has not as yet been published in this manner due to the decision being very recent) the author should please provide some form of citation for the purposes of reference. This could be a JOL or JDR citation, or a neutral citation used by the courts and SAFLII.

With the proliferation of electronic databases and neutral citations, there is less and less call for an author to refer to a case as being unreported. However, where it is necessary to do so, the *SALJ* uses two basic styles for unreported cases, the date being the date of judgment:

Dlamini v Jacobs (NPD) unreported case no 98/05 of 3 August 2006; **or**
Dlamini v Jacobs (NPD) unreported case no 98/05 (3 August 2006).

In addition, the placement of the word ‘unreported’ may be varied in accordance with the structure of the sentence, e g ‘in the unreported case of *Dlamini v Jacobs* (NPD) case no 98/05 of 3 August 2006...’

A full set of standard case abbreviations and citations may be found in the *House Style for Juta Publications*.

Books

When a book is referred to for the first time, authors' names must be given as they appear on the title page of the book or on the title page of the chapter / relevant page of the article. For instance, John D Smith must appear as John D Smith and not as J D Smith or J Smith.

In a *reference* the co-authors of any work (book, article, chapter, whatever) take an ampersand: Smith & Dlamini. We cite up to three authors: Smith, Dlamini & Pillay. Thereafter use 'et al'. When referring to authors in an ordinary sentence the ampersand is not used: 'Smith and Dlamini believe that . . . '.

If the named persons are the authors of the book, then no more need be said. But if these are the editors, then the abbreviation (ed) or (eds) must appear after the names.

Book titles take the title case and appear in italics.

If the book is in an edition after the first, the number of the edition must appear after the title: 2 ed, 3 ed, 4 ed – but not 2nd or 3rd ed. If it is the first edition of the book, then no edition need be referred to; it will be assumed that it is the first edition.

The year of publication must appear in brackets after the title (first editions) or edition.

The precise page number where the authority was found comes next, if necessary. If the book operates by paragraphs or sections (which may be connoted either by 'para' or by '§'), then this will be a sufficient reference. If it is necessary to refer to both paragraph/section and page, then do so as follows: para 27 p 160. This latter method should be used only where absolutely necessary. Where the reference is generally to a chapter in the book, this should be indicated by the abbreviation 'ch' (unless the word chapter starts the sentence, in which case it must be in full).

Examples:

John D Smith & Sipho Dlamini *Hand's Law of Arbitration* 5 ed (2006) 115.
P Q R Boberg *The Law of Delict: Aquilian Liability* (1984) ch 3.

Chapters in books

Where an author refers to a chapter in a book written by a specific author (most commonly in a book constituted of chapters by experts on a common theme, and which have been collected and edited by a general editor or editors), then both the chapter and the book must be referenced in full the first time the work is cited.

The author must be referred to exactly as he or she was in the book, and the titles of chapters in collections are always in sentence case and roman. The book is to be cited as above.

Example:

M Bear & D Bear 'Too hot, too cold, just right?' in Mary Goldilocks (ed) *The Politics of Cookery* 3 ed (2004) 23–7.

Some works (especially LAWSA and looseleaf books) can give problems. Try to follow this style:

A J Kerr 'Lease' in W A Joubert (founding ed) *The Law of South Africa* vol 14 First Reissue (1999) para 164.

Joe Bloggs 'Executive government' in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (Service 12) 6-18.

Journal articles

The name of the author(s) must appear exactly as they appear in the journal being cited.

The title of the article must appear in sentence case, in roman, and within single inverted commas.

The year (in brackets) the volume (where relevant) and the title of the journal must be supplied. The title of the journal must be in italics.

The names of well-known journals (such as *SALJ*) should be abbreviated. Otherwise *LJ*, *LR* and other abbreviations may be used.

Examples:

Jane Dube 'The new Consumer Protection Act: An introduction' (2002) 119 *SALJ* 700 at 725.

S P Moyo 'The decline and fall of constitutionalism' (1998) 23 *SAJHR* 456.

Where the periodical carries no volume number, the year is not placed in brackets, eg 2006 *Acta Juridica* 43; 2003 *TSAR* 89; 2004 *Annual Survey of South African Law* 776.

Theses

Mary Brown *South African Theories of Justice* (unpublished LLM thesis, Rhodes University, 2001) 334.

Newspapers

Angela Jones 'Nuclear reactor in trouble' *The Star* 24 May 2005 at 2.

White papers, etc

The *White Paper on Energy Policy* (GN 3007 in GG 19606 of 17 December 1998).

The 'National Policy on HIV/AIDS for Learners and Educators' (published in GG 20372 of 10 May 1999).

Law Commission papers

South African Law Commission Issue Paper 20 (Project 123) *Protected Disclosures* (2002) para 3.

South African Law Commission Discussion Paper 107 (Project 123) *Protected Disclosures* (2004) para 56.

South African Law Commission (Project 123) *Report on Protected Disclosures* (2007).

The Constitution

The new long citation (used when referring to the Constitution for the first time) is simply Constitution of the Republic of South Africa, 1996. The interim Constitution remains the Constitution of the Republic of South Africa, Act 200 of 1993.

Legislation

In the first reference give the short title, number and year of a statute without any punctuation: the Judicial Service Commission Act 9 of 1994. Thereafter variants may be used: the Judicial Service Commission Act, the Act, Act 9 of 1994.

Use abbreviations for sections, subsections, paragraphs and subparagraphs, but never at the start of a sentence: chapter = chap, section = s, sections = ss, subsection = subsec, paragraph = para, subparagraph = subpara, article = art. (Plurals: subsecs, paras, subparas, arts.)

Use italics as shown to avoid confusion: s 45(2)(b)(i)(aa).

Schedules: 'in terms of Schedule 4 to the Act' (cap), but 'according to the schedule' (l/c).

Delegated legislation

A proclamation is cited as follows: Proc R46 GG 24567 of 31 January 2003.

Regulations are cited by referring to the notice in which they appear, eg the Road Accident Fund regulations in GN 232 GG 24568 of 1 February 2003. A regulation is abbreviated to reg, as in reg 5(1) (but not at the start of a sentence).

Some pieces of delegated legislation should be abbreviated, others not:

Government Notice = GN
General Notice = General Notice
Proclamation = Proc
Provincial Notice = Provincial Notice
regulation = reg

If unsure whether you are dealing with a proclamation, a government notice or a general notice, consult the list of contents on the back page of the *Government Gazette* in question or check Juta's annual index to the *Government Gazette*.

Internet references

Wherever possible, a published or authoritative source should form the basis of a reference. However, it is true that more and more frequently authors are referring to websites. This may be done, provided that the author considers carefully how authoritative the source of the information is before using it.

Where an internet reference is to be used, it must appear as follows:

John Bringardner 'IP's brave new world' available at *<http://www.law.com>*, accessed on 12 May 2008.

B I G Stick 'Time to bring back the death penalty?' *The Star* 24 May 2005 at 2, available at *<http://www.thestar.com/arts/wed>*, accessed on 23 February 2009.

NB: the URL must appear in italics, in black, and must NOT be underlined.

Where an author has accessed a published source on the internet (e g a journal article accessed through WestLaw) then the original citation should be given, and there is no need to refer to the URL.

The exceptions to the above rule are newspaper articles accessed from the internet, or resources such as law commission reports etc from other countries, which may not be obviously or easily accessible to interested readers. For convenience, a URL reference may be given to assist the reader.

The use of footnotes in articles

Authors are welcome to use footnotes to elaborate on points that would otherwise clutter the main text of the article. The other important purpose of footnotes is to provide the relevant references without cluttering the text.

In footnotes a reference to any authoritative source (which must comply with the house style described above) is given once in full.

Thereafter a book, chapter, journal article, newspaper article, law commission report, thesis will be cited by author and a cross-reference (using 'op cit') to the FIRST footnote where the full reference appeared. An abbreviated reference to the work may be used to provide further guidance where appropriate (e g several of an author's works are cited sporadically in an article).

Examples:

Smith & Dlamini op cit note 5 at 67.

Pillay et al *Disclosure* op cit note 19.

Cases are also cited using the cross-referencing method, but ‘supra’ is used: *Fedsure supra* note 12 para 34.

Supra note 16 at 365G–H.

For consecutive references to the same work, *ibid* is used with or without a page number / paragraph reference as appropriate.

Examples:

Ibid.

Ibid at 45.

Ibid para 45 (no ‘at’ with para refs).

References in the text (used for all notes and book reviews)

Essentially the same rules apply for first and subsequent references, but now the references are contained in the text in brackets — using brackets for ‘supra’ and for other material where appropriate — and there is no reference to a previous note:

Examples:

Smith & Dlamini *op cit* at 56

Jacob’s case (supra).

The use of ‘supra’ and ‘op cit’ can be obviated by giving a special abbreviated name (eg Smith) in brackets when the case / work is first mentioned. Thereafter the case / work can simply be referred to as ‘Smith’. This style should be used where there are repeated references to the case /work in a note, as for instance where the note is essentially about a particular case.

Miscellaneous

A name should appear in full before any acronym is used for it. However, this does not apply to acronyms that are very well known, such as NGO and UN and US. (Having used ‘United States’ once, it is acceptable to start calling it ‘the US’ without announcing this in advance.)

If at all possible, avoid starting a sentence with an acronym or any other kind of abbreviation.

Where an entire sentence appears in parentheses, the full stop is placed *inside* the second bracket. (Here an entire sentence is bracketed.)

When giving starting and ending page numbers and paragraph numbers, chop off the unnecessary ones: thus 34–5 and not 34–35. Care must be taken with teens: it is 514–15 not 514–5. However, with ones it is correct to say 20–1, 400–1 and so on.

On the following two pages, examples are given of first pages of one article and one note, to give authors some guidance as to what their manuscripts should look like.

TAKING DIVERSITY SERIOUSLY: RELIGIOUS ASSOCIATIONS AND WORK-RELATED DISCRIMINATION

PATRICK LENTA *

Associate Professor, School of Philosophy and Ethics, University of KwaZulu-Natal

I INTRODUCTION

In a series of decisions implicating the right to freedom of religion, the Constitutional Court has indicated its readiness in appropriate cases to grant exemptions from facially neutral laws or regulations of general application where such laws or regulations impose disproportionate burdens on members of religious groups.¹ In a recent decision, *MEC for Education, Kwazulu-Natal & others v Pillay*,² the Constitutional Court granted an exemption from a regulation to permit a member of a religious group to engage in a practice that (the court determined) expressed her religious beliefs and culture. Should courts likewise be prepared to grant an exemption from anti-discrimination legislation to permit religious associations to engage in work-related discrimination on legally prohibited grounds?

In *Pillay*, a central reason for the court's decision to accommodate the pupil concerned was that the school's interest in enforcing the school uniform regulations without exception was weak. As Langa CJ observed, it was difficult to see how granting an exemption to permit the wearing of a nose stud by a pupil would interfere with the effective running of the school and the purposes the school uniform was designed to further.³ The government's interest in enforcing ...

* MA LLB (Natal) PhD (Cantab).

¹ *Christian Education South Africa v Minister of Justice* 2000 (4) SA 757 (CC), *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) and *MEC for Education, Kwazulu-Natal & others v Pillay* 2008 (1) SA 474 (CC). For a discussion of these decisions and related matters, see: Paul Farlam 'Freedom of religion, conscience, thought and belief' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2003) (service 2) ch 41; Denise Meyerson 'Religion and the South African Constitution' in P Radan, D Meyerson & R Croucher (eds) *Law and Religion* (2005) ch 5; Patrick Lenta 'Religious liberty and cultural accommodation' (2005) 122 *SALJ* 3; Johan van der Vyver 'The contours of religious liberty in South Africa' (2007) 21 *Emory International LR* 77; Patrick Lenta 'Muslim headscarves in schools and in the workplace' (2007) 124 *SALJ* 296; Patrick Lenta 'Cultural and religious accommodations to school uniform regulations' (2008) 1 *Constitutional Court Review* 259; and Mark Kende *Constitutional Rights in Two Worlds: South Africa and the United States* (2009) ch 8.

² *Supra* note 1.

³ *Pillay's* case *ibid* para 101.

REVIVAL OF WILLS — THE SUPREME COURT OF APPEAL
RESOLVES LONG STANDING UNCERTAINTY:
WESSELS NO v DIE MEESTER

MICHAEL CAMERON WOOD–BODLEY
Senior Lecturer in Law, University of KwaZulu-Natal

In 2001, our leading textbook on the law of succession, commenting on the decision of the Appellate Division in *Moses v Abinader* 1951 (4) SA 537 (A), stated with justification that ‘[t]he result of this decision is that the law is in an uncertain state in so far as the question of the revival of a revoked will is concerned’ (see The Hon M M Corbett, Gys Hofmeyr & Ellison Kahn *The Law of Succession in South Africa* 2 ed (2001) 111). In particular, the *Moses* decision left unresolved the question whether it is physically necessary to re-execute a revoked will in order to bring it to life once more. This issue has now thankfully been resolved in a decision of the Supreme Court of Appeal in *Wessels NO v Die Meester* [2007] SCA 17 (RSA) (coram Brand JA, van Heerden JA & Combrinck JA), in which Brand JA delivered the unanimous judgment of a the bench. (For a discussion of the revival of wills immediately prior to the Wills Act 7 of 1953 coming into force, see Corbett et al op cit at 110. In short, revival by a subsequent will was expressly provided for in the Natal statute and had been held to be permissible under the Cape and Transvaal statutes, all of which were repealed by the Wills Act.)

In *Wessels* the deceased, who died on 7 March 2004, was pre-deceased by his wife, to whom he had been married in community of property. They had executed a joint will on 18 January 2002, the core provisions of which worked on the assumption (in the event incorrect) that the testator would pre-decease the testatrix (see para 2 of the judgment). Thus, for example, clause 3(a) provided that ‘[w]e specially bequeath, *in the event that the Testator comes to die first*, to our grandson Freddie Rautenbach all our immovable property’ (my translation from the Afrikaans original clause in para 3 of the judgment, emphasis supplied by me). In the event that the testator survived the testatrix, clause 8 of the will provided succinctly that ‘[i]f the Testatrix comes to die first we name and institute the Testator as sole heir’ (my translation from the original Afrikaans; see para 3 of the judgment). In the event, the testator survived the testatrix and thus came to own their entire joint estate. ...

ARTICLE 10

HIGH COURT OF SOUTH AFRICA JUDGEMENT STYLE GUIDE



AFSA

The Arbitration Foundation of Southern Africa
NPC



OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA

JUDGMENT STYLE GUIDE

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Chapter I

INTRODUCTION

HOW TO USE THIS GUIDE:

The purpose of this guide is to provide guidance on the formatting, citation and other conventions that are recommended for use in all High Court judgments in order to promote uniformity. Examples will be indicated in blue font. Notes on examples will be indicated in red font. The key to proofreading is the consistency of the chosen style throughout the entire judgment.

Please note that although care has been taken to ensure the guide is as extensive as possible, the guide is not intended to be exhaustive. Instead, it is a living document to be built upon and added to as the need arises.

STARTING THE JUDGMENT

THE JUDGMENT HEADER

The judgment header is the “cover page” of the judgment. It contains the Judiciary’s logo, the case number, the parties names as well as the “information box” on whether a judgment is reportable/not reportable, whether it is of interest to other Judges and whether it was revised or not. An example of the judgment header is displayed below:



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 660/21

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED: YES/NO

Information box
Flush to left margin
Flush to right margin

In the matter between:

XYZ

and

ABC

APPLICANT

FIRST RESPONDENT

Parties

Note that the parties appear flush to the left and right margins of the header.

Describe the parties on the right-hand side as the “Applicant” and “Respondent” where there is only one. Where there is more than one, list them as the “First Applicant”, “Second Applicant”, etc. Note that both words are capitalised.

In instances where you have a very high number of conjoint parties, use digits rather than words for all parties: “1st to 250th Applicants”. In all other cases, use words (“First Respondent”, “Second to Fifth Respondent” and “Seventeenth Applicant”).

In some cases, it is appropriate to combine parties' names into a single header entry. For example, where four people are cited in their capacities as the joint trustees of a single trust, they may be cited as the "**TRUSTEES FOR THE TIME BEING OF THE XXXX TRUST**" and listed conjointly as "Fourth to Seventh Respondents".

Do take into account that the parties' citation has legal significance; parties' names should therefore not be too freely obscured by conjoining them.

Parties' names

The following rules apply regarding parties' names:

- The names must always be in all capitals. One exception is that the case of a single character might be dropped to enhance the readability of the name (e.g. "**McDONALD**").
- Names must always be in bold font.
- The names of natural persons and corporations must closely follow the names provided in that person's own affidavit, where available.
- The names of the parties must always appear in order (rather than with the surname first, then a comma, then the first names – even if this is how they are described in the parties' papers).
- Mere initials should be avoided unless the parties' full names are unknown or in instances where the identity of the party/parties needs to be kept confidential. Where initials must be resorted to, they should be separated by a space and not by full stops (e.g. **A B Colt**).
- Titles like Mr, Ms, Adv or Dr are never used unless we have neither the parties' full names nor initials.
- Where the person appears *nomine officio*, we add "**N.O.**" to the end of his or her name. The full stops are necessary for readability as "**NO**" looks like the word "no". Other abbreviated designations like "**SC**", on the rare occasions that it is necessary and appropriate to provide them, do not need full stops.
- Where a parties' name requires diacritics or special characters, those must be used (e.g. "**LENÉ GRÜNDLING**").
- The names of state departments, institutions and offices must never have a "**THE**" before them unless we are citing "**THE STATE**" or a company has a registered name

starting with **“THE”**. In the latter case we have to include it. Thus, we simply say **“MINISTER OF JUSTICE AND CORRECTIONAL SERVICES”** and **“SOUTH AFRICAN POLICE SERVICE”**.

- We always use the full official title when it appears in the header. For example, **“MEMBER OF THE EXECUTIVE COUNCIL”** and never just **“MEC”**.
- In the case of MECs and provincial departments, the relevant province is preceded simply by a comma, not by **“OF THE GAUTENG PROVINCE”**. Thus, write **“MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, GAUTENG”** and **“DEPARTMENT OF BASIC EDUCATION, NORTH WEST”**.
- When citing a company, ensure that the full name is included (e.g. ABC (Pty) Limited or Telkom SA SOC Limited). Do not include the company’s registration number in their citation.
- Where parties cite themselves as “ABC (Pty) Limited and 182 Others”. The applicant will then be cited as “1st to 183rd Applicants”.

Coram

The coram is the list of judges that sat at the hearing. In the High Court, this will appear in the judgment when the Full Court sits consisting of two or more judges.

Judgments

Whether a Judge concurs or dissents is determined by the *order* she would make, not by whether she agrees with all the *reasoning* of the main judgment. It is occasionally appropriate to say “dissenting in part” to show that the judge mostly agrees, notwithstanding that she would vary the majority’s order.

Summary

The summary or flynote is a set of key phrases that indicate the subject areas of the judgment. The emphasis is on extreme brevity. In contrast, the media summary is a proper summary of the judgment containing more details. The flynote is for reference purposes and an at-a-glance determination of the judgment’s core issue(s). It should include the findings on those core issue(s), but *not* a synopsis of the Court’s reasoning. Further, there is no obligation to mention *every* issue touched upon by the Court in the flynote. Only those issues that are fundamentally at issue or ones where the Court’s holding was so significant that a researcher would want her

attention drawn to it. In almost all cases where legislation is fundamentally at issue, the flynote should start:

Full name and number of the Act – pertinent section - ...

See below for an example of a flynote:

Section 1 (1) (d) of the Intestate Succession Act 81 of 1987 – interpretation of term “parent” – term “parent” to be applied within objectives of Constitution and Children’s Act 38 of 2005.

The flynote should *not* look like this:

Interpretation of term “parent” - term ‘parent’ not to be narrowly and strictly interpreted - interpretation to include the meaning and content of what is understood by the idea of parenting and parenthood – definition not simply a matter of blood or biology but interpretation of term “parent” to be applied within the values and objectives of the Constitution and Children’s Act 38 of 2005.

Start of the judgment itself

The judgment begins with “**JUDGMENT**” in tramlines with one single (1.0) line spacing above the word “**JUDGMENT**” below the top line and one single (1.0) line spacing below, directly above the bottom line, immediately followed by the name of the judgment’s author in all capitals (together with the list of concurring judges in brackets, which is *not* in capitals). These are set at single (1.0) line spacing.

The above is followed by two single (1.0) line spaces. Then the judgment begins.

Single (1.0) space

JUDGMENT

Single (1.0) space

KOLLAPEN, J (Basson J and Maumela J)

Single (1.0) space

Single (1.0) space

[1] The judgment begins...

[2] ...

[3] ...

[4] ...

CHAPTER II STRUCTURE AND FORMATTING
--

NUMBERING

Page numbering

Pages are to be numbered at the bottom right of the page in Arial 12pt font.

The first page of the judgment and any further “header” pages must not show the page number, however, the pages are still counted from the first page of the document.

The “JUDGMENT” page will be the first numbered page, although it will not be page 1. It will be 2 or 3 or 4, depending on how many pages are taken up by the header.

Paragraph numbering

Each paragraph in the body of the judgment should be automatically numbered using the numbering function of Microsoft Word (“MS Word”).¹

FONT

- Normal judgment text: Arial 12 pt font.

¹ In the home menu of MS Word, click on numbering button arrow. At the bottom of the pop-up menu select “Define New Number Format”. In the block below “Enter formatting number” type [1] and then click “OK”. The numbering will then become automatic.

- Header, signature line and full details of judge/s, attorney / counsel details, date of hearing and date of judgment: Arial 12 pt font.
- Embedded quotes and quotes within quotes: Arial 11 pt font.
- Footnotes and quotes in footnotes: Arial 9 pt font.

ALIGNMENT, MARGINS AND INDENTATION

Margins

The “normal” margins of MS Word is used which is 2.54 cm all around.

Alignment

All text in our judgments (including tramlines for “judgment”, quotations, footnotes, lists, etc.) should be justified.

Only the header has text that is left-, centre- or right-aligned.

Indentation

Every indentation, in any context, is always 1.27 cm (or 0.5”). Where there are several successive indentations, add 1.27 cm (or 0.5”) to the previous. So, the first indentation will be 1.27 cm (or 0.5”), the second 2.54 cm (or 1”), the third 3.81 cm (or 1.5”), and so forth.

Each indent should include a “special” hanging indent of 1.27 cm.

The default tab stops of MS Word is 1.27 cm apart. However, it often happens that the tabs are changed before the judgment is sent for proofreading. The tabs should then be reset by using the “clear all” button under the tab menu.

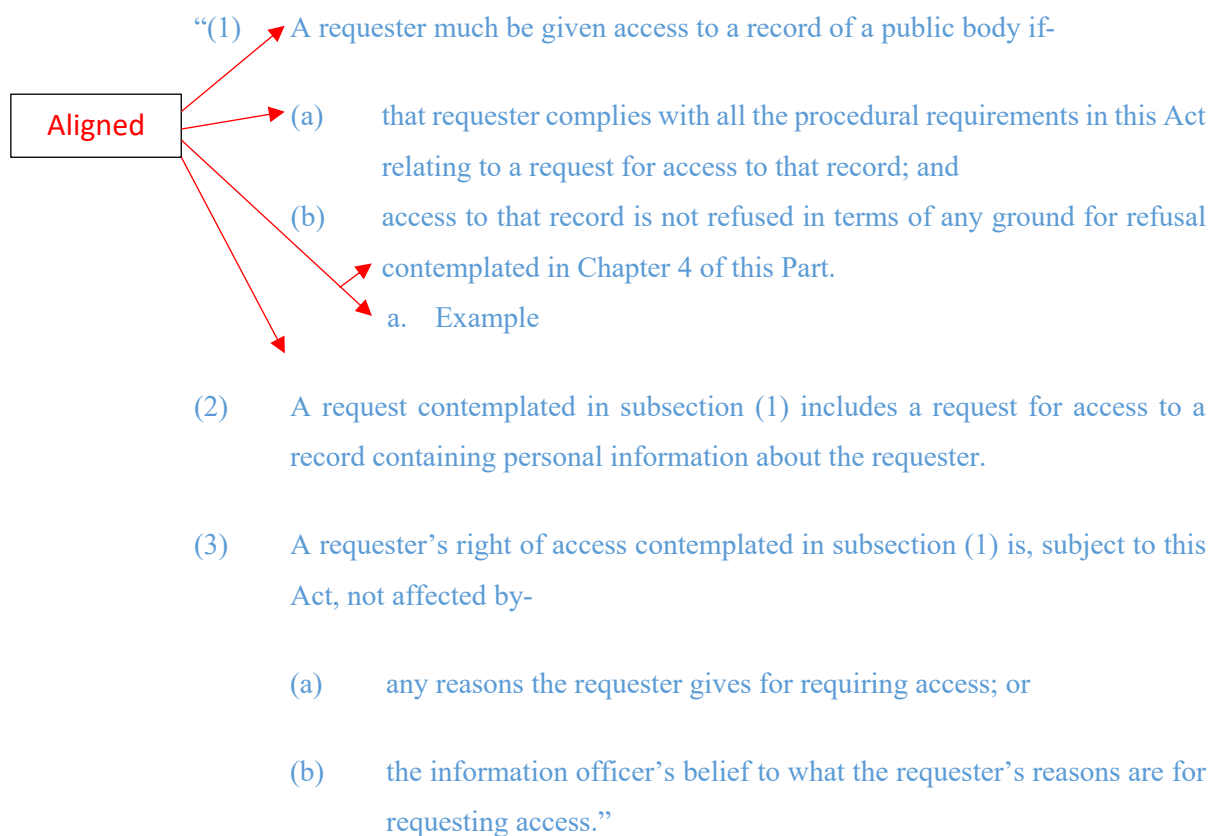
Where the indented text is more than one line, the text should align under the indented text, for example:

“(1) For the purposes of these Regulations, a 'face mask' means a cloth face mask or a homemade item that covers the nose and mouth. or another appropriate item to cover the nose and mouth.”

Note that the right-indentation of, for example, a quotation is the same. An embedded quotation is indented on both sides by 1.27 cm; and a quotation within a quotation by 2.54 cm.

The numbering of a list is indented (from the left) by 1.27 cm; the text of the subsections by 2.54 cm; the paragraph numbers by 2.54 cm; the text of the paragraphs by 3.81 cm; the sub-paragraph numbers by 5.08 cm; the text of the sub-paragraphs by 6.35 cm. This is what it will consequently look like:

[1] Section 11 of PAIA provides:



The default indentation of MS Word is set at 1.27 cm apart. The easiest way is to check the tab settings to ensure that they are at default and then the first tab will be at 1.27 cm, the second at 2.54 cm and so on.

However, note that hanging indents will have to be added manually for provisions that span more than one line, such as section 11(1)(a) of PAIA in the example above.

Pro tip: after the first one is manually formatted, use the format painter to quickly do all the others of the same level (i.e. after 11(1)(a) is completed, you could use format painter to properly format both 11(1)(b) and 11(3)(b)).

Never use the automatic numbering in the judgment for quoted legislative provisions, lists or orders. Automatic numbering has a reputation for messing up the indentations.

LINE SPACING

Between each line

The normal text of the judgment must be written in 1.5 spacing. The same is applied to the rest of the judgment, except the following, which have single (1.0) line spacing:

- Footnotes and quotations within footnotes.
- The entire header of the judgment.
- The counsel details.

Between paragraphs in normal text

Between paragraphs, there should be one empty line (with 1.5 spacing). The same applies between the end of a paragraph and the heading below it. It will look like this:

[2] This matter pertains to intestate succession. The applicant is the duly appointed executor in the estate of the late M van der Merwe.

(1.0 spacing)

[3] The first to third respondents all lay claim to the intestate estate of M van der Merwe.

However, there should be no line space between a heading and the following paragraph. For example:

Introduction

[1] This matter pertains to intestate succession. The applicant is the duly appointed executor in the estate of the late M van der Merwe.

Before and after quotations

Each embedded quotation must have an empty line space before it. The line before the quotation should be set at 1.5 spacing and 11 point font.

Each embedded quotation must also have an empty line space after it (whether or not the same paragraph continues thereafter, or a new one starts). This line should be set at 1.5 spacing 12 pt font. For example:

[2] Section 7(1) of the Disaster Management Act provides-

1.0 spacing, 11 point font

“The national disaster management framework must provide a coherent, transparent and inclusive policy on disaster management appropriate for the Republic as a whole.”

Right tab at
1.27cm

1.0 Spacing, 12 point font

Quotations within quotations as well as quotations in footnotes should not have empty line spaces before or after, examples of which will be addressed herein below in “*Paragraph breaks in quotations*” and “*Quotations within quotations*”.

Between paragraphs in quotations

In embedded quotations that span more than one paragraph, or comprise more than one section / subsection / paragraph / subparagraph of a legislative provision or court order, there should not be any empty lines between each paragraph or section.

Between paragraphs in footnotes

Footnotes should maintain a single (1.0) spacing in between paragraphs.

HEADINGS

Headings within judgments are to be written in Arial, 12pt font, set to 1.5 spacing and in *italics*. If sub-headings are used they should be tabbed in once to distinguish them from the main headings. It will look like this:

Introduction

Background facts

[1] The parties were married to each other in out of community of property with accrual on 12 April 1998. Two children were born from the marriage, both of which has reached majority.

Do not “invert” the italics in the heading. So if a case name is mentioned in a heading, for example, do not put this in regular font. Keep it italics, like the rest of the heading.

The substantial and compelling circumstances test in light of Malgas

[1] In *Malgas*, the Supreme Court of Appeal clarified the meaning of substantial and compelling circumstances.

QUOTATIONS

Quotation marks

Where quotation marks are used, they should always be double quotation marks: “...”.

Single quotation marks are only used for quotes within quotes, in other words for quotations that are already inside double quotation marks.

Double quotation marks are further used for terms or phrases within quotation marks that are not quotations as such, e.g. the “2018 court order”; an “old-order” occupational right.

Sourcing quotations

Quotations must accurately reproduce the source. The following are regarded as authoritative sources:

- Juta Law Reports are the most authoritative and should be used as far as possible where they are available. Juta Law Reports include South African Law Reports, South African Criminal Law Reports and Industrial Law Journal.
- If there is no Juta law report available, use the Butterworth law report (www.mylexisnexis.co.za).
- Only where neither report is available use SAFLII versions.
- Do not use the unreported judgment from Juta as the authoritative citation unless the judgment is not reported elsewhere.
- When quoting legislations, regulations, etc, the authoritative version is always the promulgated version. The Juta version is helpful, especially where the legislation has

been amended several times. However, it must be ensured that the quotation in the judgment reflects the versions in the *Government Gazette*.

Embedded and run-on quotations

When a quotation is longer than 40 words in length, it must be embedded. This means it must appear as a block quotation, starting on a new line. As already indicated, there must be an empty line space before the quotation. There should also be an empty line space after the quotation.

[15] The Supreme Court of Appeal held that when a trial court applies s 51 the trial court is not in appellate mode and-

“It is not confronted by a prior exercise of judicial discretion attuned to the particular circumstances of the case and which is *prima facie* to be respected. Instead, it is faced with a generalised statutory injunction to impose a particular sentence which injunction rests, not upon all the circumstances of the case including personal circumstances of the offender, but simply upon whether or not the crime falls within the specific categories spelt out in Schedule 2.”

When a quotation is fewer than 40 words in length, it may “run on”, i.e. form a normal part of the sentence or paragraph in which it appears, without any line breaks, indenting or change in font. If for reasons of emphasis or aesthetics the author of the judgment wants to embed a shorter quotation, it is permissible to do so.

[38] An important premise in dealing with the rights of detainees and prisoners to maintain contact with the world outside the institutions where they are held is that, like free persons, those deprived of their liberty enjoy all the human rights guaranteed by the international law, however subject to those restrictions that are an unavoidable consequence of the confinement. This means, *inter alia*, that no detainee or prisoner “shall... be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence”.

Introducing a quotation

All embedded quotation should have quotation marks around it even though it is already indented and in a smaller font. This is due to SAFLII not always retaining the indentation and font, which then makes it impossible to identify quotations in the judgment.

An embedded quotation must in certain instances be introduced by a colon and start with a capital letter. In other instances, the embedded quotation will be introduced by an em-dash and start with a small letter. The rules are:

- Where either the introducing sentence or the first sentence of the quotation can stand alone as a full sentence, then the quotation must be introduced by a colon and start with a capital letter. Should the quotation have a small letter at the pertinent point, the quote must be changed into a capital letter and square-bracketed.

[17] The Court took the following view:

“[S]ection 18(4) grants an automatic right of appeal to be heard urgently, it does not dispense with the requirement to comply with the time periods prescribed by the rules for the launch of an application for leave to appeal to the SCA.”

- Where the introducing sentence and the first sentence of the quotation are incomplete sentences and form a complete sentence only jointly, then the quotation will be introduced by an em-dash and start with a small letter. If the quotation starts with a capital letter, the quotation must be changed into a small letter and square-bracketed.

[1] A service provider is not liable for damages incurred by a person if the service provider refers or links users to a web page containing an infringing data message or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hyperlink, where the service provider—

“(a) does not have actual knowledge that the data message or an activity relating to the data message is infringing the rights of that person.”

Altering the quoted text

Any additions or alterations to the quoted text, that are inserted for purposes of the judgment, should be indicated by square brackets. For example where the original quote read, “In oral argument, the defendant relied on section 5 of the Act”, it may be necessary when we quote it

to indicate the Act that was referred to. Therefore we write, “In oral argument, the defendant relied on section 5 of the Act [Promotion of Administrative Justice Act]”.

Certain abbreviations are changed by default without indicating the correction. For example, “s 5” will be changed to “section 5”, “Ch 10” to “Chapter 10”, “SCA” to “Supreme Court of Appeal” and “CC” to “Constitutional Court”. Do not place these expansions in square brackets.

Small errors, including minor spelling mistakes, are also automatically corrected without indicating such. For example, “trail” to “trial”. The use of [sic] should be avoided at all costs, except in exceptional circumstances. An example of this would be where the case deals with the interpretation of an error in a legislative provision, which cannot be auto-corrected when quoted. We also autocorrect what is not politically correct. For example, we would never use “he / him / his” only, even when this appears in the original text. We would instead change the wording to “they” or “he or she”.

Do not use auto-correct generally to change a letter to upper- or lower-case – instead use square brackets. However, exceptions can be made for *inter alia* “section” and “regulations”. The golden rule is when in doubt, make the change in square brackets.

Ending the quotation

If changes are made to the quote in respect of emphasis, omissions of footnotes and references, this should be indicated at the end of the quote.

Where emphasis was added to the quote this can be indicated with a bracketed insertion of (Emphasis added.) at the end of the quote. However, it is not mandatory and depends on the preferences of the judge.

Should the judge prefer to include the phrase “emphasis added” the following practice should be kept in mind:

- For embedded quotations, the phrase appears two spaces after the end of the embedded quotation, in brackets, and with a capital first letter and a full stop inside the brackets.

“embedded quotation”.² (Emphasis added.)

- With run-on quotations, things are a bit more complex. If the quotation has a footnoted citation straight after it, put the phrase in the footnote, one space after its citation, in brackets, and with a lower-case first letter and the full stop outside the brackets.

² footnoted citation at pinpoint (emphasis added).

- If there is no footnoted citation, add a footnote and write “Emphasis added.” in it. It will look like this:

³ Emphasis added.

Where there is an existing emphasis in a quote, it is useful to say “Emphasis in original”, following the rules above. For a footnote or footnotes, we say “Footnote omitted” or “Footnotes omitted”. This applies similarly where we omit references, we say “Reference omitted” or “References omitted”.

An embedded quotation must always end on a full stop. Run-on quotations must never end on a full stop – the full stop must be outside the quotation – unless they are more than one sentence in length and end and end in a full stop in the source.

Omitting parts of the quoted text

There should never be leading or trailing ellipses in a quotation. In other words, do not put in any ellipsis at the start or end of the quotation as there is no need to indicate that the source sentence started before the quotation or continued on thereafter.

Short omissions falling inside of the quoted text should be indicated by a space, followed by three separated ellipsis dots (each with a single space between them), and then followed by another space.

[12] Section 25(8) provides that—

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land . . . in order to redress the results of past racial discrimination,

provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

Where the omitted portion of the quote includes the end of a sentence, add a fourth dot, like this: “The sun is shining Do you see it?

“[50] It is essential that where the Commission has grounds to believe that the parties to a merger have a motive not to notify a merger, it must investigate that merger and not accept their mere say-so. Nor, in these circumstances, should the investigation be confined only to the documents submitted by the parties. Significantly, merger investigations are not meant to be rudimentary “desktop” evaluations of the documents submitted by the parties to a merger or a transaction giving rise to a merger. Legh argues that:

“Very few mergers are approved solely on the basis of the documents filed. The filings are generally followed by a series of questions from the Commission clarifying issues and verifying information provided. The person signing the merger documentation is under a duty to declare that the information disclosed is comprehensive and correct and the provision of false information is an offence under [section 73(2)(d) of] the Act The Commission may require any party to a merger to provide additional information in respect of the merger [under section 13B(2)].”

Where the omitted portion of the quotation is also the end of the sentence, add the fourth dot but do not put a space before the first dot, like this: “The sun is shining. . . . Do you see it?

[12] The Constitutional Court in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) 557D-G, confirmed that:

“The right to privacy is applicable, where appropriate, to a juristic person.... Juristic persons are not the bearers of human dignity. Their privacy rights, therefore, can never be as intense as those of human beings. However, this does not mean that juristic persons are not protected by rights to privacy. Exclusion of juristic persons would lead to the possibility of grave violations in our society, with serious implications for the conduct affairs. . . .”

Where an entire subsection / paragraph of a quoted legislative provision is omitted, the ellipsis should be aligned with the subsection / paragraph numbers, as the case may be. It will look like this:

[3] Section 18(4) of the Superior Courts Act provides that—

(4) If a court orders otherwise, as contemplated in subsection (1) —

(i) the court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

...

(iv) such order will be automatically suspended, pending the outcome of such appeal.

Quotations in footnotes

Long quotations in footnotes must be embedded but unlike embedded quotations in the body of the judgment, there should be no line-spaces before and after the quotation. In all other respects, quotations in footnotes are the same as the quotations in the body of the judgment.

³⁵ Thus, in *Myeni v Organisation Undoing Tax Abuse and Another* above n 24 at para 19, the Court stated that —

“[A]n important question would then be what effect would the lodging of the petition after the right to appeal has lapsed then have on the principal judgment’s order. Having regard to the case law, in light of the belated petition now filed by the appellant, the principal judgment’s order continues to remain operational for the mere fact that the service of an application to condone the late filing of the petition to the SCA does not suspend the operation and execution of any order. To conclude otherwise would give rise to an untenable situation in law where, after an order has been operational for a number of months, a party could simply bring a condonation application which would result in such an order suddenly being suspended. Such a situation would clearly give rise to far reaching consequences that this court cannot condone.”

The Court also held at para 20, that in “*Ntlemenza*, the SCA did take into account . . . the fact that an application for leave to appeal had not been filed at the SCA at the time of the hearing of the application to execute – the one before the High Court having been dismissed – did not curtail the court’s power in terms of section 18, to reverse the automatic suspension of a decision. This was because the court’s power in terms of section 18(1) was not dependant on that decision being subject to an application for leave to appeal.”

Paragraphs breaks in quotations

In both the body of the judgment, there should be one empty line between paragraphs in quotations (with 1.5 spacing). It will look like this:

[29] In *Elrich v Minister of Correctional Services and Another*² Plasket, J found it necessary to preface his judgment with a short discussion of the central principle that applies to the treatment of prisoners before turning to the applicable provisions of the Act:

“[4] That principle is one that, in its articulation by the highest court of the land, predated the 1996 Constitution and has a much older but just as august pedigree. The line of cases starts in 1912 in the matter of Whittaker and Morant v Roos and Bateman in which Innes JA held:

‘The action of the Governor [of the prison] was a wrongful and intentional interference with those absolute natural rights relating to personality, to which every man is entitled. True, the plaintiffs’ freedom had been greatly impaired by the legal process of imprisonment; but they were entitled to demand respect for what remained. The fact that their liberty had been legally curtailed could afford no excuse for a further illegal encroachment upon it. Mr Esselen contended that the plaintiffs, once in prison, could claim only such rights as the Ordinance and the regulations conferred. But the directly opposite view is surely the correct one. They were entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed.’

...

[6] Even though that dictum was in a dissenting judgment, it relied on the judgment of Innes AJ, cited above, in *Whittaker and Morant v Roos and Bateman*. Subsequently, Corbett JA’s dictum was held to correctly reflect the law in Hoexter JA’s judgment in *Minister of Justice v Hofmeyr*. In this matter, prior to expressing his agreement ‘with the general approach reflected in the residuum principle enunciated by Corbett JA in the *Goldberg* case, Hoexter JA held:

‘The Innes dictum serves to negate the parsimonious and misconceived notion that upon his admission to a goal a prisoner is stripped, as it were, of all his personal rights; and that thereafter, and for so long as his detention lasts, he is able to assert only those right for which specific provision may be found in the legislation relating to prisons, whether in the form of statutes or regulations.

The Innes dictum is a salutary reminder that in truth the prisoner retains all his personal right save those abridged or proscribed by law. The root meaning of the Innes dictum is that the extent and content of a prisoner's rights are to be determined by reference not only to the relevant legislation but also by reference to his inviolable common-law rights.'

[7] The common law may not be as prominent now as it was in 1912, 1979 or 1993 for the protection of fundamental rights and it was, of course, subject to legislative override, as a result of parliamentary sovereignty being a central tenet of the constitutional order at the time. Now, in a era of democratic constitutionalism, in which fundamental rights are justiciable and in which they may only be limited by laws of general application 'that are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom', the residuum principle has stronger protection than before. There can be no doubt that it is in harmony with the Constitution's values.

[8] Section 35(2)(e) of the Constitution provides that everyone who is detained, including every sentence prisoner, had the fundamental rights 'to conditions of detention that are consistent with human dignity'. In addition, s 9(1) provides that every persons 'is equal before the law and has the right to equal protection and benefit of the law'; s 10 entrenches a fundamental right to human dignity; and section 33(1) of the Constitution gives everyone the right to 'administrative actions that is lawful, reasonable and procedurally fair.' (Footnotes omitted.)

FOOTNOTES

Footnotes are inserted to provide citations for all sources relied upon. They are also used to make peripheral points that are worth including or mentioning but not in the body of the judgment.

Where possible footnotes should be inserted at the end of a sentence and whenever they appear, it is preferable for them to be after the punctuation. However, there are exceptions, for instance where an Act is referred to for the first time in the judgment midway through a sentence, and a different Act is referred to at the end of the sentence. Then, it may be appropriate to place one footnote immediately after the first reference to the Act and another at the end of the sentence, after the full stop.

All footnotes must be in the same font being Arial but in 9 pt and must be superscripted, but this will happen automatically when you insert the footnote.

All footnotes must begin with a capital letter and end with a full stop.

The footnote numbers themselves will automatically be placed at the bottom of each page and must be fully left-aligned at the standard 2.54 cm. There should be one space between the footnote number and the footnote text.

EMPHASIS

Emphasis should be avoided in the judgment itself. However, emphasis in quotations is common. Where necessary, italics should be used. Never use underlining or bold.

CHAPTER III GRAMMAR, PUNCTUATION AND STYLE
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Each Law Researcher is responsible to ensure that the judgment they proofread complies, as far as possible, with all rules of general English usage. This will not be covered in this Style Guide. It is usually helpful to make use of the proofreading tool in MS Word. If you have a grammar or spelling query that is not covered here, we recommend the following reliable websites:

- <https://www.grammar-monster.com>
- <https://www.grammarbook.com>
- <https://www.grammarly.com>

The following desktop dictionaries are also helpful:

- <https://wordweb.info/free/>
- <https://www.dictionary.com/>

SPELLING

We use English, not American, spelling. We use “s” and rarely “z” (“realise” and not “realize”, “criticise” and not “criticize”), and the “u” is never dropped from words like “neighbour” or “labour”.

PUNCTUATION

Most rules about punctuation come from the normal rules of English usage. We only deal with punctuation issues that are particular to judgments.

Spaces

It is important that there are no “hanging spaces” at end of paragraphs after the full stop as this can mess up SAFLII’s formatting. Select “Show paragraph marks” in MS Word to make it easier to spot them.

The end of one sentence and the start of the next should always be separated by two spaces. This rule applies to the entire judgment: normal text, footnotes, quotations, etc.

One space is left after other punctuation marks like commas, semi-colons, colons, etc.

Sticky spaces

To ease reading, we insert a “sticky space” (Ctrl + Shift + Space), instead of a normal space. We do this to keep two or more words together, in the following contexts for example:

- “regulation”, “rule” and “Article” will always be kept together with the number of the “regulation”, “rule” and “Article”: section 6; rule 19.
- “para” is always kept with the number: “para 16”.
- “at” is kept together with its number: “at 23”.
- Judges’ names are always kept with their designations: “Mlambo JP”; “Potterill ADJP”.
- People’s names and their title are kept on the same line: “Mr Vermeulen”; “Dr Mahlangu”.
- Dates and numbers are kept together: “26 February 2021”; “R 1 234 567”.
- There are other instances where the sticky space is not strictly required but inserting them at the authors request can improve the appearance of the judgment.

Dashes

Types of dashes

Hyphens (-): Hyphens should be on a short dash only. It is created by pressing the - key. We use these to hyphenate words and to give pages ranges.

The en-dash (–): This type of dash is used between words instead of a comma or brackets. It must be a short dash (as opposed to the longer em-dash), with a space on either side. Alternatively, MS Word automatically creates an en-dash if you type a letter, space, two dashes, another space, and then a letter.

The em-dash (—): This type of dash is used to introduce an embedded quotation. It is the longer type dash, with no spaces before or after it. We also use em-dash between flynote entries. To create an em-dash hold Ctrl + Alt + Numpad -.

[1] The applicant – who appeared in person – sought the following urgent relief—

a. Condonation for his non-compliance with section 3(2)(a) of Act 40 of 2002.

Sometimes MS Word splits hyphenated words over two lines. To avoid this, use a “sticky hyphen” (Ctrl + Shift + -). Bear in mind that this will look like an en-dash when you have Show All Characters on. But it will print normally (and will look normal when you turn off Show All Characters).

List

When the list items are full sentences, they must always start with a capital letter and end with a full stop. And the list must be introduced by a colon.

When the list does not contain full sentences, each point in the list must start with a small letter and end with a semicolon. At the penultimate point of this type of list, “and” or “or” – as the case may be – should be placed after the semicolon.

If the list and its introducing sentence can be written grammatically as a run-on sentence, then the list must be introduced by an em-dash (—), without any spaces on either side.

If the list and its introducing sentence cannot be written grammatically as a run-on sentence, the list must be introduced by a colon.

All lists in our judgments use letters, not numbers and not Roman numerals. In the unlikely event that you need to use a sub-list, it should use Roman numerals and the Roman numerals should appear inside brackets.

- [2] The plaintiff has instituted an action for—
- (a) unlawful arrest;
 - (b) assault;
 - (c) unlawful detention; and
 - (d) general damages.

The relief sought under each claim of the four claims are:

- (a) claim 1 an amount of R200 000, compsed of—
 - i. R 100 000 for medical fees; and
 - ii. R 100 000 for loss of earnings;
- (b) claim 2 an amount of R100 000;
- (c) claim 3 an amount of R200 000; and
- (d) claim 4 an amount of R200 000.

COMMON ABBREVIATIONS

In general, common abbreviations should be avoided in favour of full word forms. Rather use “for example”, “in other words”, “that is”, “it is”, “he is” instead of the abbreviations thereof. If abbreviations are used, they should have full stops between the letters and should not be in italics. Never start a sentence with an abbreviation. As a mark of respect never abbreviate the names of our courts. Use Constitutional Court not “CC”, Supreme Court of Appeal not “SCA”, Equality Court not “EC”, High Court not “HC”, Competition Appeal Court not “CAC”, and so forth.

Abbreviations for units of measurement may be used for example “km” for kilometres and “L” for litres. If you use an abbreviation once ensure you use it consistently throughout the

judgment. Also ensure that you insert a space between all numbers and units of measurement, i.e. “25 cm”.

NAMES

Names of people

In the body of the judgment, always precede the names of people by a title like “Mr”, “Ms”, “Dr”, “Adv”, “General”. For example, “Mr John Soap”, “Ms Ledwaba”. Avoid the old-fashioned “Mrs” and use “Ms” instead.

Names and Surnames must always be capitalised. However, note that in normal usages, the first word in surnames like “van Niekerk”, “du Toit”, “de Vos”, for instance, is not capitalised. They should appear as “Ms van Niekerk”, “Johan du Toit”, “Mr de Vos”.

Names of corporations and entities

The names of a company, closed corporation, trust, etc. should normally be stated in full on the first occasion that they are used. The precise name can be obtained from a party’s affidavit, should it be a party to the matter. For example: “Fiat Chrysler Automobiles”, “the Van der Merwe Basson Family Trust IT2354/2005”.

Names of public institutions and offices

Institutions should be capitalised where they are used as a proper noun, for example, “the Executive”, “the President”, “the Judiciary”, “the Legislature”, “Parliament”. But note that, subject to authorial discretion, we generally do not capitalise “the state”.

Public officials / titles are also capitalised, for instance, “the Director of Public Prosecutions submitted . . .”, “the Public Protector argued . . .”.

We also capitalise names of institutions and offices even, ungrammatically, where the institution or public office is being used as a common noun, for example, “As is well-known, Members of Parliament and even Cabinet Ministers are democratically accountable in a way that judges are not.”

We refer for example to “Minister of Health”, “Minister of Public Works”, although where the Minister is appearing as a party it depends on his or her self-description. A Minister is a “he” or “she” not an “it”.

As in the header of the judgment, offices like “Member of the Executive Council for Education, Gauteng (MEC)” should be written in full on the first occasion they are used. Thereafter a short title such as “MEC” may be used.

Names of Courts

- Constitutional Court of South Africa
- Supreme Court of Appeal of South Africa

For reference, the High Courts as renamed by directive 3/2014 of 28 February 2014 are:

- High Court of South Africa, Eastern Cape Division, Grahamstown
- High Court of South Africa, Eastern Cape Local Division, Bhisho
- High Court of South Africa, Eastern Cape Local Division, Mthatha
- High Court of South Africa, Eastern Cape Local Division, Port Elizabeth
- High Court of South Africa Free State Division, Bloemfontein
- High Court of South Africa Gauteng Division, Pretoria
- High Court of South Africa Gauteng Local Division, Johannesburg
- High Court of South Africa, Mpumalanga Division, Mbombela
- High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg
- High Court of South Africa, KwaZulu-Natal Local Division, Durban
- High Court of South Africa, Limpopo Division, Polokwane
- High Court of South Africa, Limpopo Local Division, Lephalale
- High Court of South Africa, Limpopo Local Division, Thohoyandou
- High Court of South Africa, Northern Cape Division, Kimberley
- High Court of South Africa, North West Division, Mahikeng
- High Court of South Africa, Western Cape Division, Cape Town

Note that it might be necessary, for historical correctness and contextual purposes, to refer to a court by one of its previous names, such as “Western Cape High Court, Cape Town” or “KwaZulu-Natal High Court, Pietermaritzburg”. When this occurs it might be necessary to insert

a footnote stating “Now known as the ABC Court”, for clarity purposes. Alternatively, it can be indicated that the judgment is using an older name by stating “the then ABC Court”. Note that this does not apply to the “Appellate Division”. We still refer to the “Appellate Division” for old cases (although since 1997 it has been the Supreme Court of Appeal), and the order must always refer to the name of the court at the time the order is handed down.

As indicated previously, the names of courts are never abbreviated.

When a particular court is being referred to, its name must be capitalised, for example, “The appellant was convicted on all counts by the Specialised Commercial Crimes Court, Johannesburg. The Court dismissed his appeal.”

When a court is being referred to by a description rather than by its name, it should not be capitalised, for instance, “the court of first instance”, “the trial court”. When “court” is being used as a common noun, it should not be capitalised, for instance, “The courts of South Africa are the civil and criminal courts responsible for the administration of justice in South Africa.”

We no longer refer to the “full bench” of the High Court but may refer to the Full Court, which should be capitalised.

The apostrophe is always *after* the “s” in Magistrates’ Court. When referring to magistrates’ courts, the town/city name should appear first, for example, Protea Magistrates’ Court.

Names of judges

Judges always have an abbreviated designation at the end of their names. For example, “J” and also “JP”, “DJP”, “JA”, “AJA”, “AJ”. Keep consistency in mind when using the abbreviated designation.

It is important to note that a judge’s designation should not be separated from his or her name. Use a sticky space (Ctrl + Shift + Space) between the judge’s name and the designation.

In the High Court, where there are multiple judges we write out fully each judge’s name and designation: “Potterill J and Kollapen J”. We do not use the title of “JJ” or “JJA” like in the Supreme Court of Appeal.

For ease of reference, see the abbreviation key below:

- JP - Judge President
- DJP - Deputy Judge President
- ADJP - Acting Deputy Judge President
- AJ - Acting Judge
- CJ - Chief Justice
- DCJ - Deputy Chief Justice
- J - Justice/ Judge (context-specific)
- ADCJ - Acting Deputy Chief Justice
- JA - Judge of Appeal
- AJA - Acting Judge of Appeal

DEFINING SHORT TITLE

A “short title” may be defined on the first occasion that one refers to a person, institution or office. It is done by putting the short title in brackets, without any inverted common or article, immediately after the first mention of that person, institution or office. Thereafter you should consistently use that precise short title for the rest of the judgment.

[1] The applicants approached this court in terms of the Promotion of Access to Information Act (PAIA) seeking certain relief against the respondents.

[2] The decision to constitute a special court was, in part, informed by the fact that PAIA applications in this Division form the bulk of the court rolls in most, if not all motion court sittings. Very few of them comply with PAIA requirements resulting in most of the matters being removed from the roll, only to be re-enrolled without amendment. This is obviously an untenable situation which the Judge President determined would best be addressed by a special court providing comprehensive guidance in respect of PAIA applications.

The purpose of defining short titles in a formalised way is to avoid ambiguity. If the short title creates no risk of ambiguity, then defining a short title should be avoided.

When one is referring to a natural person, say for example “Ms Johanna Petronella Jacobs”, one can start using a shorter name without having to define it. On the second occasion one can simply say “Ms Jacobs”, unless, there is another person mentioned in the judgment that is also “Jacobs”.

The same applies to “the Gauteng Division, Pretoria”. Where no other High Court is mentioned in the judgment, simply start referring to it as the “High Court” without having defined a short title. However, as stated earlier, we do not use an abbreviation/acronym for a court. So, although you can refer to the “Gauteng Division, Pretoria” simply as “High Court”, you may never use “GDHC”, “GDP” or “HC”.

GENDER

Reference to gender is a matter of personal style and will vary from Judge to Judge. The following can be of assistance in this regard.

To be inclusive, use “they” throughout the judgment and avoid the use of “he/she” or “s/he”. Gender neutral language is preferred, and the traditional practice of using male pronouns to reflect all genders is to be avoided if at all possible.

Alternative sentence construction can also be of assistance. For example, instead of “If a persons doesn’t wear a mask in public, he or she may be liable . . .”, you can make use of “A person not wearing a mask in public may be liable . . .”.

USING FOREIGN PHRASES AND LEGALESE

Avoid using lots of Latin phrases and legalese. Remember that a judgment should be easily understandable to a general member of the public that reads it in the spirit of the promotion of justice.

Exceptional usage of Latin and other foreign phrases

We try to avoid Latin phrases, especially if there is a readily available English alternative. For example, use “above” and “below” instead of “supra” and “infra”, “court of first instance” instead of “court a quo”, “amongst others” instead of “inter alia”.

However, where a Latin or other foreign phrase has been incorporated into ordinary English, it is permissible to use it. For instance, use “bona fide”, “per se”, “prima facie”, “ad hoc” and “modus operandi”.

In some instances, it is unavoidable in legal writing not to use Latin phrases, for example “ex parte” and “amicus curiae”.

Some Latin descriptions and maxims are so commonly and precisely used by the legal fraternity, and it is so hard to capture their meaning correctly and succinctly in English, that we continue to use them. In these instances always provide the English translation in brackets at least on the first occasion that the phrase is used in the judgment. The translation should also be in much simpler terms and easily understandable. For example, *condicio sine qua non* (condition without which it could not be), *nemo iudex in sua causa* (no one should be a judge in their own cause), *salus populi suprema lex esto* (the good of the people shall be regarded as supreme law), *volenti non fit injuria* (a person cannot bring a claim against another for injury, if said person willingly places themselves in a situation where they knew injury could result), *vigilantibus non dormientibus aequitas subvenit* (equity aids the vigilant, not the sleeping).

Italicisation

Latin phrases that have been incorporated into ordinary English are not italicised. For instance, “bona fide”, “per se”, “prima facie”, “ad hoc” and “modus operandi”.

However, Latin descriptions and maxims that are fairly long and not easily translatable are italicised, as in the examples above.

NUMBERS AND PRICES

Whole numbers between one and nine should be spelt out in full. Numbers greater than nine should be written in figures. However, where a sentence starts with a number it must always be typed in full. For example, “Eleven years have passed since the occurrence of . . .”

All numbers with decimals and all numbers attached to percentages must also be written in figures. Always use the % sign. We do not spell out “per cent”. Decimals should make use of full stops and not commas. Use sticky spaces to prevent the number from being split over two lines.

Where a value in rands and cents are given use a full stop, not a comma. If there are no cents, do not write R 10.00. Include a space between the number and the “R”.

[7] The plaintiff, served a letter of demand on the respondent, two years’ ago. Summons was subsequently served, 11 months thereafter.

[8] The plaintiff claims damages of R 5 578 908.12, together with an amount of R 10 000 000 for loss of support.

DATES

Dates should always use the following simple format: day month year. For example, one would write 26 March 2020. Never use any punctuation or ordinal suffix. It should never look like this, “March 26, 2020”, “26th March 2020” or the “26th of March 2020”.

Use sticky spaces to ensure that the dates stay on the same line.

CHAPTER IV REFERENCING

HOW TO INTRODUCE CITATIONS

Use the following conventions to introduce a citation, or series of citations, in a footnote:

- No introduction: Where the source directly supports the proposition stated in the text. Note that bridging language is still necessary, but none of the formulations from below is needed.
- “See, for example,” (note the commas that we always use, for consistency): Where the source directly supports the proposition, but the proposition is well-established and could have been supported by many other sources that are not cited.

- “See generally”: Where the source provides a general discussion of the area of law raised by the proposition, but not direct, pointed support for the proposition.
- “See”: Where the source supports the proposition only with a degree of indirectness.
- “Compare”: Where the source provides no direct support for the proposition, but readers are urged to draw an analogy between the two. Note that we never use “cf.”
- “But see”: Where the source contradicts the proposition.
- “See also”: Where the source supports the proposition but other, more directly relevant authority has already been mentioned.

CITING ENACTED LAW

The Constitution

The Constitution is easy. Always say “the Constitution”, without any need to give its full title or define this shorter form.

When referring to a particular section, say “section # of the Constitution” rather than “Constitution section #”. If the section is in the Bill of Rights, you can say “section # of the Bill of Rights”, with no need to define that term.

The interim Constitution, similarly, is always simply called “the interim Constitution”.

Legislation

When citing statutes from any jurisdiction it is necessary to include the full name, Act number and year the first time it is cited. The Act number and year should appear in a footnote (immediately after the Act name and before the bracketed short title) rather than in the body of the text.

If the Act is referred to again in the judgment, and the full name is unwieldy, a short title should be defined immediately after the first time the Act is mentioned. The short title appears in brackets, with no inverted commas or article. The short title should be used consistently thereafter.

[9] This is evident from section 23(1)(b) of the Private Security Industry Regulation Act¹ (PSIRA). It thus differs from the position under the Criminal Procedure Act² (CPA). But neither PSIRA nor the CPA authorises security officials to ignore the law.³

¹ 56 of 2001.

² 51 of 1977.

³ For example, the Promotion of Administrative Justice Act 3 of 2000 (PAJA) may apply to their conduct.

When referring to sections of an Act, write out “section” (in full, with lower-case “s”) and give the section numbers according to the pinpoint conventions set out above. For example: “section 12”; “sections 22-4”; “sections 34 and 48”.

When referring to multiple subsections within one section, use the singular “section”, with the appropriate concord. Thus we say, “This is inconsistent with section 8(1) and (2), which applies to large agreements.” To say “sections 8(1) and (2) . . . apply” is wrong.

There should not be spaces between sections and subsections (e.g. “section 8(1)(b)” is correct; “section 8 (1) (b)” is incorrect).

Regulations

Regulations must always be cited in footnotes, using the following format:

Full Regulation Name, GN number *GG* number, date of promulgation.

On the rare occasions that one cites provincial regulations, substitute “*Provincial Gazette*” for “*GG*”.

As with section references, use a lower-case “regulation” and the singular “regulation” when referring to many sub-regulations in the same regulation. See example as in footnote:

¹ Patent Regulations, GN R2470 *GG* 2647, 15 December 1978.

² Regulations for the South African Police Service relating to the Code of Conduct for Members of the Service, ³GN R529 *GG* 27642, 10 June 2005.

⁴ Regulations for the South African Police Service, GN R203 *GG* 719, 14 February 1964. See especially regulation 11(1) and (2), which sets appointment criteria.

⁵Gauteng Schools Education Act (6/1995): Regulations for Admission of Learners to Public Schools, 2012, GN 1160 *Provincial Gazette* 127, 9 June 2012.

Other government notices

Occasionally we cite government notices other than regulations. For example, one might need to cite the notice by which the President brings an Act into operation. In that case, the citation is the same as for regulations – also in footnotes, using the following format:

Full Notice Title, GN number GG number, date of promulgation.

Proclamations

If you are unsure whether you are dealing with a proclamation, a government notice or a general notice, consult the list of contents on the back page of the Government Gazette in question or check Juta's annual index to the Government Gazette. A proclamation is cited in a footnote, should be cited in the manner shown below:

Proc R number GG number of day month year.

¹Proc R46 GG 24567 of 31 January 2003.

Rules

When citing court rules, cite them as follows:

- “the Rules of the Supreme Court of Appeal”;
- “the Uniform Rules of Court”;
- “the Magistrates’ Courts Rules”; and
- “the Rules of the Constitutional Court”.

Although each set of rules gets a capital “R” when referred to as a whole, each rule is lower-case. So, one will say “According to rule 29 of the Rules of the Constitutional Court, which incorporates rule 42 of the Uniform Rules of Court, . . .”.

Citing a particular provision

The High Court’s judgments do not abbreviate “section”, “regulation”, “rule”, “Article”, etc. We even auto-correct “s”, “reg”, “r” and “Art” in quotations, giving instead their full form. When referring to a paragraph in a cited judgment, however, we use “para” rather than the full form (e.g. “In *J v NDPP* at para 23, this Court held . . .”).

The words “section”, “rule” and “regulation” are not capitalised. (Though “the Rules” and “the Regulations”, referring to the whole instrument, are capitalised.) The words “chapter”, “volume” and “article” are generally capitalised but are within your judge’s discretion. The key is to be consistent within the judgment.

Citing an enacted law more than once

The rules surrounding legislation that is cited more than once apply also to Regulations, Rules and other enacted law. When you first refer to legislation you must give its full name in text and its number in a footnote. If you refer to it again, there is no need to give the number. But you must still give the full name *unless* you have defined a short name, which you should do wherever the Act has a cumbersome name.

If several successive footnotes cite the same statute, you can use “Id section . . .” for all but the first. But note that we treat the Constitution with reverence and never “id” it.

Citing South African case law

General rules

We generally avoid drawing attention to the particular Judge who authored the judgment cited but this is subject to the writing Judge’s discretion. Thus we generally say “the Constitutional Court held” or “the Supreme Court of Appeal held” (or, if necessary to avoid ambiguity, “the majority of the Supreme Court of Appeal held”), rather than “Legodi J held” or “Wallis JA held”.

In footnoted case citations, one should not include the author of the judgment. The exception to this rule is where one is relying upon a dissenting or minority judgment, or one’s pinpoint refers to part of a dissenting or minority judgment. If this fact is not mentioned, it would be misleading as it would create the impression that the source relied upon was the majority or

leading judgment. Thus we might say “*Mbatha* at para 230 (judgment of Madlanga J)” and “*F v Minister* at para 110 (judgment of Froneman J)”.

Citations must never include full stops. So, for example, never say “2014 (2) 210 B.C.L.R. (CC)” or “1888 Buch. 12”. Even if your source includes the full stops (which is, in any event, unlikely), you should remove them. Full stops are only included at the end of a citation in a footnote.

SEVERAL CASES IN THE SAME FOOTNOTE

Where you have many cases in more than one footnote, cite them in the following order:

1. Constitutional Court cases in reverse chronological order, i.e. with the most recent case first;
2. Supreme Court of Appeal/Appellate Division cases in reverse chronological order; and
3. High Court (and equivalent) cases in reverse chronological order.

Where there are two cases cited in the footnote, separate the two cases with “and”. Where there are three or more cases cited in the footnote, separate the cases with a semicolon; and for the very last case have a semicolon *and* an “and”.

¹*Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995; *Minister of Safety and Security and Another v Carmichele* [2003] ZASCA 117; 2004 (3) SA 305 (SCA); *Carmichele v Minister of Safety and Security and Another* [2000] ZASCA 61; 2001 (1) SA 489 (SCA); and *Carmichele v Minister of Safety and Security and Another* 2003 (2) SA 656 (C).

²*Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at paras 21-3 and *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138.

Constitutional Court cases

Constitutional Court cases are ideally to be cited as follows:

Full name given in Juta report neutral citation; *Juta citation*; *Butterworths citation*.

In South Africa, the “neutral citation” basically means the SAFLII citation (e.g. [2014] ZACC 1). The *Juta* citation is most commonly the SA Law Reports citation (e.g. 2014 (4) SA 385

(CC)), but if that is not available there could be an SA Criminal Reports citation or Industrial Law Journal citation. The Butterworths citation is most commonly the All South African Law Report published by LexisNexis (e.g. [1967] 3 All SA 337 (A)), but it may also be available as the Butterworths Constitutional Law Reports (e.g. 2014 (6) 421 BCLR (CC)), or the Butterworths Labour Law Reports citation. Note that the above citation ordering must be preserved (even if SAFLII's header does not present them in that order).

The Juta citation is authoritative for the Court, and the case name that appears on the first page of the Juta law report must *always* be used in the Court's judgments when available, and must be reproduced down to the last comma. Note that we do not amend the Juta citation from "Ltd" to "Limited".

The differences are as follows:

1. We do not write the case name in all caps as the Juta report does;
2. We do not include full stops except for N.O. and, where the Juta citation does not add full stops to N.O., we autocorrect and add them.
3. We italicise the case name (but note that we do not "invert" the italics that appear in the Juta name; thus, although the Juta name says "Section27 as *Amicus Curiae*", we write "*Section27 as Amicus Curiae*" and not "*Section27 as Amicus Curiae*"); and
4. We delete every "*and Another*" and "*and Others*" from the case citations.

Kindly note the below:

- Each word of each party's name should be capitalised, except where it is an article, preposition or conjunction.
- Occasionally a name has a capital letter somewhere in the middle. In that case, use common sense or, if possible, refer to the body of the judgment to determine whether it is correct. For example, "MacAlpine", "McKinley", "FirstRand Bank".
- "*In re*" and "*Ex parte*" appear as such, without the second word capitalised.
- When two or more cases were consolidated before the Court, each case name should be given in full before the combined citation, separated by a semi-colon.
- The "v" separating the sets of parties must be lower case and have no full stop after it. It must also be italicised along with the names of the parties.

Occasionally we cite a case that does not yet have any Juta report and/or Butterworths report. In that case, simply omit that citation.

¹*De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC).

²*Sali v National Commissioner of the South African Police Service and Others* [2014] ZACC 19.

³*Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) at para 18 and *Lane and Fey NNO v Dabelstein and Others* [2001] ZACC 14; 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 (CC) at para 23.

Supreme Court of Appeal (and Appellate Division) case after 1947

Supreme Court of Appeal cases are cited like Constitutional Court cases, except that we do not insist on a Butterworths citation. This is shown below by way of example:

Full name given in Juta report neutral citation; Juta citation.

Even some Appellate Division cases are on SAFLII, in which case the neutral citation should be provided. For earlier cases, however, there is no neutral citation, which must therefore be omitted. Do not use “(AD)”, “(CPD)” or “(WLD)” for SALR citations. We *always* use “(A)” for the Appellate Division, “(C)” for the Cape Provincial Division, “(W)” for the Witwatersrand Local Division, etc.

¹*Grey’s Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* [2005] ZASCA 43; 2005 (6) SA 313 (SCA).

²*Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* [2005] ZASCA 2; 2008 (2) SA 638 (SCA).

³*Luster Products Inc v Magic Style Sales CC* [1996] ZASCA 146; 1997 (3) SA 13 (A) and *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A).

High Court cases after 1947

High Court cases should be cited as follows:

Full name given in Juta report *Juta citation*.

Where the Juta citation is not available, include the Butterworths citation. If the case is not reported, do not use the SAFLII neutral citation as is. Refer to the “Unreported judgments” section below in that case.

High Court cases before 1947

Very exceptionally we will cite a case from before 1947 – that is, before the SALR existed. For the period from 1910 to 1946, we use the relatively well-known reports for the Appellate Division and each High Court:

¹ *R v Zondagh* 1931 AD 8 at 9.

² *Ex parte Sidelsky* 1920 TPD 70 at 71.

³ *Union Government (Minister of Justice) v Thorne* 1930 AD 47 at 54; *Cape Town Municipality v Clohessy* 1922 AD 4 at 12; and *Halliwell v Johannesburg Municipal Council* 1912 AD 659 at 666.

For pre-1910 cases, one must use more obscure and now-defunct law reports, like the TS reports, Buchanan reports, Kotze reports and Searle reports. These reports, and their correct citation forms, can all be found on LexisNexis.

However, note that where one of these old law reports has several years’ judgments compiled in a single volume of the report, you must give only the year of the judgment being cited. So, for example, the Searle reports have one volume for all Cape Supreme Court judgments from 1861 to 1863. But instead of saying “(1861-1863)” in the citation, change this to give only the year of the judgment being cited.

¹ *In re Campbell* (1862) 4 Searle 102.

² *Van Staden and Another v Attorney-General* (1906) 23 SC 4.

³ *Bank of Africa v Kimberley Mining Board and Gem Diamond Mining Company (Limited)* (1883) 2 HCG 150 and *Rudolph v White & Tucker* (1879) K 135.

Unreported judgments

Where a case is unreported – and does not even have a SAFLII citation – then use the following convention:

Case name, unreported judgment of the Name of Court, case number #####/##### (date).

In respect of the above, please remember to be context-sensitive in populating the citation format. Since the ZACC and ZASCA numbers of Supreme Court of Appeal judgments are immediately available upon hand-down, there should only be a need to use this convention for judgments of High Courts and courts of a similar status.

¹ *Mphela and Others v Engelbrecht and Others*, unreported judgment of the Land Claims Court, Case No 66/01 (1 June 2005).

² *Botha and Another v Rich NO and Others*, unreported judgment of the Northern Cape High Court, Kimberley, Case No 476/2009 (28 March 2013).

³ *S v Qhinga and Others*, unreported judgment of the Eastern Cape High Court, Bhisho, Case No CC35/2007 (31 March 2009).

Pinpoints: Citing particular passages of a judgment

Frequently you need to refer to a particular paragraph or page of a case you are citing. An entire case rarely supports the proposition sought to be justified. The reference to the particular page, paragraph, etc., that is pertinent is called a “pinpoint” or “pin cite”.

The basic format for giving a pinpoint for cases is very simple:

citation for case at pinpoint.

The point is that there is *always* an “at” before the pinpoint, for every single source. We never give the pinpoint directly after the citation, with no introduction. And there is never a comma before the pinpoint either. You should use a sticky space between the “at” and the pinpoint so that they are not orphaned.

Pinpoints can be for many things. In case citations, they are usually for paragraphs. Whenever the judgment has paragraphs, you must use the paragraphs – not pages, which are particular to

each law report. We always use the shortened “para”. Accordingly, it would be “at para #”, and never “at paragraph #”.

In citations of older cases, which do not have paragraph numbers, you need to use the page number. Remember that you should always be using the Juta report and treating it as authoritative when available. For that reason, you will almost invariably be using Juta’s page numbers, together with the margin lettering. Thus, the pinpoint will be, for example, “at 55F”, “at 125A-G”, “at 126H-127A”, etc.

On occasion, you will cite a footnote of a case. Although we say “n” to cross-refer to another footnote *within the same judgment*, when pinpointing to a footnote in a source we use “fn”. Where it is appropriate to use page numbers (so mostly secondary sources), give *both* the page number and the footnote:

[citation at page fn #.](#)

Do not give both a paragraph and footnote number.

Sometimes a pinpoint will be to an entire chapter of a book. In that case, you can say “at Chapter 5” rather than giving the span of pages that comprises Chapter 5. Any smaller division than a chapter, though, and you must use the page span. Do not refer to a chapter’s sub-section, e.g. “at 5.2.2”. It is much easier for a reader to turn to a given page of the source than to find out where 5.2.2 is.

In many cases, the idea or principle you are referencing will extend over more than one page or paragraph, in which case your pinpoint will give a page or paragraph range. The crucial rule here is that you always write the starting number in full, *but only give the digits of the end number that change* and separate them by a hyphen (*not* an en- or em-dash). There are some examples with which one cannot go wrong: “at 7-9”; “at paras 1-6”; “at 78-81”; “at paras 9-16”, “at 190-201”; “at paras 77-123”, “at 91-1046”. The rule comes into play in the following examples: “at 22-4”, *not* “at 22-24”; “at paras 16-8” *not* “at paras 16-18”; “at 155-78” *not* “at 155-178”.

Note, finally, that where your page or paragraph numbers themselves contain a dash of some kind, it can look ugly and confusing to join them with a hyphen. In such cases simply write “to”. For example: “B1–24 to B1–28”; “B1–44 to C2–2”.

If you want to pinpoint two or more pages or paragraphs, but they are not consecutive, then separate the pinpoints (which may range) by “and”. For example: “at paras 12 and 18”; “at 55 and 121”; “at paras 19-21 and 25”; “at 223-4 and 255-71”.

Citing a case more than once

Where a case has been cited previously, but not in the immediately preceding footnote, you must use the “above n #” formula. We never say “supra” or “op cit”, only “above n #”.

For cases, use the case’s short title when referring to it on a second or further occasion, which you will have defined on the first occasion that you cite the case.

The formula of the first citation and its short title will be something like:

¹ *Full case name* SAFLII citation; SALR citation; BCLR citation (*Short title*) at pinpoint.

The formula for the subsequent citation will be:

² *Short title* above n # at pinpoint.

Note, however, that where a Magistrates’ Court decision is being appealed, we refer to the “Magistrates’ Court decision”. We do *not* use an italicised short title based on the parties’ names.

Where the case was cited in the *immediately* preceding footnote, use “Id” (without italics or a full stop). Where there was only one source cited in the preceding footnote, and there is accordingly no risk of ambiguity, the footnote can be “Id at para 3”. Or, if the pinpoint citation is the same as in the preceding citation, the whole footnote will simply be “Id.”, without repeating the pinpoint. If there is more than one source cited in the preceding footnote, and accordingly a risk of ambiguity, use:

“Short title id” (rather than “Short title above n #”).

¹²*Viking Pony Africa Pumps (Pty) Ltd v Hidro-Tech Systems (Pty) Ltd and Another* [2010] ZACC 21; 2011 (1) SA 327 (CC); 2011 (2) BCLR 207 (CC) (*Viking Pony*) at para 13.

¹³Id at para 73.

¹⁴Id at para 12.

¹⁵Id.

¹⁶*Women’s Legal Centre Trust v President of the Republic of South Africa and Others* [2009] ZACC 20; 2009 (6) SA 94 (CC) at paras 11-25 and *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* [2010] ZACC 5; 2010 (6) BCLR 520 (CC) (*Poverty Alleviation Network*) at para 21.

¹⁷*Women’s Legal Centre Trust* id at para 13.

¹⁸*Viking Pony* above n 12 at paras 58-9.

¹⁹*Poverty Alleviation Network* above n 16 at para 22.

²⁰Id.

CITING FOREIGN LAW

It is impossible to catalogue exhaustively the citation formats for all jurisdictions that could be cited. Always try to mimic the way we cite South African authorities, to make the citation easy on South African eyes and consistent with the other conventions in this Style Guide – though without doing undue violence to the foreign jurisdiction’s citation conventions. So, for example:

- Omit punctuation from citations. Thus, regardless of what readers from that jurisdiction would find most familiar, say “[1988] 2 KB 1”, not “K.B.”; “460 US 536”, not “U.S.”; “*Phillips v Dumas* 361 US 376 (1960)”, not “*Phillips v. Dumas*, 361 US 376 (1960)”; and so on. Use semicolons to separate different citations even where that jurisdiction would use commas.
- Make sure pinpoint citations are preceded by an “at”, regardless of what that jurisdiction would do.
- For legislation and constitutions, try as far as possible to stick to the way we cite our own. So say “Article 3 of the US Constitution” rather than something like “US Constitution, Art. 3”; “Section 3 of the UK Human Rights Act 1998” rather than something like “UK Human Rights Act, 1998, s. 3”; and so on.

Here are some short, jurisdiction-specific guidelines and examples:

United Kingdom

Neutral citations are very easily available for recent UK cases. You can use the UK's SAFLII equivalent, BAILII. You can give one of the well-known law report citations, but need not do so – the neutral citation will be by far the easiest way for any South African reader to access the case.

¹ *Sherras v De Rutzen* [1895] 1 QB 918 at 921.

² *Donoghue v Stevenson* [1932] AC 562 at 573.

³ *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong* [1984] 2 All ER 503 (PC).

⁴ *Rottman v MPC* [2002] UKHL 20; [2002] 2 AC 692.

⁵ *Spiller and Another v Joseph and Others* [2010] UKSC 53 at para 13.

⁶ Section 12 of the Human Rights Act 1998.

⁷ Section 1 of the Defamation Act 1952.

Australia

Like the United Kingdom, Australia has a SAFLII equivalent, [AustLII](#). It has both cases and legislation.

Canada

Canada's SAFLII equivalent is [CanLII](#). Use this to find recent cases, using the citations that it records. Like AustLII, CanLII has both cases and legislation. You can also search the [SCC reports](#) for free online. Always give the SCC citation (if it is available) and the SCR citation (or, failing that, one other authoritative report). There is no need to provide further citations.

¹ *Union Natural Gas Co v Chatham Gas Co* 56 SCR 253.

² *R v Buhay* 2003 SCC 30; (2003) 225 DLR (4th) 624 (SCC).

³ *Grant v Torstar Corp* 2009 SCC 61; [2009] 3 SCR 640.

⁴ *R v Salituro* (1992) 8 CRR (2d) 173 (SCC).

⁵ Sections 8-10 of the Canadian Charter of Rights and Freedoms.

⁶ Section 23 of the Canadian Constitution of 1982.

⁷ Section 446 of the Criminal Code RSC 1985 c C-46.

⁸ Section 2 of the Mutual Legal Assistance in Criminal Matters Act RSC 1985 (4th Supp) c 30.

⁹ Section 10 of the Sex Offender Information Registration Act SC 2004 c 10.

United States

The United States has a peculiar citation style which we alter quite significantly to accord with what South African readers find familiar. In addition, we sometimes write out things that

Americans would abbreviate, because South African readers may not recognise the abbreviations. Do not do this where, in context, the source's full name is already clear.

¹ *Baker v Carr* 369 US 186 (1962) at 297.

² *United States v Alvarez* 132 S Ct 2537 (2012).

³ *Shirley v State National Bank of Connecticut* 493 F 2d 739 (2d Cir 1974).

⁴ *Atlee v Laird* 347 F Supp (ED Pa 1972).

⁵ Article 3 of the United States Constitution.

⁶ Fourth Amendment to the United States Constitution.

⁷ Section 12 of the Alien Tort Claims Act of 1948.

⁸ 28 United States Code § 1350 (1948).

⁹ New Hampshire Revised Statutes § 1:15 (1973).

Germany

Continental European citations can be quite unfamiliar to South Africans and other common lawyers. German citations do not have a case name; they only have a case number. Note that the law report name, volume number and case number provide a complete citation, though you can also add the year if you want. Germans will often refer to the case by some description of its facts or features, or by some famous person involved; and you should do the same for short titles – or, if you are not able to do that, simply use the full citation when you repeat it.

¹ (1983) BGHZ 86, 240.

² (1958) BverfGE 7, 198 (*Lüth*).

³ See BGHZ 86, 240 above n 20.

⁴ See *Lüth* above n 21.

CITING INTERNATIONAL & REGIONAL LAW

There are many different international and regional sources of law, too many to consider here. The same basic rules apply: remove full stops, make things readable to South Africans, etc. Also, keep things simple – international treaties come with lots of information, but the names and dates are usually more than sufficient to identify them uniquely. For ease of reference, several popular treaty names can be found here: https://treaties.un.org/pages/AdvanceSearch.aspx?tab=UNTS&clang=_en

Try to follow this format when citing international and regional sources of law:

Name, day month year.

The year refers to the date of the conclusion of the agreement. It may be necessary to include in the footnote when it came into effect, was signed or ratified by South Africa, but this should follow in a separate sentence after the citation.

Examples (as taken from National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another):

¹ SADC Treaty, 17 August 1992.

² African Commission, Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, 17-23 October 2002.

³ African Commission, Resolution on Ending Impunity in Africa and the Domestication and Implementation of the Rome Statute of the International Criminal Court, 5 December 2005.

⁴ Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, recommended by UN General Assembly Resolution 55/89, 4 December 2000.

⁵ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948.

⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Punishment, 10 December 1984.

⁷ Vienna Convention on the Law of Treaties, 23 May 1969.

⁸ Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995.

⁹ African Charter on Human and Peoples' Rights, 27 June 1981.

¹⁰ SADC Protocol on Mutual Legal Assistance in Criminal Matters, 3 March 2002.

For the more obscure treaties and instruments (being those that are not well known), you should give the International Legal Material (ILM) reference. Where the ILM reference is not available, cite the United Nations Treaty Series (UNTS) reference or full UN Doc or OAU Doc reference. (These reference points are usually located at the very top of the relevant document.)

ILM reference example:

[United Nations Code of Conduct on Transnational Corporations \(1984\) 23 ILM 626.](#)

UNTS reference example:

[Convention on Civil Aviation \(1994\) 15 UNTS 295.](#)

UN Doc reference example:

Resolution on an International Development Strategy for the Third UN Development Decade GA Res 35/56, UN Doc A35/56 (1981).

OAU Doc Reference example:

African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990).

European Court of Human Rights

The increasingly cited ECHR has a short online citation guide (https://www.echr.coe.int/Documents/Note_citation_ENG.pdf) . We follow this, except that, as usual, we drop the full stops.

¹ *Campbell v Ireland*, no 45678/98, § 24, ECHR 1999-II.

² *P and S v Poland*, no 57375/08, § 38, ECHR 2008.

CITING SECONDARY SOURCES

Books

In all cases, save for the exceptions below, books are to be cited as follows:

Author's surname *Title of Book* edition (Publisher, City Year) volume.

Note that there are no commas between the author, title and edition.

Do not put in the author's first name or initial. The only exception is where the failure to include an initial would result in confusion (e.g. because several different Potgieters are being cited in the judgment). In those cases, put the initial of the author immediately before the surname, with no full stop after it.

Where there are two authors, both authors' surnames should be included, separated by an "and" (not an ampersand). Where there are three or more authors, only the surname of the first author should be included, followed by "et al" (without any italics or full stops).

Where the book is an edited volume, rather than singly authored, insert “(ed)” or “(eds)” after the surname(s) of the editor(s). It will then usually be necessary to include the author of the relevant chapter too.

The title of the book should have each word capitalised (regardless of whether that is how the title is printed in the book itself), excluding articles (“a”, “an”, “the”), conjunctions (“and”, etc) and prepositions (“in”, “on”, “to”, “for”, etc). Where a book has a subtitle then the first word of the subtitle should be capitalised even if it is an article or preposition.

The edition should take the following form: “2 ed”, “3 ed”, etc. If you are citing the first edition, or there is only one edition, then there is no need to put anything here.

The volume number should take the following form: “vol 1”, “vol 2”. If, as in most books, there is only one volume, then there is no need to put anything here.

For the sake of consistency, always write “Juta & Co Ltd” for books published by Juta. Stick strictly to this even if in the book itself Juta’s name appears with, for example, a comma after the “Co” or an “and” instead of an ampersand. There are a handful of publishers that are so well-known that it is appropriate to give an abbreviation for the name, for example, “OUP” for Oxford University Press and “CUP” for Cambridge University Press.

The city in which the book was published must be a city! So, for example, Juta books should say “Cape Town”, and never the suburbs of “Claremont” or “Kenwyn”, even if that is what the book says. See the example below:

¹ Okpaluba and Osode *Government Liability: South Africa and the Commonwealth* (Juta & Co Ltd, Cape Town 2010).

² Bekker *Seymour’s Customary Law in Southern Africa* 4 ed (Juta & Co Ltd, Cape Town 1982).

Du Toit et al *Labour Relations Law – A Comprehensive Guide* 5 ed (LexisNexis Butterworths, Durban 2006) at 6-8.

³ Neethling, Potgieter and Visser *Law of Delict* 6 ed (LexisNexis, Durban 2010) at 365-8.

Hutchison et al (eds) *The Law of Contract in South Africa* 2 ed (OUP, Cape Town 2012) at 50 and 61.

Chapters in books, edited volumes, encyclopaedias, etc

If different sections of the book are authored by different people, the author of the pertinent chapter or part must be given. The applicable format in these cases is:

Chapter author's surname "Title of Chapter" in Book author/editor's surname *Title of Book* Edition (Publisher, City Year) volume.

The chapter title must be capitalised in the same way as the title of a book (see above).

Sometimes one cites a collection of a single author's essays or articles (some of which likely appeared elsewhere first). Even though the whole book is written by the same person, giving only the name of the collection, which comprises disparate works, is unhelpful. In that case, use the same citation format as above, but do not repeat the author's name when you give the author of the book. Instead, say "his" or "her", depending on whether the author is male or female.

¹ Joubert "The Roots of a Contract: An Overview" in Visser (ed) *Essays on the History of Law* (Juta & Co Ltd, Cape Town 1989).

² Visser "Delict" in Du Bois (ed) *Wille's Principles of South African Law* 9 ed (Juta & Co Ltd, Cape Town 2007).

³ Honoré "Are Omissions Less Culpable?" in his *Responsibility and Fault* (Hart Publishing, Oxford 1999) at 60 and 65-6.

⁴ Gardner "Legal Positivism: 5 ½ Myths" in his *Law as a Leap of Faith* (OUP, Oxford 2012).

Electronic Books

Electronic books may include books found on personal websites, databases, or even in audio form. The print version of an electronic book should always be the one cited, if it is available. Obviously, certain books will only be available in a digital format or will be very difficult to find in print, however.

In these instances, include the publication date – if available – in brackets as with print books, but also include a reference to the e-book version (e.g. "[Kindle]", "[PDF]" or "[Audio]"). If Digital Object Identifiers (DOI) are available, provide them at the end of the reference. Thus, you must include the following information: author, title, edition, e-book version, year, and either the DOI number or the place where you downloaded the book.

There are many different e-book versions or formats. Kindle, iPad and Barnes & Noble Nook all accept a variety of formats, of which PDF, MOBI and EPUB are but a few. To cite a source

from one of the well-known e-reader databases (e.g. “Amazon” or “Barnes & Noble”—in other words, if you were to purchase the book from the e-reader) use the corresponding e-reader’s name (e.g. “Kindle” or “Nook”). If you are citing a PDF, MOBI, HTML or another file type found online and *not* from one of these main sources, regardless of whether you are using a Kindle to read it, use the file type extension in capital letters.

Preference is given to the DOI number and only if there is no DOI available are you required to state the place where you downloaded the book. Crossref.org has a large database where you can search to find a book’s DOI. Note that the DOI/place of download is used in place of publisher information.

See the “Internet sources” section below for more detail on how URL addresses should be formatted if needed.

Where the DOI is available, the format should be as follows:

Author’s surname *Title of e-book* Edition [Version of e-book] (Date of original publication)
DOI 10.XXXX/XXXXXXXXXX.XX.

See the example in the footnote below:

¹ O’Connell *The Power and Purpose of International Law* [Kindle] (2008) DOI 10.1093/acprof:oso/9780195368949.001.0001.
Orwin (ed) *Anniversary Essays on Tolstoy* [PDF] (2010) DOI 10.1017/CBO9780511676246.

Where the DOI is *not* available, the format is as follows:

Author’s surname *Title of e-book* Edition [Version of e-book] (Date of original publication),
available at URL address.

See the example in the footnote:

¹ O’Connell *The Power and Purpose of International Law* [Kindle] (2008), available at http://www.amazon.com/Power-Purpose-International-Law-ebook/dp/B004WMS9NW/ref=mt_kindle?_encoding=UTF8&me=.

² Cormen et al *Introduction to Algorithms* 3 ed [PDF 3] (2012), available at <https://github.com/esbanarango/Competitive-Programming/blob/master/%C2%B7Documentation/Books/Introduction.to.Algorithms.3rd.Edition.Sep.2010.pdf>.

³ Tolstoy *War and Peace* [EPUB], available at <https://www.gutenberg.org/ebooks/2600>.

DeHuff *Taytay's Tales: Traditional Pueblo Indian Tales* [HTML] (1922), available at <http://digital.library.upenn.edu/women/dehuff/taytay/taytay.html>.

LAWSA

LAWSA has its own unique citation format:

Chapter author's surname "Title of Chapter" in *LAWSA* reissue or edition (year of publication) volume.

Give the author(s) that LAWSA lists as the chapter authors; ignore those listed as the authors of the "original text" or the "updating authors". On the electronic version (available on LexisNexis), you normally need to go to the cover/contents page of the chapter to see its author.

The "Companies" and "Revenue" chapters spill over into several volumes and are therefore broken up into different "Parts". Do not include the Part in the chapter name.

You can find the reissue or edition either from the electronic overview page or by clicking the "Publication details" button (an icon at the top left of the new LexisNexis interface). Unless for some strange reason one cites the original edition of *LAWSA*, the "reissue or edition" is going to be one of the following:

- "reissue" if it is the first reissue volume;
- "2 ed" if it is the second edition volume *or* second edition replacement volume; or
- "3 ed" if it is the third edition volume.

The date of the last update can be found very easily on *LAWSA*'s electronic version. Make sure you are using LexisNexis's new interface, as the old interface does not have the latest *LAWSA* versions. Click the "Publication details" button (an icon at the top left).

Pinpoint citations, as with judgments, should be to paragraph numbers if possible. If this is not possible, page numbers will suffice. See the example below:

¹ Williams “Companies” in *LAWSA* 2 ed (2012) vol 4(1) at para 34. (Note that the old LexisNexis interface does not have the latest version of this chapter, and will give you the old Blackman version.)

² See Bonthuys et al “Gender” in *LAWSA* 2 ed (2005) vol 10(2).

³ Du Plessis “Statute Law and Interpretation” in *LAWSA* 2 ed (2011) vol 25(1).

Loose-leaf publications

Loose-leaf publications are cited more or less like books but present some difficulties. The main difficulty is that, by their nature, they are continuously updated rather than re-published in new editions. For this reason, you will normally have to provide the year in which the section you are citing was last updated (if you can find it – the electronic versions are normally clear about this), rather than any publication date.

Try to follow this format:

Name(s) of chapter author(s) “Chapter Title” in Name(s) of editor(s) *Title of Publication*
Revision or edition (year of last update) volume.

See the example of the footnote reference below:

¹ Seedorf “Jurisdiction” in Woolman et al (eds) *Constitutional Law of South Africa* Service 5 (2013).

Van Loggerenberg *Erasmus Superior Court Practice* Service 45 (2014).

Journal articles

Journal articles are cited according to the following convention:

Author’s surname “Title of Article” (Year) Volume *Journal Name* article’s starting page.

The name(s) of the author(s) and the capitalisation of the article’s title follow the same rules given above in relation to authors and titles of books. Where the journal article has a very long subtitle, it is permissible to omit it.

The number of the edition/issue should *not* be provided. Provide only the volume number. For example, simply say (2010) 130 *SALJ* 33, *not* (2010) 130:1 *SALJ* 33 or (2010) 130(1) *SALJ* 33. Some journals, like *Acta Juridica*, have no volume number, in which case do not include one!

The journal name can sometimes be abbreviated. It should be abbreviated only when the journal is well-known to South African readers and has a familiar abbreviation. So say “*SALJ*” for the *South African Law Journal*, “*SAJHR*” for the *South African Journal on Human Rights* and “*Stell LR*” for the *Stellenbosch Law Review*. There are only a few other journals that we cite by an abbreviated name. Lesser-known journals and foreign journals should almost invariably be given their full title (though sometimes the *LR* can be safely abbreviated). Err on the side of the full title: If you do not know for sure the abbreviation recognised in South Africa, just give the full name. Note that an abbreviated name must *not* contain full stops. So never say “*S.A.L.J.*”, “*Stell. L.R.*”, etc.

¹ Dube “The New Consumer Protection Act: An Introduction” (2002) 119 *SALJ* 700.

² Meyerson “Rethinking Marriage and Its Privileges” (2013) *Acta Juridica* 385.

³ Hershovitz “Harry Potter and the Purposes of Tort Law” (2010) 63 *Stanford Law Review* 67.

⁴ Mureinik “Beyond a Charter of Luxuries: Economic Rights in the Constitution” (1992) 4 *SAJHR* 464.

⁵ Cox “Federalism and Individual Rights” (1978) 73 *Northwestern University Law Review* 1.

⁶ Chokuda “An Application for Debt Review Does Not Constitute an Act of Insolvency: *FirstRand Bank Ltd v Janse van Rensburg*” (2013) 130 *SALJ* 5; Santucci “Substantive Fairness in Australian Standard Form Consumer Contracts: Lessons from the UK Experience” (2011) 11 *Oxford University Commonwealth Law Journal* 55; and

⁷ Sunstein “Incompletely Theorized Agreements” (1995) 108 *Harvard Law Review* 1733.

Dissertations

Theses and dissertations should be cited as follows:

Author Dissertation Title (description, university, year).

Each word of the dissertation title (except articles, prepositions and conjunctions) should be capitalised.

“Description” is vague and cannot be exhaustively formulated. Most commonly, it will simply take this form: “LLM thesis”, “LLD thesis”, “DPhil thesis”, “JSD thesis”. When the thesis did not form the entirety of any degree, it is necessary to give a slightly longer description, e.g. “final year LLB thesis”, “thesis submitted in partial fulfilment of LLM degree”.

¹ Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* (LLD thesis, University of the Witwatersrand, 2002).

² Wicke *Vicarious Liability in Modern South African Law* (LLM thesis, University of Stellenbosch, 1997).

Conference papers

Conference papers should be cited in the following format:

Author's name "Title of paper" (conference paper presented at conference name, conference venue, year).

Here the words of the paper's title should not be capitalised (except where they would be in any event, in normal prose).

¹ Price "The impact of the Bill of Rights on state delictual liability for negligence in South Africa" (conference paper presented at the Obligations V Conference, St Anne's College, University of Oxford, 2010).

² Sibanda and Mothulwe "*Bhe v Magistrate, Khayelitsha*: The cultural dialectic, Fanonian alienation and a constitutional oneness" (conference paper presented at the Conference for Justice Langa, University of Cape Town, 2014).

Lectures

Cite lectures as follows:

Lecturer "Title of Lecture" (description of the lecture, date).

Of course, "description of the lecture" is vague. It will vary depending on the lecture, and no universally applicable formula can be provided. If the lecture has a formal title, especially as part of a lecture series, that is the best description to give. Failing that, a brief description of the purpose and place of the lecture is best, e.g. "valedictory lecture delivered at the Law Faculty, University of Fort Hare" or "keynote speech delivered at the Human Rights and Private Law conference, University of Cape Town".

Because published versions of lectures can be hard to find if there is an Internet link to the lecture it can be worth including. See "Internet sources", below, for more detail.

¹ Budlender "People's Power and the Courts" (Bram Fischer Memorial Lecture, 11 November 2011).

² Moseneke "Establishing Social Consensus on the Shifting Boundaries between Judicial and Executive Functions of the State — Lessons from the Recent Past" (Inaugural Griffiths and Victoria Mxenge Memorial Lecture, 30

October 2009), available at http://www.nmmu.ac.za/documents/lectures/Griffiths_and_Victoria_Mxenge_Inaugural_Lecture_30_October_2009.pdf.

³ Dworkin “Justice for Hedgehogs” (keynote address delivered at the Boston University School of Law Symposium, 25 September 2009).

Newspapers and periodicals

When citing newspapers, the format is that given above for online newspapers (without the URL address, obviously):

Author’s name “Article title” *Newspaper/publication title* (Date of the article).

If no author is named, simply omit the author.

¹ Khumalo “SA Easter accidents result in 150 deaths” *Sowetan* (26 April 2011).

² Jones “Nuclear reactor in trouble” *The Star* (24 May 2005).

³ Coetzee “Fransman and the ‘lost millions’” *Cape Times* (26 June 2014).

Often one is citing an article not from a hardcopy newspaper but from the newspaper’s website. And even when an article appears in both it can be useful to provide an Internet link. For these and other uses, see the next subsection:

Internet sources

Internet sources are sometimes inaccurate and unreliable and might be taken down at some point. If possible, use a source that is not exclusively found on the internet. However, the purpose of this guide is not in any way to inform the decision whether to cite an Internet source. It is only to provide the conventions for their citation if they are used.

For citation purposes, there are two kinds of Internet sources. First, any article in an online newspaper or periodical (including fairly formal, well-known blogs) should be cited as follows:

Author’s name “Article title” *Newspaper/publication title* (Date of the article), available at URL address.

Other online sources, not linked to any periodical or series, should be cited as follows:

Author's name "Website title" (Date of the article), available at URL address.

The name(s) of the author(s) follow the same rules as books and journal articles. Often the author of an Internet source is an organisation rather than a person.

Sometimes the Internet source has no listed author. In the case of a newspaper or periodical article, simply omit any author. The newspaper, periodical, blog or encyclopaedia in which the article appears *is*, in a sense, the entity responsible for the publication. Where any other Internet source does not have an author, write "Anon". (But bear in mind, of course, that if authorial and publication information cannot be provided, the source is probably unreliable and best avoided!)

Unlike with books and journal articles, the title of the article or website should not have each word capitalised. Capitalise only those words that would be capitalised in normal prose.

The URL address must be underlined and in normal black font, *not* the blue that MS Word applies to hyperlinks. Do *not* include an actual clickable hyperlink, as having these in the judgment causes complications. Sometimes a space must be tactically inserted into the URL so that its length does not upset the justified font. In the case of extremely long URLs, it is sometimes best to provide only the "root" (in other words, only the main, directory website from which the article can be traced).

¹ Balkin and Mbikiwa "Narrow 'public interest' can harm the common good" *Business Day* (31 March 2014), available at <http://www.bdlive.co.za/opinion/2014/03/31/narrow-public-interest-can-harm-the-common-good>.

² De Vos "Censoring Malema seems to have no basis in law" *Constitutionally Speaking* (24 June 2014), available at <http://constitutionallyspeaking.co.za/censoring-malema-seems-to-have-no-basis-in-law>.

"Couple unable to conceive of child" *The Onion* (20 March 2008), available at <http://www.theonion.com/articles/couple-unable-to-conceive-of-child,6068>; AngloAmerican "Sishen mine", available at http://www.kumba.co.za/ob_sishen.php; and Torchia "Old Zim laws inconsistent with new Constitution" *Mail & Guardian* (26 June 2014), available at <http://mg.co.za/article/2014-06-26-old-zim-laws-new-constitution-are-inconsistent-experts>.

³ Department of Correctional Services "Media release: Department of Correctional Services dismisses as disingenuous claims about medical parole of Derby-Lewis" (18 June 2014), available at <http://www.dcs.gov.za/UploadedFiles/Correctional%20Services%20dismisses%20as%20disingenuous%20claims%20about%20medical%20parole%20of%20Derby-Lewis.pdf>. (Or here you could provide only the directory URL: <http://www.dcs.gov.za/News/MediaReleases.aspx>.)

⁴ Sergeant at the Bar “McCarthy the fall guy” *Mail & Guardian* (8 April 2009), available at <http://mg.co.za/article/2009-04-08-sergeant-at-the-bar-mccarthy-fall-guy>.

Government reports and papers

When citing a report or paper by an organ of state, cite as follows:

The issuing Department/Commission *Title of the Report* (report/paper number, month and year of issue).

Many government reports, most obviously those of the SA Law Reform Commission, appear in a series or are numbered. Where that is so, give their allocated number. Where that is not so, omit this part.

Sometimes these reports are made easily available online but are hard to obtain anywhere else. In such cases, it can be useful to add the familiar “, available at . . .” at the end.

¹ Truth and Reconciliation Commission of South Africa *Truth and Reconciliation Commission of South Africa Report* (March 2003).

² Department of Correctional Services *White Paper on Corrections in South Africa* (February 2005).

Public Protector Secure in comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province (report 25 of 2013/14, March 2014), available at http://www.pprotect.org/library/investigation_report/2013-14/Final%20Report%2019%20March%202014%20.pdf.

³ South African Law Reform Commission *Statutory law revision: Legislation administered by the Department of Justice and Constitutional Development* (discussion paper 129, October 2011), available at <http://www.justice.gov.za/salrc/dpapers/dp129.pdf>.

Translated works

Where a source has been translated, add “Trans”, the last name of the translator followed by the location, the publisher and date of publication, in brackets. For example:

¹ Jung *Synchronicity* (PUP, New York 1951) Trans: Hull (New York, PUP 2010).

Pinpoints: Citing particular passages of a secondary source

Pinpoints to secondary sources follow exactly the same simple format as pinpoints to cases:

[citation for secondary source at pinpoint.](#)

Take note of the rules above about giving pinpoints for cases, most of which have some relevance here.

In books, the pinpoint will mostly be to pages. You do not write “at page #” or “at p. #” or “at p #”. Simply say “at #”.

Always use the page numbers when possible, in preference to the other numbering systems that some books also use. For example, some books have page numbers *and* paragraph numbers, often in something like the following form: “14–33” or “2.4”. To repeat: always use the page numbers when available.

For *LAWSA*, however, you must always use paragraphs. Though it does come in a paginated hardcopy, its more commonly used electronic version does not have page numbers at all.

Some sources, especially loose-leafs, do not have page numbers or more accurately have page numbers only in “B1–24” form (or something similar), which you have no choice but to use.

Citing a secondary source more than once

Secondary sources are treated much like cases, using the “above n #” formula and “Id” where possible. But secondary sources are simpler because there is no need to define a short title. Simply use the author’s names (or authors’ names). Thus:

[Name\(s\) of author\(s\) above n # at pinpoint.](#)

Slight complications arise if, very exceptionally, the judgment cites several works by the same author(s). In that case, use the year of publication to distinguish:

[Name\(s\) of author\(s\) \(year of publication\) above n # at pinpoint.](#)

If the source was cited in the immediately preceding footnote, use “Id” as explained above.

Slight complications arise if one is dealing with a secondary source not recognisable by its authors, like an Internet source without an author or a government report. In those cases, use a sensible and easily recognisable short title (without any need to have defined it previously), together with the usual “above n #” formula.

¹ Okpaluba and Osode *Government Liability: South Africa and the Commonwealth* (Juta & Co Ltd, 2010) at 123.

² Visser “Delict” in Du Bois (ed) *Wille’s Principles of South African Law* 9 ed (Juta & Co Ltd, Cape Town 2007). Id at 777.

³ Okpaluba and Osode above n 1 at 250.

⁴ Visser above n 2 at 780.

Citing more than one secondary source in a footnote

If a source is directly quoted, it should always be the first to be cited. Thereafter, sources should be cited in order of relevance, with additional sources cited after “See also . . .”. If all sources are equally relevant, cite them in reverse chronological order.

Cross-referring to other parts of the judgment

To be clear, the above citation and pinpoint conventions do not apply where a judgment cross-refers to another part of that same judgment.

Where the judgment cross-refers to another footnote within the judgment, use “n #”, and “above” or “below” (though with no need to comply strictly with the “above n #” formula used after a short citation). For example, “This provision was set out about at n 4” or “See again n 6 above”.

When the judgment cross-refers to another paragraph within the judgment, give the paragraph number in square brackets. Do *not* use “para”, as one does in pinpoint citations. For example, “Regulation 11, which was set out in [59], was contravened” or “See [67]”. For a range of paragraphs, use the word “to” instead of a hyphen, i.e. “See [67] to [71]”.

You may refer to the “first judgment”, “second judgment” etc., or the “main judgment”, “separate concurrence” or “dissenting judgment”. In this case, say: “See the first judgment at [67]”.

Chapter VI ENDING AND CONSOLIDATING THE JUDGMENT
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THE ORDER

The Court’s order should appear at the start of the judgment as a preview as well as at the end. The orders must be identical. Before the order, the words “ORDER” must appear between tramlines. It should be indented in the normal way, as one would with the pre-programmed numbering feature on MS Word. The paragraphs should be numbered. Sub-paragraphs should use letters.

The order should be capable of an independent reading. A reader must be able to discern the party, Act and other pertinent aspects referred to without recourse to the text of the judgment itself. Short titles are not desirable within the order, e.g. PAJA and PAIA.

Where an order of the lower court is substituted, the substitution should be introduced by a colon and be in quotation marks.

See below the following example:

ORDER

- (1) The applicant's application for leave to amend dated the 1st of October 2020 is granted and the notice of motion be and is hereby amended as per the 'Amended Notice of Motion', being annexure 'A' to the said application.
- (2) Pending the final determination of Part B of the applicant's application, Histomark (Pty) Ltd ('Histomark') and Servigraph 42 CC (in business rescue) ('Servigraph'), jointly and severally, the one paying the other to be absolved, are directed to pay within ten days from the date of this order an amount equivalent to the proceeds of the sale of a quantity of 900 tonnes of yellow maize, into the trust account of ENSafrica (Edward Nathan Sonnenbergs Inc, Account Held with First National Bank, Account Number 621 1678 8582, Swift Code FIRNZAJJ, Branch Code 250655), to be held in escrow.
- (3) The first, second and third respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicant's costs of this application, including the costs consequent upon the employment of two Counsel.

CONSOLIDATED JUDGMENTS

When the High Court has produced more than one judgment in a particular matter, the judgments must be "consolidated" into a single document. The following are the rules to apply when consolidating judgments.

Order of consolidated judgments

The judgments should appear in the order in which their first drafts were written. Further, the scribe's judgment (i.e. the main judgment) should appear first, even if it does not carry the majority. This is essential as it sets out the salient facts upon which the subsequent judgments follow.

Transitions between judgments

At the end of each judgment, there should be three single (1.0) line spaces before the judge's name (and concurrences) that start the next judgment.

The judge's name (and concurrences) should be set to single line (1.0) spacing.

There should be two single line (1.0) spaces between the judge's name (and concurrences) and the start of the judgment text.

Header transitions

It is notoriously difficult to transition from one judgment to another insofar as the header is concerned. Each judgment should be distinguished from the other by way of indicating its author (the particular judge) on the top right-hand corner, but where the judgment texts coalesce onto one page, both names need to appear but be separated by a slash (e.g. HARTLE J / JOLWANA J).

To create a transition, place a continuous section break on the page that precedes the transition header then unclick "Link to Previous" when you edit the transition header. Another "Section Break (Continuous)" must be placed on the transition page itself, so that the header on the following page may reflect another distinct header. "Link to Previous" must also be unclicked when editing this header.

MS Word can be tricky to navigate, at times you may need to try placing the section breaks in different places on the page to ensure the text still looks as it should, i.e. do not push the rest of the words onto the next page or distort the formatting. Please ensure you double-check the formatting before finalising the judgment, especially the page numbering.

This guide does not traverse troubleshooting issues, however, a quick rummage around Google or Microsoft office forums tends to help should you encounter any difficulties. But before that, checking the help tab on MS Word is of assistance.

Page, paragraph and footnote numbers

Page, paragraph and footnote numbers must flow sequentially. The end of the last judgment does not mean the next judgment ought to start at 1. The next judgment's numbering ought to carry on from the previous one.

Short titles and cross-referencing

Where the second and following judgments cite cases already cited in the main judgment, there is no need to cite these in full. One should use cross-referencing in the same way as successive citations within each judge's judgment.

It is necessary to ensure that the short names and titles are standardised across the judgments as well as references to persons and places. This avoids confusion. However, the judge's style should be deferred to.

COUNSEL DETAILS

The last page of the judgment must indicate the counsel who appeared in the matter as well as the attorneys that instructed them. It is necessary to note the following:

- There need not be a judge indicated on the header.
- The parties' names ("Applicant", "First and Second Respondents", etc.) should all be capitalised.
- Each counsel appearing should be referred to as "**Initials Surname**" with "**SC**" added where applicable. Use the initials provided by counsel at the end of their written submissions; where there is more than one, separate each with a space. Note that the names should *not* be preceded by "Advocate" or "Adv". For example: "W Trengove SC and N Muvangua". We no longer use full stops at the end of counsel details.
- Only list counsel who were present for oral argument at the hearing.
- Where a party is unrepresented simply say "Unrepresented".
- Where the judgment is given without a hearing but with written submissions, still give the counsel details as normal. The details of the counsel and attorneys should be evident in the affidavits and written submissions.
- Where the judgment is given with no hearing *and* no written submissions, do not provide any counsel details. Delete the last page from the template altogether.

For the Applicants:

A B Rossouw SC; S J Myburgh and
C H Badenhorst instructed by Makhafola
and Verster Incorporated

For the Respondent:

R Bedhesi SC and D Moodliyar instructed
by State Attorney