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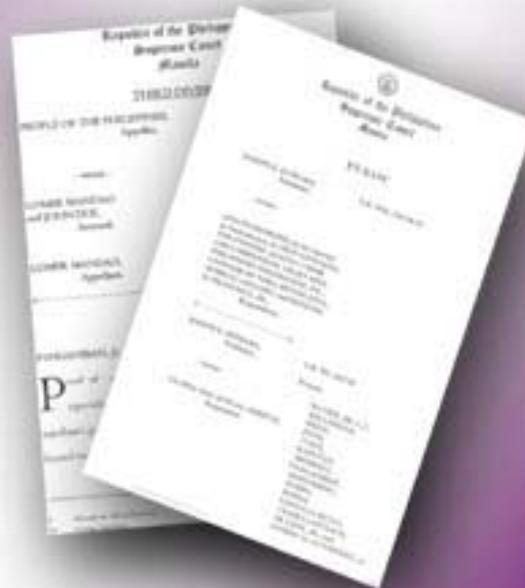


OCTOBER - DECEMBER 2002 VOL. 4, ISSUE NO. 14

# JUDICIAL JOURNAL



## Decision and Legal Writing







*The*  
**PHILJA**



OCTOBER-DECEMBER 2002 VOL. 4, ISSUE NO. 14

**JUDICIAL  
JOURNAL**



**DECISION  
AND  
LEGAL WRITING**

**I. DECISION WRITING**

Decision Writing

The Four "Cs" of Effective  
Decision-Writing: An Introduction  
for Newly Appointed Judges

Decision Writing

Writing and Writing Style

Writing of Decisions and Resolutions

The Architecture of Argument

**II. LEGAL WRITING**

Writing Style

Plain English

Case Analysis and Legal Writing

**III. LEGAL LOGIC**

Legal Logic



**The PHILJA Judicial Journal.**

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Tel. No.: 552-9524      Telefax No.: 552-9525  
E-mail: [research\\_philja@yahoo.com](mailto:research_philja@yahoo.com)

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# THE PHILJA JUDICIAL JOURNAL

## CONTENTS

OFFICIALS OF THE SUPREME COURT OF THE PHILIPPINES .....	v
OFFICERS OF THE PHILIPPINE JUDICIAL ACADEMY .....	vi

### I. DECISION WRITING

DECISION WRITING <i>Justice Reynato S. Puno</i> .....	I
THE FOUR “CS” OF EFFECTIVE DECISION-WRITING: AN INTRODUCTION FOR NEWLY APPOINTED JUDGES <i>Justice Artemio V. Panganiban</i> .....	29
DECISION WRITING <i>Justice Lucas P. Bersamin</i> .....	53
WRITING AND WRITING STYLE <i>Justice Lucas P. Bersamin</i> .....	72
WRITING OF DECISIONS AND RESOLUTIONS <i>Justice Hugo E. Gutierrez (ret.)</i> .....	97
THE ARCHITECTURE OF ARGUMENT <i>Dr. James C. Raymond, PhD</i> .....	III

# CONTENTS

## II. LEGAL WRITING

### WRITING STYLE

*Justice Camilo D. Quaison* ..... 140

### PLAIN ENGLISH

*Dr. James C. Raymond, PhD* ..... 152

### CASE ANALYSIS AND LEGAL WRITING

*Prof. Myrna S. Feliciano* ..... 185

## III. LEGAL LOGIC

### LEGAL LOGIC

*Fr. Ranhilio C. Aquino, PhD, JD* ..... 223

# CONTENTS

## I. DECISION WRITING

### DECISION WRITING

*Justice Reynato S. Puno*

I. INTRODUCTION .....	2
II. FORM OF DECISION .....	3
III. TECHNIQUES IN DECISION-MAKING .....	20
IV. CONCLUSION .....	27

### THE FOUR “Cs” OF EFFECTIVE DECISION-WRITING:

AN INTRODUCTION FOR NEWLY APPOINTED JUDGES

*Justice Artemio V. Panganiban*

I. COMPLETENESS .....	31
II. CORRECTNESS .....	45
III. CLARITY .....	49
IV. CONCISENESS .....	51
V. FINAL WORD .....	52

### DECISION WRITING

*Justice Lucas P. Bersamin*

I. INTRODUCTION .....	55
II. FORM AND CONTENTS OF WRITTEN LEGAL DECISIONS .....	55
III. WHY FACTUAL AND LEGAL FINDINGS SHOULD BE STATED IN THE DECISION .....	57
IV. STYLE AND LENGTH OF DECISIONS .....	58
V. DECISION AND OPINION, DISTINGUISHED .....	60
VI. QUALITIES OF AN EFFECTIVE DECISION .....	61
VII. POWER OF WORDS IN COMMUNICATING THE INTENDED MEANING FORCEFULLY .....	64
VIII. REFERENCES .....	65

# CONTENTS

## WRITING AND WRITING STYLE

*Justice Lucas P. Bersamin*

I. LEGAL WRITING .....	74
II. REFERENCES .....	85
III. CONCLUSION .....	92

## WRITING OF DECISIONS AND RESOLUTIONS

*Justice Hugo E. Gutierrez (ret.)*

I. INTRODUCTION .....	99
II. TWO-FOLD NATURE OF OBJECTIVES .....	99
III. REQUIREMENTS OF LAW AND THE RULES OF COURT .....	101
IV. DECISION, JUDGMENT AND RESOLUTION .....	102
V. PARTS OF THE DECISION .....	103
VI. STATEMENT OF THE FACTS OF THE CASE AND THE APPLICATION OF LAW TO THOSE FACTS .....	104
VII. ADDITIONAL POINTS TO CONSIDER .....	106
VIII. ATTENTION TO FORM AND STYLE .....	108
IX. THE PERSONALITY OF THE JUDGE .....	110

## THE ARCHITECTURE OF ARGUMENT

*Dr. James C. Raymond, PhD*

I. INTRODUCTION .....	112
II. THE UNIVERSAL LOGIC OF THE LAW .....	113
III. A UNIVERSAL OUTLINE FOR JUDGMENTS, BRIEFS, MOTIONS, AND OTHER SUBMISSIONS .....	114
IV. A SEVEN-STEP RECIPE FOR ORGANIZATION .....	117

# CONTENTS

## II. LEGAL WRITING

### WRITING STYLE

*Justice Camilo D. Quaison*

I.	INTRODUCTION .....	141
II.	STAGES OF WRITING PROCESS .....	142
III.	ELEMENTS OF EFFECTIVE STYLE .....	143
IV.	POINTERS ON STYLE .....	144

### PLAIN ENGLISH

*Dr. James C. Raymond, PhD*

I.	INTRODUCTION .....	154
II.	VISIBLE ELEMENTS OF STYLE .....	158
III.	INVISIBLE ELEMENTS OF STYLE .....	173
IV.	TESTING FOR PLAIN ENGLISH .....	183

### CASE ANALYSIS AND LEGAL WRITING

*Prof. Myrna S. Feliciano*

I.	INTRODUCTION .....	188
II.	BASIC CHARACTERISTICS OF JUDICIAL OPINIONS .....	190
III.	BRIEFING A CASE .....	194
IV.	ANALOGIZING AND SYNTHESIZING .....	197
V.	FORMULATING ARGUMENTS AND USING PERSUASIVE WRITING TECHNIQUES .....	200
VI.	CASE RESOLUTION .....	209
VII.	RULES IN LEGAL WRITING .....	215
VIII.	CONCLUSION .....	222

# CONTENTS

## III. LEGAL LOGIC

### LEGAL LOGIC

*Fr. Ranhilio C. Aquino, PhD, JD*

I. INTRODUCTION .....	223
II. STRUCTURE OF LEGAL REASONING .....	224
III. DEDUCTIVE REASONING IN LAW .....	228
IV. ANALOGICAL REASONING IN LAW .....	231
V. INDUCTIVE REASONING IN LAW .....	232

# Decision Writing

*Justice Reynato S. Puno\**  
*Supreme Court*

I. INTRODUCTION .....	2
II. FORM OF DECISION .....	3
A. <i>Constitutional Framework</i>	
B. <i>Form</i>	
1. Findings of Facts	
2. Statement of the Law	
3. Dispositive Portion	
C. <i>Decisions of the Supreme Court</i>	
1. On Findings of Facts	
2. Consequences Where There are No Findings of Facts	
3. Ready-Made Decision Set Aside	
4. Memorandum Decision	
5. Relating to the Dispositive Portion of the Decision	

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\* Justice Reynato S. Puno was appointed Associate Justice of the Supreme Court in 1993, later becoming the Chairman of its First Division. He also chairs the Court Systems Journal and the Supreme Court Committee which digests the Court's decisions, and heads the Committee on Revision of the Rules of Court. He obtained his Bachelor of Science Degree in Jurisprudence and Bachelor of Laws Degree from the University of the Philippines (U.P.) ; Master of Comparative Laws from the Southern Methodist University in Dallas, Texas, as a full scholar at the Academy of American Law; Master of Laws from the University of California, Berkeley, as a scholar of the

III. TECHNIQUES IN DECISION-MAKING .....	20
A. <i>Fact-Finding Techniques</i>	
B. <i>Factors to Consider</i>	
C. <i>Weighing the Evidence</i>	
D. <i>Gestures and Postures as Non-Verbal Clues</i>	
1. Head	
2. Face	
3. Chest	
4. Posture	
5. Leg Movements	
E. <i>Techniques in Interpreting the Law</i>	
IV. CONCLUSION .....	27

## I. INTRODUCTION

The question may be asked: Why should judges get a lecture on how to write Decisions and Orders? Let me read to you a letter written to a judge by a group of lawyers.

---

Walter Perry Johnson Foundation; and Doctor of Juridical Science Degree from the University of Illinois, Urbana-Champaign, USA. In 1994 he was conferred the Doctor of Humanities degree, *honoris causa*, by the Philippine Wesleyan University. Other prestigious awards he received are: Ten Outstanding Young Men Award (TOYM); Araw ng Maynila Award as Outstanding Jurist; UP's Most Outstanding Law Alumnus; Grand Cross of Rizal from the Order of Knights of Rizal; Grand Lodge Gold Medal from the Grand Lodge of Free and Accepted Masons of the Philippines; and Centennial Awardee in the Field of Law by the United Methodist Church on the occasion of its 100th anniversary.

Dear Judge:

We respectfully request you to hang the accompanying sign in your chambers, where you will face it as you dictate your opinions.

It will serve as a reminder that, if we are to continue to practice law, we must buy and provide office space for the many volumes of law reports in which your opinions are printed. At the present time, these law reports are costing us millions of dollars per year; and year after year your opinions are getting longer and longer.

When dictating your opinions, please remember that in effect you are sending us collect telegrams.

Since we must pay for every word, every line, and every page, we would greatly appreciate your being as brief as you would be if you were sending the telegrams prepaid.

You could save us much money if you would merely refer us to the volume and page of your former messages, instead of repeating paragraph after paragraph and page after page of former messages for which we have already paid.

## II. FORM OF DECISION

### ***A. Constitutional Framework***

The form and content of a Decision is provided for in Art. VIII, Sec. 14 of the Constitution, to wit:

SEC. 14. No decision shall be rendered by any court without expressing therein clearly and distinctly the facts and the law on which it is based.

No petition for review or motion for reconsideration of a decision of the court shall be refused due course or denied without stating the legal basis therefor.

As explained by Justice Isagani A. Cruz:

Except for the second paragraph, which was introduced only in the present charter, Section 14 has been in force since the Constitution of 1935. The provision was recast in affirmative terms in the 1973 Constitution, but has been virtually restored to the original form in the Constitution of 1987, to apply to all courts, including the municipal courts. The purpose has always been the same, *viz.*, to inform the person reading the decision, and especially the parties, of how it was reached by the court after consideration of the pertinent facts and examination of the applicable laws. (*Francisco v. Permskul*, G.R. No. 81006, May 12, 1989)

Rule 36, Section I of the Rules of Court similarly provides:

SECTION I. *Rendition of Judgments* – All judgments determining the merits of cases shall be in writing personally and directly prepared by the judge, stating the facts and the law on which it is based, signed by him and filed with the clerk of court.

### **B. Form**

Please note that the Constitution does not specify the form of Decisions. It only requires that “the facts and the law on which it is based” be clearly and distinctly stated.

This leaves a lot of room on your style. I cannot tell you with certitude which style of writing to adopt. I suppose there is not a style that can qualify as the style for all classes. Style is not only a matter of taste, but it is also dictated by the topography of each case, *i.e.*, its complexion depends on the complexity of the case in terms of issues of facts and law presented.

In any event, the traditional form of a Decision consists of four (4) parts. The *first* part states the nature of the case if a Decision or an Order is involved, and the issue to be presented. The *second* part pertains to your findings of facts. The *third* part pertains to the applicable law. And the *fourth* part pertains to the dispositive ruling.

### **I. Findings of Facts**

How do judges relate the facts of the case? Former Minister of Justice Ricardo C. Puno identifies the following forms in vogue. He wrote:

In regard to facts, we have two basic types of narration: the “reportorial” type and the “synthesis.” A “cross” between the reportorial type and the synthesis is the “semi-reportorial” type. The reportorial type is the easiest to handle. As the term indicates, it is nothing more than a report of what happened during your trial. It usually consists, in a summation, of what the witnesses testified to. It is a stereotype kind of narration.

You begin in a criminal case, for instance, with the usual opening: “The accused stands charged with the crime of bigamy allegedly committed as follows:” Then you copy the information. “The prosecution presented witnesses A, B, C, D and E. A, testified as follows:” Then you just narrate everything that he testified to. “B, testified as follows:” Narrate everything that B said. After the parade of prosecution witnesses, then you shift to the defense: “On the part of the accused, he presented three witnesses, namely, X, Y and Z. “X, testified as follows:” After summarizing all these testimonies, you make a brief summation of what you consider as the correct version.

In the synthesis type of decision-writing, the judge summarizes the factual theory of the plaintiff or prosecution, as the case may be, and after that the version of the defense. After summarizing both versions, the judge will state which version he takes as true and correct, and then renders the adjudication

In the semi-reportorial type, the judge summarizes the version that he accepts, and then “reports” on the version that he rejects. There is a fourth type which is a sub-classification of the synthesized decision. In this last type, the court just summarizes the version that it accepts and adopts, without at all narrating or explaining what the other version is. After the summation of that particular accepted version, the judge renders his decision.

## **2. Statement of the Law**

Next is the question of how you will discuss the applicable law in your Decision. Again, there is no hard and fast rule. If the applicable law is clear, its simple recitation will suffice. Its further explanation will be, more often than not, a mere exercise in redundancy. One legal writer said:

It seems that reverence for citation is the greatest handicap of lawyers and judges. We delight in cumulative authority. We think that one citation is not enough if we can cite twenty, even though the proposition is obvious enough to require no citation at all. It will suffice to cite one case if it is controlling, along with a reference to a reliable text or encyclopedia.

If the applicability of the law, however, is arguable, then you have to justify your choice of law. Your discussion may take quite a length. You may have to go through its history. You may have to summon analogous rulings even of foreign courts. You

may have to invoke abstract concepts of justice and equity. In any event, here is where you have to display your legal scholarship. Always remember that substance should not be sacrificed for style.

### **3. Dispositive Portion**

Now, let us go to the writing of the dispositive portion of the Decision. It is required that the dispositive ruling must be complete. What is the test of completeness: *First*, the parties know their rights and obligations. *Second*, the parties should know how to execute the Decision under alternative contingencies. *Third*, there should be no need for further proceedings. *Fourth*, it terminates the case by according the proper relief. The “proper relief” usually depends upon what the parties asked for. It may be merely declaratory of rights, or it may command performance of positive prestations, or orders the party to abstain from specific acts. And *lastly*, it must adjudicate costs.

## ***C. Decisions of the Supreme Court***

### **I. On Findings of Facts**

In *Griñen v. Consolacion* (5 SCRA 722 [1962]), the Supreme Court stated the ultimate test as to the sufficiency of a trial court’s findings of facts. Let me quote the test:

The trial judge need only make a brief, definite and pertinent findings and conclusions upon controverted matters. The ultimate test as to the sufficiency of the trial court’s findings of facts is whether they are comprehensive enough and pertinent to the issue raised to provide a basis for decision. When the issue involved is simple, the trial court is not required to make a finding upon all the evidence

adduced. It must state only such findings of facts as are within the issue presented and necessary to justify the conclusion.

When the Constitution speaks of acts, it means material facts as opposed to immaterial facts. Consequently, it is not enough for a judge to recite the testimonies of witnesses. He must synthesize them.

Grammarians gives us numerous rules on how to be concise in our writing. It is difficult to remember all the rules. In the book *Legal Writing*, by Squires and Rombauer, the authors give us only eleven (11) rules in making word choices. Let me share them with you, and I quote the book:

**a. Use Words in Their Literal Sense.**

Two common sources of imprecision in legal writing are *personification* (the givens of human qualities to abstractions or objects, for example, “cold-blooded decision”) and *metonymy* (the substitution of an attributive or a suggestive word for the word identifying a person or thing, for example, “stage hand” for “stage worker”). In some writings, this kind of imprecision may be acceptable; in legal writing, it may introduce ambiguity:

1. ***Imprecise:***

California has so held.

***Precise:***

The California Court of Appeals has so held.

**2. Omit Archaic Legalisms.**

*Archaic legalisms* are words and phrases, such as “hereinafter,” “heretofore,” “aforesaid,” “forthwith,” “herein,” “hereby,” “for purposes

hereof,” “notwithstanding anything to the contrary herein,” “so made,” “by these presents,” and “said.” Not only are these words obstacles to the lay reader, but they are also imprecise and thus troublesome to the legal reader.

The more serious fault of archaic legalisms is that they may create the appearance of precision, thus obscuring ambiguities that might otherwise be recognized. For example, a question that has been frequently litigated is whether “herein” refers to the paragraph in which it is used, to the section, or to the whole document.

### **3. Use the Same Words to Refer to the Same Thing; Use Different Words to Refer to Different Things.**

Never attempt to improve style by introducing synonyms or other word variations that will create confusion or ambiguity. In the following sentence, the substitution of the word “prevailing” for the word “dominant” creates initial confusion:

“According to the **dominant** view, this article is applied to periodic meetings as well as to special meetings. The **prevailing** view is that Article 237 of the Commercial Code provides the right for minority shareholders to convene either type of meeting.”

Is the author going to discuss two views?

A corollary is to use different words when you mean different things. If the same word is used to mean different things, the reader will be at least momentarily confused.

#### 4. Use Simple, Familiar Words.

When you have a choice between a short, familiar word, such as “call,” and a longer, more elaborate word, such as “communicate,” choose the shorter, simple one. Simple words are understood more quickly; they require less reading and thinking time.

<i>Simple Words</i>	<i>Elaborate Counterparts</i>
after	subsequent to
before	prior to
begin, carry out	implement, effectuate
happen	eventuate, transpire
inform	apprise
make	render
send	transmit
think	deem
think, see	regard, envisage

#### 5. Use Concrete Rather than Abstract Words.

*Concrete words* such as “split decision” are easier to understand than abstractions such as “judicial dichotomy.” Legal writers are likely to use abstract, overblown language in part because many of the cases that law students read during their first year reflect an older, overstuffed style that is all too easy to imitate. Legal writers must resist the old style.

Some common abstractions are simple words that can often be eliminated without loss of

meaning, for example, “type,” “kind,” “manner,” “state,” “area,” “matter,” “factor,” “system,” and “nature.”

Style:

The central thrust of plaintiff’s legal position is dependent on matters having to do with three decisions of the Supreme Court.

Revised:

Plaintiff’s argument for summary judgment depends on three Supreme Court decisions.

#### **6. Use Words that are Consistent in Tone.**

All words have *connotation* (overtone of meaning) as well as *denotation* (explicit meaning). Since connotation contributes to tone, the word choices in a particular piece of legal writing should have compatible connotations. Many briefs contain glaring inconsistencies in tone, as in the following excerpt from the fact statement:

“A third-party park-sitter, unbeknownst to Plaintiff, contacted said Plaintiff’s head with a wine bottle. Plaintiff now has two metal plates and twelve screws holding things together.”

#### **7. Avoid Equivocations.**

As lawyers, we often hesitate to make direct or dogmatic statements. To protect ourselves or to reflect uncertainty, we use either equivocal or qualifying words that undermine their meaning. Typical words and phrases used in this way are: “it seems to indicate,” “if practicable,” “it would seem,”

“it may well be,” and “it might be said that.” If you are uncertain, state the reasons for your uncertainty.

### **8. Use Unqualified Nouns, Adjectives and Verbs.**

Many writers add modifiers to intensify or buttress poorly chosen nouns, adjectives, and verbs. The right word ordinarily needs no bolstering. The following modifiers can be removed without compromising clarity:

absolutely	nearly
actually	obviously
basically	particularly
certain, certainly	plainly
clearly	practically
completely	pretty much
deepest	quite
extremely	really
frankly	so (as in “so great”)
generally	sort of
given	surely
greatly	truly
in effect	various
kind of	very
more or less	virtually

### **9. Use Few Literary Devices.**

A plain style is usually the best style. If you do wish to use figurative language, do so where it will not interfere with communication of substance.

Clichés come readily to mind during writing. Thus, a standard part of your revision should be to remove them or to renovate them. Examples of clichés are “height of absurdity,” “day of reckoning,” and “cold light of reason.” Again, they ought to be removed.

### **10. Avoid Jargon from Other Fields.**

Words go in and out of fashion. Vague psychoanalytic terms, such as “interaction” and “supportive,” were frequently used for a time before they gave way to computer jargon, such as “interface” and “input.” Avoid word fads altogether. Words in fashion are quickly degraded; their specific meaning disappears, leaving only a vague general meaning.

## **II. Watch Out for Redundancy in Legal Writing.**

As most lawyers know, redundant wording has a long and respectable past. Our Anglo-Saxon ancestors gave us word pairings, such as “safe and sound.” After the Norman Invasion, French synonyms were added to the Middle English word pairs. Thus, many legal terms have come to us in triplicate. Some word pairings are still commonly used, such as “acknowledge and confess,” “act and deed,” “deem and consider,” “fit and proper,” “goods and chattels,” “keep and maintain,”

“pardon and forgive,” “shun and avoid,” “aid and abet,” “cease and desist,” “fraud and deceit,” and “null and void.” Before automatically adopting an archaic word pairing, consider whether both words are needed.

Unnecessary word pairing continues to be a habit in Modern English. If you think about each word you use, you will avoid redundancies such as the following:

basic fundamentals	telling revelation
basic starting point	terrible tragedy
false misrepresentation	true facts
final result	unexpected surprise
if and when	unless and until
sufficient enough	save and except

A more pervasive form of redundancy is the throw-away phrase such as:

a certain amount of	that all intents and purposes
due to the fact	the nature of
in case of	the case is
in regard to	the necessity of
the fact of the matter	with reference to
as a matter of fact	

Watch out for these phrases and gradually train yourself to omit them. As an editing technique, ask the question, “Do I need this word?”

## 2. Consequences Where There are No Findings of Facts

The decision was assailed as unconstitutional. The Supreme Court sustained the attack. It held through Justice Antonio Barredo:

We hold that whenever in connection with an appeal to the Court of First Instance from a decision of an inferior court order rendered in the exercise of the latter's exclusive original jurisdiction, pursuant to Section 45 of the Judiciary Act, as amended by Republic Act 6031, the memorandum of the appellant makes specific assignments of errors which do not appear to be obviously inconsequential, unsubstantial or patently erroneous, it is a reversible error for the Court of First Instance to entirely ignore and not expressly pass upon the errors assigned. It would not be enough for the court to say, as in the instance case, that it "finds no reason to disturb the findings of the trial court," even if it asserts that it has gone "over the testimonial and documentary evidence submitted by the parties." It is our considered view that the better rule is that in case of such an appeal to the Court of First Instance from an inferior court, the former should state the facts and the law on which its decision is based, as required by the Constitution, with due regard to the assignment of errors, if any, made by the appellant, if only to enable the higher appellate court to act on any possible petition for review thereof without having to go through the trouble of searching for the reasons supporting the same in the decision of the inferior court.

## 3. Ready-Made Decision Set Aside

The concern of the Supreme Court for judges to think well of the reasons for their Decisions remains unbending. In *People of the Philippines v. Gonzaga* (127 SCRA 158 [1984]), Chief Justice Claudio Teehankee annulled what he called a "ready-made"

decision of a Court of First Instance (CFI). In this case, the facts show:

The information was filed on November 3, 1977. On November 8, 1977, accused was immediately arraigned and pleaded guilty to the offense charged with the assistance of a counsel *de officio* who had just been appointed then and there. The case was set for trial the next day, November 9, 1977, notwithstanding counsel *de officio's* request that he be given two days to prepare for trial. The hearing was continued the following day, November 10, 1977, and again on November 16, 1977. On the hearing of November 16, 1977, after the prosecution has rested its case, the trial court read the sentence of conviction, consisting of three (3) paragraphs including the dispositive portion. The judge sentenced the accused to death.

*Ang nasawing si Amparo Quilatan ay isang pampamahalaang guro ng Mababang Paaralan ng Taguig na pataksil na pinatay ng nasasakdal na si Eduardo de Ocampo Gonzaga, na ginamitan pa ng nakahihigit na lakas, sa dahilang siya ay isang lalaki at ang nasawi ay isang mahinang babae. Ang nasawi ay hindi man lamang nagkaroon ng pagkakataon upang maipagtanggol ang kanyang sarili. Ang isang katangiang ikinabigat ng pangyayaring ito ay ang balak na pagpatay ng nasasakdal laban sa isang mahinang guro tulad ni Amparo Quilatan. Ayon sa Artikulo Blg. 64 ng Binagong Kodigo Penal na nagsasaad na ang mga mapagpipiliang mga pangyayari ay ang mga nakabibigat o nakagagaang pangyayari, ayon sa katayuan o kinalabasan ng krimen, tuald ng kalasingan.*

*Isina-alang-alang ng Hukumang ito ang kusang-loob na pag-amin ng nasasakdal alinsunod sa Artikulo 7, talata 13 ng Binagong Kodigo Penal, subalit matapos niyang aminin ang*

*sakdal laban sa kanya, at bilang pagtupad sa simulain ng Kataastaasang Hukuman ng Pilipinas, na kahit na umamin na ang isang nasasakdal, kailangan din maghain ng mga katibayan ukol sa sakdal o sa usapin, at iyan ang ipinag-utos ng Hukuman sa Pampurok na Taga-Usig upang mapatunayan ang mga kakabigat na katibayan laban sa kanya.*

*SA GAYONG KADAHILANAN, at dahil sa kusang-loob na pag-amin sa pagkakasala ng nasasakdal na si Eduardo de Ocampo Gonzaga, napatunayan ng Hukumang ito ng walang pag-aalinlangan, na siya ay lumabag sa Artikulo 248 ng Binagong Kodigo Penal. At sa nasasaad sa impormasyon, siya ay hinahatulan ng parusang KAMATAYAN at babayaran din niya ang mga naulila ng nasawi ng halagang P12,000.00; babayaran din niya ng halagang P10,000.00 bilang bayad pinsala; panibagong P10,000.00 bilang bayad pinsalang di pamamarisan; at babayaran din niya ang lahat ng nagugol ng pamahalaan sa usaping ito.*

The Supreme Court held:

The fact that immediately after the prosecution has rested its case in the last hearing held on November 16, 1977, the trial court read a "ready-made" decision of conviction shows that the accused was meted the death penalty without due process of law. With the perfunctory arraignment of the accused and the undue haste with which the hearing was held, the Court sees that accused's fate was predetermined from the start. Even before the termination of the hearing, the sentence of death had already been prepared. At the last page of the transcript of stenographic notes taken by stenographer Luisa S. Golla, a note appears, which states: "NOTE: Sentence already attached to the original records of the case."

#### 4. Memorandum Decision

Section 40 of Batas Pambansa Blg. 129 reads:

Every decision or final resolution of a court in [an] appealed decision, or final resolution of a court in appealed cases shall clearly and distinctly state the findings of facts and the conclusions of law on which it is based, which may be contained in the decision or final resolution itself, or adopted by reference from those set forth in the decision, order or resolution appealed from.

In *Francisco v. Permskul* (G.R. No. 81006, May 12, 1989), Justice Isagani A. Cruz discussed the nature of a memorandum decision and the requisites for its validity. He said:

The distinctive features of the memorandum decision are, first, it is rendered by an appellate court, and second, it incorporates by reference the findings of facts or the ruling under review. Most likely, the purpose is to affirm the decision, although it is not impossible that the approval of the findings of facts by the lower court may lead to a different conclusion of law by the higher court.

The reason for allowing the incorporation by reference is to avoid the cumbersome production of the decision of the lower court, or portions thereof, in the decision of the higher court. The idea is to avoid having to repeat in the body of the latter decision the findings or conclusions of the lower court since they are being approved or adopted anyway.

What are the requirements for its validity? The Supreme Court held:

The memorandum decision, to be valid, cannot incorporate the findings of facts and the conclusions of law of the

lower court only by remote reference, which is to say that the challenged decision is not easily and immediately available to the person reading the memorandum decision. For the incorporation by reference to be allowed, it must provide for direct access to the facts and the law being adopted, which must be contained in a statement attached to the said decision. In other words, the memorandum decision authorized under Section 40 of B.P. 129 should actually embody the findings of facts and conclusions of law of the lower court in an annex attached to and made an indispensable part of the decision.

It is expected that this requirement will allay the suspicion that no study was made of the decision of the lower court and that its decision was merely affirmed without a proper examination of the facts and the law on which it was based. The proximity at least of the annexed statement should suggest that such an examination has been undertaken. It is, of course, also understood that the decision being adopted should, to begin with, comply with Article VIII, Section 14 [of the Constitution] as no amount of incorporation or adoption will rectify its violation.

The Court finds it necessary to emphasize that the memorandum decision should be sparingly used lest it become an addictive excuse for judicial sloth. It is an additional condition for its validity that this kind of decision may be resorted to only in cases where the facts are in the main accepted by both parties or easily determinable by the judge and there are no doctrinal complications involved that will require an extended discussion of the laws involved. The memorandum decision may be employed in simple litigations only, such as ordinary collection cases, where the appeal is obviously groundless and deserves no more than the time needed to dismiss it.

## 5. Relating to the Dispositive Portion of the Decision

If there is anything that ought to be clear in a Decision, it must be the dispositive portion for it is settled that the judgment of a case is what is contained in the dispositive portion. Statements made in the opinion are “informal expressions of the view of the court and cannot prevail against its final order or decision” (*City of Manila v. Entote*, 57 SCRA 498 [1974]). Hence, the general rule is where there is a conflict between the dispositive part and the opinion, the former must prevail over the latter on the theory that the dispositive portion is the final order, while the opinion is merely a statement ordering nothing. In exceptional cases, as in *Republic v. De Los Angeles* (41 SCRA 422 [1971]), the Supreme Court departed from this strict rule invoking justice and equity.

The dispositive portion should provide the costs of suit. Judicial costs are the statutory allowances to a party, to an action for his expenses incurred in the action, and having reference only to the parties and the amounts paid by them. Costs are allowed to the prevailing party as a matter of course, unless otherwise provided in the Rules of Court. Section 10 of Rule 142 regulates the costs that may be recovered by a prevailing party in the RTCs. Note that attorney’s fees are not normally taxable as costs. (See Sec. 6, Rule 142, *Damasen v. Hon. Harold Hernando*, 104 SCRA 111 [1981]).

## III. TECHNIQUES IN DECISION-MAKING

### A. Fact-Finding Techniques

In deciding cases, judges should not delude themselves in the thought that they are tasked to discover the ultimate truth. That

is almost impossible and should not be a thorn in their throats. Let us remember the standards: In *civil cases*, decide in favor of the party who is able to establish his cause of action by mere preponderance of evidence. In *criminal cases*, acquit the accused unless his guilt is shown beyond reasonable doubt.

But even then, the judge's task of finding the facts to determine where preponderance of evidence lies or whether guilt has been established beyond reasonable doubt is not an easy matter.

J.P. McBaine spells out the problems of fact-finding, *viz*:

Courts too often fail to realize that certainty as to what has happened cannot be ascertained from the testimony of witnesses or other evidence of acts. The frailty of man is such that certainty in the field of fact-finding is impossible. An attempt to find out what has transpired involves correctness of perception, reliability of memory, and ability to describe what was seen or heard. There are also certain generic human traits respecting testimony, which affects its probative value, such as the age, sex, intelligence, character, temperament, emotion, bias, experience, etc. of the witness. Man's imperfections, which everybody knows exist, make absolute perfection or certainty unattainable in the field of fact-finding. (32 Cal. L. Rev. 242 *Burden of Proof: Degrees of Belief*).

### ***B. Factors to Consider***

There are factors to consider in determining the burden of proof. In determining where the preponderance of evidence lies, the court may consider:

1. All the facts and circumstances of the case;
2. The witnesses' manner of testifying;

3. Their intelligence;
4. Their means and opportunity of knowing the facts to which they are testifying;
5. The probability and improbability of their testimony;
6. Their interest or want of interest;
7. Their personal credibility so far as the same may legitimately appear upon the trial; and
8. The number of witnesses, though the preponderance is not necessarily with the greatest number.

These factors can also be used in determining the weight of evidence in criminal cases (*People v. Maisug*, 27 SCRA 742 [1969]).

### ***C. Weighing the Evidence***

Scoping these facts and factors is difficult enough. But much more difficult is the task of calibrating their proper weight. Our rules on evidence do not assign specific truth value to the different kinds of admissible evidence. Indeed, we do not have a table of logarithm in law for our different kinds of evidence. Even so, our courts have developed techniques through the ages, which can be used by judges in the difficult task of weighing evidence. Here are some of these techniques:

1. The uncontroverted facts must be separated. They come from the pleadings, pre-trial proceedings, and evidence during the trial in the forms of admission, uncontradicted allegations, clear implications, etc. These uncontroverted facts are helpful to measure the truth or falsity of other evidence.

2. In interpreting the testimony of a witness, his whole testimony must be considered, *i.e.* his direct cross examination, redirect and recross. The truth in testimony cannot be distilled in a chopped fashion.
3. Self-contradictions by a witness usually happen. In assessing self-contradictions, the judge should determine whether they are due to innocent mistakes or deliberate falsehood. Innocent mistakes usually cover minor details. If the self-contradictions are innocent, they should be disregarded. If they are deliberate, they should be counted against the witness.
4. Contradictions between witnesses also commonly occur. Initially, the judge should try to reconcile them. If they cannot be reconciled, the judge has to make a choice of which testimony to adopt as true and reject as false. To guide him in his choice, he has to consider the character of the witness, his ability and willingness to speak the truth, means of knowledge, motives, manner and demeanor, and the consistency or inconsistency of his statements, as well as their probability or improbability.
5. Contradictions between testimony on the witness stand and prior affidavit are also common. If they are irreconcilable, affidavits should normally prevail. Oral testimony is often unreliable due to passage of time.
6. Testimony that is inherently improbable must be rejected. To be credible, evidence must coincide with the common experience of mankind.
7. Demeanor of witness is an important factor to be considered in weighing his testimony. In his book, *Trial Complex*, Justice Jesus M. Elbinias cited guidelines on

how to interpret the demeanor of a witness, as discussed in the following section.

#### ***D. Gestures and Postures as Non-Verbal Clues***

In addition to clothing and appearance, the witness' gestures and movements while testifying are also important factors in the court's appreciation of his credibility.

##### **1. Head**

When a witness' head is bowed or lowered, it reveals a submissive attitude; and when it is erect, it signals a mastery confidence. From either of these head postures, the court may likely derive an impression of repentance or prevarication, or of innocence or truthfulness of the witness.

##### **2. Face**

The upper face, which is the reflexive area, consists of the forehead that indicates nervousness when perspiring. The eyebrows express concern and worry when moving downward. The eyelids disclose an alert mind when wide open, and reveal sarcastic attitude when winking. The nostrils may quiver in anticipation, flare with eagerness, or widen in fear and anger. Located in the non-reflexive area, or the lower face, are the lips that convey softness and warmth when full, and strength when thin.

##### **3. Chest**

When the chest area is covered by the witness' arms folded across, such posture signals the witness' unwillingness to communicate, while an uncovered chest indicates openness and readiness to communicate.

#### **4. Posture**

The posture assumed by the witness while testifying can also affect his credibility. If he leans forward towards the examining counsel, this may indicate his willingness to tell what he believes is the truth, or his eagerness to testify to matters that may be truthful for the party to whom he is a witness. On the other hand, if he leans backward, this may signal his hesitance in giving testimony either because what he is declaring is a fabrication or because he simply does not believe in the cause of the party.

#### **5. Leg Movements**

Constant movement of the legs is an indication of tension. Crossed-legs reflect confidence and openness to communicate. Foot scuffling, however, is indicative of insecurity and nervousness.

As I said, we cannot exhaust the techniques used by the courts to ferret out the facts in a case. In any event, I advise you to read and re-read the law on evidence and see how the precepts have been applied in actual cases.

#### ***E. Techniques in Interpreting the Law***

Assuming you have already calibrated the facts, the next problem is how to find the applicable law. In most cases, the law is clear and there ought to be no problem in its application to the facts of a given case. In some cases, however, there will be a need to interpret the law. Again, this is where you separate the skilled from the unskilled judges. The various techniques on how to interpret a statute, even a constitution, are well discussed by books on statutory construction. These techniques are universal in character. They are used both by courts in common law and civil

law countries. Again, I counsel you to review these techniques for they will come in handy when you get bogged down by problems on interpreting laws.

It is almost impossible to relate how great judges rationalize their decisions and orders. You can, however, get a glimpse of how they use their skills by reading decisions, especially those involving constitutional questions, where you have a split vote and where almost every member of the court writes a concurring or dissenting opinion. I commend to your attention, for example, the benchmark case of *Fortunato Pamil v. Hon. Victorino Teleron and Rev. Fr. Margarito Gonzaga* (L-34854, November 20, 1978; 86 SCRA 413) where by a vote of seven (7) to five (5), the Supreme Court held that a priest is ineligible to sit as a municipal mayor. This case involved Father Gonzaga, a Catholic priest, who, in 1971, ran for the position of municipal mayor of Albuquerque, Bohol. He won and was duly proclaimed. His rival, petitioner Pamil, filed a suit for *quo warranto* and disqualification is based on Section 2175 of the 1917 Revised Administrative Code, which provides:

In no case shall there be elected or appointed to a municipal office ecclesiastics, soldiers in active service, persons receiving salaries or compensation from provincial or national funds, or contractors for public works of the municipality.

Father Gonzaga, however, contended that this provision has been repealed by Section 23 of the Election Code of 1971, which states:

SECTION 23. *Candidate holding appointive office or position* – Every person holding a public appointive office or position including active members of the Armed Forces of the Philippines and every officer or employee in government-owned or controlled corporations, shall *ipso*

*facto* cease in his office or position on the date he files his certificate of candidacy: Provided, that the filing of a certificate of candidacy shall not affect whatever civil, criminal or administrative liabilities which he may have incurred.

Complicating the legal issue is the larger issue of whether the election of Father Gonzaga will violate certain provisions of the Constitution and the principle of separation of Church and State.

The court was split: seven (7) voted that the provision of the Administrative Code has been repealed by the Election Code of 1971 and even assuming there was no repeal, the election of Father Gonzaga should be upheld, for we will be putting a religious test in the exercise of civil and political rights. Five (5), however, voted that there was no repeal and, moreover, to uphold the election of Father Gonzaga would violate the principle of separation of Church and State.

When you read their separate opinions, I want you to appreciate their use of different techniques in legal reasoning. Note how expertly they use tools of logic and philosophy, their mastery of history, and their resort to foresight of the substantive evil that Congress wants to avoid by the passage of the law they were interpreting. All of us have been taught these basic skills, but these skills have to be regularly honed by the constant upgrading of our legal scholarship.

#### IV. CONCLUSION

By way of conclusion, I will raise the question that you may be embarrassed to ask. And the question is: Is it really true that in making a decision, judges are straightjacketed by the process of beginning with a principle of law as his premise, applying this

premise to the facts, and finally arriving at a decision? Or by the formula,  $R \times F = \text{Rules} \times \text{Facts} = \text{Decision}$ ? Are they prohibited from reaching a conclusion first, and then justifying the conclusion? Are they not to be influenced by subjective factors? Judge Hutcheson, one of the ablest federal judges in the USA, says that oftentimes, judges arrive at a decision by using his hunch as to what is fair, just and wise. Judges do not subvert law when they give room to their “hunches” or “feelings” in the process of decision-making, because judges are not mechanical slot machines. According to Cardozo:

The doctrine of the hunch, if viewed as an attempt at psychological analysis, embodies an important truth: it is a vivid and arresting description of one of the stages in the art of thought. The hunch is the divinities of the scientist. . . the apocalyptic insight that is at the back of experiment. . . the intuitive flash of inspiration is at the root of all science, of all art, and even of conduct.

According to Lhwelym, good hunching power is a result of good sense, imagination, and much knowledge.

# The Four “Cs” of Effective Decision-Writing: An Introduction for Newly-Appointed Judges

*Justice Artemio V. Panganiban\**  
*Supreme Court*

I. COMPLETENESS .....	31
A. <i>Article VIII, Section 14, Constitution</i>	
B. <i>Rule 36, Section I, Rules of Court</i>	
C. <i>Rule 120, Section 2, Rules of Court</i>	
Case 1: Yao v. Court of Appeals	
Case 2: People v. Bugarin	
Case 3: Madrid v. Court of Appeals	
D. <i>Rule 16, Section 3, Rules of Court</i>	
( <i>Motion to Dismiss</i> )	
Case 1: Pefianco v. Moral	
E. <i>Sanctions for Failure to Follow Legal Requirements</i>	
( <i>Reversal of Decision and Possible Administrative</i>	
<i>Liabilities</i> )	

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\* Justice Artemio V. Panganiban was appointed to the Supreme Court on October 10, 1995. He is Chairman of the Executive Committee of the Supreme Court Centenary Celebrations and the Committee on Public Information, and Vice Chairman of the Committee on Publications as well as the Committee on Computerization. In representation of the Supreme Court, he was designated Alternate Delegate to the 7th Conference of Asian Chief Justices in Seoul, Korea in September 1999.

*F. Parts of a Trial Court Decision*

1. Caption and Title
2. Introduction (optional)
3. Statement of the Case
  - a. Civil Cases
  - b. Criminal Cases
4. Findings of Facts
  - a. Objective or Reportorial Method
  - b. Synthesis Method
  - c. Subjective Method
  - d. Combination of the Objective and Subjective Methods
5. Statement of the Issues
6. Court's Ruling
7. Dispositive Portion or Disposition
  - a. Criminal Cases
  - b. Civil Cases

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A distinguished civic leader and business leader, he was the first Asian to be elected International Chairman of the American Society of Travel Agents or ASTA International, the largest travel association in the world. An active Catholic Lay Leader, he held the very rare distinction of being a Member of the Pontifical Council for the Laity (PLC), appointed by Pope John Paul II in 1995 for a five-year term. He has been cited as one of the most prodigious members of the Supreme Court in terms of number of decisions authored, legal references published, and numerous articles written in both local and international legal publications. He obtained his Bachelor of Laws degree, *Cum Laude*, and received the Most Outstanding Student Award, from Far Eastern University.

II. CORRECTNESS .....	45
A. <i>Some Guidelines in Correct Legal Writing</i>	
1. Be Grammatical.	
2. Be Clear and Precise.	
3. Use Specific Words that are Well-Positioned.	
III. CLARITY .....	49
A. <i>Be Simple.</i>	
B. <i>Be Consistent in Tone, Tense, Words, Images, and the Logical and Grammatical Parallelism of Words or Group of Words.</i>	
C. <i>Remember for General Use</i>	
IV. CONCISENESS .....	51
V. FINAL WORD .....	52

## I. COMPLETENESS

The following are the legal requirements on the contents of a decision:

### **A. Article VIII, Section 14, Constitution**

SEC. 14. No decision shall be rendered by any court without expressing therein clearly and distinctly the facts and the law on which it is based.

No petition for review or motion for reconsideration of a decision of the court shall be refused due course or denied without stating legal basis therefor.

### **B. Rule 36, Section I, Rules of Court**

SEC. I. *Rendition of judgments and final orders.* – A judgment or final order determining the merits of the case

shall be in writing personally and directly prepared by the judge, stating clearly and distinctly the facts and the law on which it is based, signed by him, and filed with the clerk of court (1a).

### ***C. Rule 120, Section 2, Rules of Court***

SEC. 2. *Contents of the judgment.* – If the judgment is of conviction, it shall state (1) the legal qualification of the offense constituted by the acts committed by the accused and the aggravating or mitigating circumstances which attended its commission; (2) the participation of the accused in the offense, whether as principal, accomplice, or accessory after the fact; (3) the penalty imposed upon the accused; and (4) the civil liability or damages caused by his wrongful act or omission to be recovered from the accused by the offended party, if there is any, unless the enforcement of the civil liability by a separate civil action has been reserved or waived.

In case the judgment is of acquittal, it shall state whether the evidence of the prosecution absolutely failed to prove the guilt of the accused or merely failed to prove his guilt beyond reasonable doubt. In either case, the judgment shall determine if the act or omission from which the civil liability might arise did not exist.

### **Case I: Yao v. Court of Appeals**

In *Yao v. Court of Appeals* [G.R. No. 132428, October 24, 2000], Chief Justice Hilario G. Davide, Jr. discussed these legal requirements in this wise:

In the normal and natural course of events, we should dismiss the petition outright, if not for an important detail which augurs well for Yao and would grant him a reprieve in his legal battle. The decision of the RTC affirming the

conviction of Yao palpably transgressed Section I4, Article VIII of the Constitution, which states:

SEC. I4. No decision shall be rendered by any court without expressing therein clearly and distinctly the facts and the law on which it is based.

x x x

Let us quote in full the RTC judgment:

This is an appeal from the decision of the Metropolitan Trial Court, Branch 52, Kalookan City, in Criminal Case No. C-155713, the dispositive portion of which reads as follows:

x x x

But because the prosecution proved the guilt of the other accused, George Yao, beyond reasonable doubt as principal under the said Article 189 (I) for Unfair Competition, he is convicted of the same. In the absence of any aggravating or mitigating circumstances alleged/proven, and considering the provisions of the Indeterminate Sentence Law, he is sentenced to a minimum of four (4) months and twenty-one (21) days of *arresto mayor* to a maximum of one (1) year and five (5) months of *prison correccional*.

x x x

After going over the evidence on record, the Court finds no cogent reason to disturb the findings of the Metropolitan Trial Court.

WHEREFORE, this Court affirms *in toto* the decision of the Metropolitan Trial Court dated October 20, 1993.

SO ORDERED.

That is all there is to it.

We have sustained decisions of lower courts having substantially or sufficiently complied with the constitutional injunction, notwithstanding the laconic and terse manner in which they were written and even ‘if there [was left] much to be desired in terms of [their] clarity, coherence and comprehensibility,’ provided that they eventually set out the facts and the law on which they were based, as when they stated the legal qualifications of the offense constituted by the facts proved, the modifying circumstances, the participation of the accused, the penalty imposed and the civil liability; or discussed the facts comprising the elements of the offense that was charged in the information, and accordingly rendered a verdict and imposed the corresponding penalty; or quoted the facts narrated in the prosecution’s memorandum, but made their own findings and assessment of evidence before finally agreeing with the prosecution’s evaluation of the case.

We have also sanctioned the use of memorandum decisions, a specie of succinctly written decisions by appellate courts in accordance with the provisions of Section 40, B.P. Blg. 129 on the grounds of expediency, practicality, convenience and docket status of our courts. We have also declared that memorandum decisions comply with the constitutional mandate.

In *Francisco v. Permskul* (173 SCRA 324, May 12, 1989), however, we laid down the conditions for the validity of memorandum decisions, thus:

The memorandum decision, to be valid, cannot incorporate the findings of fact and the conclusions of law of the lower court only by remote reference, which is to say that the challenged decision is not easily and immediately available to the person reading the memorandum decision. For the

incorporation by reference to be allowed, it must provide for direct access to the facts and the law being adopted, which must be contained in a statement *attached* to the said decision. In other words, the memorandum decision authorized under Section 40 of B.P. Blg. 129 should actually embody the findings of fact and conclusions of law of the lower court in an annex attached to and made an indispensable part of the decision.

It is expected that this requirement will allay the suspicion that no study was made of the decision of the lower court and that its decision was merely affirmed without a proper examination of the facts and the law on which it is based. The *proximity* at least of the annexed statement should suggest that such an examination has been undertaken. It is, of course, also understood that the decision being adopted should, to begin with, comply with Article VIII, Section 14 of the Constitution as no amount of incorporation or adoption will rectify its violation.

The Court finds it necessary to emphasize that memorandum decisions should be sparingly used lest it become an addictive excuse for judicial sloth. It is an additional condition for the validity that this kind of decision may be resorted to only in cases where the facts are in the main accepted by both parties and easily determinable by the judge, and there are no doctrinal complications involved that will require an extended discussion of the laws involved. The memorandum decision may be employed in simple litigations only, such as ordinary collections cases, where the appeal is obviously groundless and deserves no more than the time needed to dismiss it. xxx

Henceforth, all memorandum decisions shall comply with the requirements herein set forth both as to the form prescribed and the occasions when they may be rendered. Any deviation will summon the strict enforcement of Article VIII, Section 14 of the Constitution and strike down the flawed judgment as a lawless disobedience.

Tested against these standards, we find that the RTC decision at bar failed miserably to meet them and, therefore, fell short of the constitutional injunction. The RTC decision is brief indeed, but it is starkly hollow, otiosely written, vacuous in its content and trite in its form. It achieved nothing and attempted at nothing, not even at a simple summation of facts which could easily be done. Its inadequacy speaks for itself.

We cannot even consider or affirm said RTC decision as a memorandum decision because it failed to comply with the measures of validity laid down in *Francisco v. Permskul*. It merely affirmed *in toto* the MeTC decision without saying more. A decision or resolution, especially one resolving an appeal, should directly meet the issues for resolution; otherwise, the appeal would be pointless.

We, therefore, reiterate our admonition in *Nicos Industrial Corporation v. Court of Appeals* (206 SCRA 127, 131, February 11, 1992), in that while we conceded that brevity in the writing of decisions is an admirable trait, it should not and cannot be substituted for substance; and again in *Francisco v. Permskul*, where we cautioned that expediency alone, no matter how compelling, cannot excuse non-compliance with the constitutional requirements.

This is not to discourage the lower courts to write abbreviated and concise decisions, but never at the expense of scholarly analysis, and more significantly, of justice and

fair play, lest the fears expressed by Justice Jose Y. Feria as the *ponente* in *Romero v. Court of Appeals* (147 SCRA 183, January 8, 1987) come true, *i.e.*, if an appellate court failed to provide the appeal the attention it rightfully deserved, said court deprived the appellant of due process since he was not accorded a fair opportunity to be heard and a responsible magistrate. This situation becomes more ominous in criminal cases, as in this case, where not only property rights are at stake, but also the liberty, if not the life, of a human being.

Faithful adherence to the requirements of Section 14, Article VIII of the Constitution is indisputably a paramount component of due process and fair play. It is likewise demanded by the due process clause of the Constitution. The parties to a litigation should be informed of how it was decided, with an explanation of the factual and legal reasons that led to the conclusions of the court. The court cannot simply say that judgment is rendered in favor of X and against Y, and just leave it at that without any justification whatsoever for its action. The losing party is entitled to know why he lost, so that he may appeal to the higher court if permitted, should he believe that the decision should be reversed. A decision that does not clearly and distinctly state the facts and the law on which it is based leaves the parties in the dark as to how it was reached, and is precisely prejudicial to the losing party, who is unable to pinpoint the possible errors of the court for review by a higher tribunal. More than that, the requirement is an assurance to the parties that, in reaching judgment, the judge did so through the processes of legal reasoning. It is, thus, a safeguard against the impetuosity of the judge, preventing him from deciding *ipse dixit*. Vouchsafed neither the sword nor the purse by the Constitution, but nonetheless vested with the sovereign prerogative of passing judgment on the

life, liberty or property of his fellowmen, the judge must ultimately depend on the power of reason for sustained public confidence in the justness of his decision.

Thus, the Court has struck down as void those decisions of lower courts, and even of the Court of Appeals, whose careless disregard of the constitutional behest exposed their sometimes cavalier attitude not only to their magisterial responsibilities, but likewise to their avowed fealty to the Constitution.

Thus, we nullified or deemed to have failed to comply with Section 14, Article VIII of the Constitution, a decision, resolution or order which contained no analysis of the evidence of the parties nor reference to any legal basis in reaching its conclusions; contained nothing more than a summary of the testimonies of the witnesses of both parties; convicted the accused of libel, but failed to cite any legal authority or principle to support conclusion that the letter in question was libelous; consisted merely of one (1) paragraph with mostly sweeping generalizations and failed to support its conclusion of parricide; consisted of five (5) pages, three (3) pages of which were quotations from the labor arbiter's decision, including the dispositive portion and barely a page (two [2] short paragraphs of two [2] sentences each) of its own discussion or reasonings; was merely based on the findings of another court *sans* transcript of stenographic notes; or failed to explain the factual and legal bases for the award of moral damages. (Citations omitted)

### **Case 2: People v. Bugarin**

In *People v. Bugarin* (339 Phil 570, 579-580, June 13, 1997), the Court explained:

The requirement that the decisions of courts must be in writing and that they must set forth clearly and distinctly

the facts and the law on which they are based serves many functions. It is intended, among other things, to inform the parties of the reason or reasons for the decisions so that if any of them appeals, he can point out to the appellate court the finding of facts or the rulings on points of law with which he disagrees. More than that, the requirement is an assurance to the parties that, in reaching judgment, the judge did so through the processes of legal reasoning. It is, thus, a safeguard against the impetuosity of the judge, preventing him from deciding by *ipse dixit*. Vouchsafed neither the sword nor the purse by the Constitution, but nonetheless vested with the sovereign prerogative of passing judgment on the life, liberty or property of his fellowmen, the judge must ultimately depend on the power of reason for sustained public confidence in the justness of his decision.

### **Case 3: Madrid v. Court of Appeals**

In *Madrid v. Court of Appeals* (G.R. No. 130683, May 31, 2000), the Court elaborated:

First. The trial court's decision, for all its length – twenty-three (23) pages – contains no analysis of the evidence of the parties nor reference to any legal basis in reaching its conclusion. It contains nothing more than a summary of the testimonies of the witnesses of both parties. The only discussion of the evidence is to be found in the following paragraphs:

Their testimony convinced the Court. On the other hand, accused's evidence bears the *indicia* of fabrication. Defense witnesses from their demeanor, manner of testifying and evasive answers were far from credible.

From the evidence on record, the Court believes and so holds that the prosecution has satisfactorily proved the accused [guilty] beyond reasonable doubt. Prosecution's witnesses testified in a straightforward manner.

Considering the circumstances immediately prior to the commission of the crime, and the manner the same was committed, the Court believes that the aggravating circumstances of evidence, premeditation and abuse of superior strength, as well as availment of means to prevent the deceased from defending himself, were sufficiently established. The severality, location and severity of the injuries inflicted, as well as their nature, proved that there were more than one assailant. Murder should have been the proper offense charged. However, we can only convict the accused of homicide.

The decision does not indicate what the trial court found in the testimonies of the prosecution's witnesses to consider the same "straightforward" when, as will presently be shown, they are in fact contradictory and confused. Nor does the decision contain any justification for the appreciation of aggravating circumstances against the accused, much less some basis for finding conspiracy among them.

In view of the weight given to its assessment of a witness' credibility on appeal, the trial court should exert effort to ensure that its decisions present a comprehensive analysis or account of the factual and legal findings which would substantially address the issues raised by the parties.

***D. Rule 16, Section 3, Rules of Court  
(Motion to Dismiss)***

SEC. 3. *Resolution of motion* – After the hearing, the court may dismiss the action or claim, deny the motion, or order the amendment of the pleading.

The court shall not defer the resolution of the motion for the reason that the ground relied upon is not indubitable.

In every case, the resolution shall state clearly and distinctly the reasons therefor.

**Case I: Pefianco v. Moral**

In *Pefianco v. Moral* (G.R. L-132248, January 19, 2000), the Court held:

Clearly, the above rule [Rule 16, Sec. 3] proscribes the common practice of perfunctorily denying motions to dismiss ‘for lack of merit.’ Such cavalier disposition often creates difficulty and misunderstanding on the part of the aggrieved party in taking recourse therefrom and likewise on the higher court called upon to resolve the issue, usually on *certiorari*.

***E. Sanctions for Failure to Follow Legal Requirements  
(Reversal of Decision and Possible Administrative  
Liabilities)***

Judges cannot be disciplined for every erroneous order or decision rendered in the absence of a clear showing of ill motive, malice or bad faith. This, however, is not a license for them to be negligent or abusive in performing their adjudicatory prerogatives. The absence of bad faith or malice will not totally exculpate them from charges of incompetence and ignorance of the law when they

render decisions that are totally bereft of factual and legal bases.” (*De Vera v. Dames*, A.M. No. RTJ-99-1455, July 13, 1999)

## ***F. Parts of a Trial Court Decision***

### **I. Caption and Title**

- a. Caption
  - i. Name of the court
  - ii. Title of the action
  - iii. Docket number
- b. Title
  - i. Names of all parties and their respective participation

### **2. Introduction (Optional)**

### **3. Statement of the Case**

- a. Civil Cases
  - i. Collection
  - ii. Ejectment
  - iii. Quieting of title
  - iv. Foreclosure of mortgage, etc.
- b. Criminal Cases
  - i. Specific charge
  - ii. Accusatory portion of the information

- iii. Plea of the accused
- iv. Sometimes the conduct of preliminary investigation

This Court is disturbed by the fact that the decision of the trial court now subject of automatic review failed to include a statement of facts or at least a summary of the evidence presented by the prosecution to prove the guilt of the accused beyond reasonable doubt. The information upon which the accused was arraigned is [neither] cited nor quoted in the trial court's decision, which failed to state distinctly the acts [constituting the crime] allegedly committed by the accused. The trial court simply stated that the accused is guilty of rape of his own daughter and that the evidence for the prosecution is not controverted by the accused without mentioning the evidence the prosecution presented in court. x x x The trial judge is hereby admonished for her failure to comply with the Rules regarding the form and contents of judgments. (*People v. Dumaguing*, G.R. No. 135516, September 20, 2000)

#### **4. Findings of Facts**

Each case has its own flesh and blood and cannot be decided simply on the basis of isolated clinical classroom principles. (*Philippines Today v. NLRC*, G.R. No. 112962, January 30, 1997; 267 SCRA 202, 228.)

The methods of reporting facts are:

##### **a. Objective or Reportorial Method**

Usually done by summarizing, without comment, the testimony of each witness, and the contents of each exhibit.

**b. Synthesis Method**

According to his best light, the judge summarizes the factual theory of the plaintiff or prosecution, and then that of the defendant or defense.

**c. Subjective Method**

The judge simply narrates what he accepts as his own version, without explaining what the parties' versions are.

**d. Combination of the Objective and Subjective Methods**

The judge reports the testimony of each witness as in the first type and then makes his own version as he sees fit.

**5. Statement of the Issues****6. Court's Ruling**

Application of law and jurisprudence to the facts, and explanation for the conclusions reached. Each issue, as a rule, must be taken up and disposed of.

**7. Dispositive Portion or Disposition**

- a. In criminal cases, the disposition should include:
  - i. Finding of innocence or guilt
  - ii. Specific crime
  - iii. Penalty (with special attention to the indeterminate sentence law)
  - iv. Participation of the accused

- v. Qualifying, aggravating and mitigating circumstances
  - vi. Civil liabilities costs
- b. In civil cases, the disposition should include:
- i. Whether complaint or petition is granted or denied
  - ii. Specific relief granted
  - iii. Costs

According to Justice Reynato S. Puno, a disposition must be complete. He gives the following test of completeness:

First, the parties know their rights and obligations. Second, the parties should know how to execute the decision under alternative contingencies. Third, there should be no need for further proceedings. Fourth, it terminates the case by according the proper relief. The 'proper relief' usually depends upon what the parties asked for. It may be merely declaratory of rights, or it may command performance of positive prestations, or orders the party to abstain from specific acts. And lastly, it must adjudicate costs.

## II. CORRECTNESS

This means that the decision must conform to the law and settled jurisprudence. Scholarship and research are the landmarks of a great decision. Citations of authorities, especially those involving novel or difficult issues, are always desirable.

Remember that your audience is not just the parties or their lawyers, but also the appellate court which may review your decisions and opinions.

A mastery of the various branches of law is essential. Otherwise, judges who show patent or gross ignorance of the law and settled jurisprudence would be subject to disciplinary action.

However, decisions must be correct not only in substance, but also in form. They must be written in correct English or Filipino.

### ***A. Some Guidelines in Correct Legal Writing***

#### **I. Be Grammatical.**

Learn and use correct grammar, spelling, tenses, numbers, gender. What are the correct spellings of “pre-trial,” “guesstimate,” and “percent”?

#### **2. Be Clear and Precise.**

Choose appropriate words that convey the correct nuance or shade of meaning.

It is very embarrassing when a judge [or hearing officer] is asked by the parties to explain what he meant in his opinion or what he ordered in the dispositive part of his decision. (Justice Isagani A. Cruz and Justice Camilo D. Quason, *Correct Choice of Words*, 1998 ed., p. iv.)

Words are like chameleons which reflect the color of their environment. (Judge Learned Hand)

Examples:

- a. “One after the other, the four accused attacked the victim *alternately*.”

Use “*successively*” instead of “*alternately*.” Note the difference.

- b. “Petitioner alleges that the *applied* land was located in Barangay Mambogan.”

Better:

“Petitioner alleges that the land he *applied* for was located in Barangay Mambogan.”

- c. “The witness *only* testified on one matter.”

Better:

“The witness testified on *only* one matter.”

- d. “WHEREFORE, finding no merit in the instant complaint, the same is hereby DISMISSED.”

Who found no merit? The participial phrase is dangling, a very common error.

Correct:

“WHEREFORE, finding no merit, the court hereby DISMISSES the Petition.”

Or:

“WHEREFORE, the Petition is hereby DISMISSED for lack of merit.”

- e. “An accused is charged *with* a crime and convicted *of* it.”

“Treachery makes him liable *for* murder.”

### 3. Use Specific Words that are Well-Positioned.

Vague generalities tend to say nothing. In fact, they may even confuse the reader.

a. Vague:

“It is clear from the testimony of the private complainant that appellant used force and intimidation.”

Specific:

“It is clear from the testimony of the private complainant that after the appellant had forcibly embraced her, he threatened to break her head if she shouted; thereafter, he strangled her with one hand and pointed a knife at her neck with the other.”

- b. The main clause at the end of a sentence tends to catch the most attention. Reserve it for points to be emphasized. Next to the end of the sentence, the beginning attracts attention.

Awkward:

“The rule that no statute, decree, ordinance, regulation or policy shall be given retroactive effect, unless explicitly stated so, is basic.”

Better:

“Basic is the rule that no statute, decree, ordinance, regulation or policy shall be given retroactive effect, unless explicitly stated so.”

- c. To create effect, vary sentence length and construction in a paragraph. Use long sentences to describe complicated matters, to give dramatic narration, or to convey tedium or heaviness. On the other hand, use a short sentence to stress an important point. Examples:

“This is not an accurate statement of a legal principle. It confuses venue with jurisdiction, but venue has nothing

to do with jurisdiction, except in criminal actions. This is fundamental.”

“Petitioner is in error. The public respondent did not adopt *in toto* the aforequoted portion of the arbiter’s decision.”

### III. CLARITY

A decision should be easy to read and to understand.

#### A. *Be Simple.*

Excessive ornateness, unorthodoxy, multisyllabic words, and obscure spelling and diction call attention to themselves, not to the message. Glitter is *nouveau riche*, but simplicity is elegance. Simplicity does not mean lack of force or color. It means condensing many words into a few meaningful ones that deliver the desired message.

- I. Avoid wordiness and vacillation. Minimize phrases like *it is said that, it would seem that, it might be said that.*

#### Wordy:

“In common or ordinary parlance, and its ordinary signification, the term ‘shall’ is a word of command, one which has always or which must be given a compulsory meaning as denoting obligation. It has a peremptory meaning, and it is generally known as peremptory or mandatory.”

#### Simple:

“The word “shall” denotes an imperative and indicates the mandatory character of a law.”

2. Minimize the use of highfalutin language and foreign words and phrases. However, used sparingly in a proper way and in the proper context, they add dignity and majesty to a decision. Used in excess, they expose not erudition, but exhibitionism and amateurism. Thin, indeed, is the line between profundity and pomposity.

***B. Be Consistent in Tone, Tense, Words, Images, and the Logical and Grammatical Parallelism of Words or Groups of Words.***

1. While it is desirable to avoid monotony of words, do not change a word for the sake of changing it. If one must repeat, then repeat a word or phrase that has a unique legal characterization, like “laches,” “renvoi” or treachery.
2. Strive for logical and grammatical parallelism.

Not parallel:

“Respondent challenges the credibility of the witnesses who, he says, are all bosom friends of the complainant, and that their testimonies contradict one another.”

Parallel:

“Respondent challenges the credibility of the witnesses because they are all the complainant’s bosom friends, and because their testimonies contradict one another.”

3. Avoid using mixed metaphors and clashing images.

Mixed metaphors:

“The price was the carrot dangling in front of the horse.”

Clashing images:

“He admitted having killed the deceased, but he set up self-defense.”

NOTE: In general, abbreviations, capitalization, italicization, and, to a large degree, punctuation are matters of style, not of right and wrong.

***C. Remember to Use in General:***

1. Topics and titles for distinct ideas, headings and subheadings.
2. Numbers or letters for enumerations and succession of ideas.
3. Transition words and phrases.
4. Proper punctuation marks.
5. Bold types or italics to stress words and phrases.

**IV. CONCISENESS**

Question: How long should a decision be?

Answer: It depends on the facts and the issues involved.

The decision of the trial court is exceedingly long, without any effort to trim the fat and keep it lean. Judges are not stenographers transcribing the testimony of the witnesses word for word. Judges must know how to synthesize, to summarize, to simplify. Their failure to do is one of the main reasons for the delay in the administration of justice. It also explains the despair of the public over the foot-dragging of many courts and their inability to get to the point and to get there fast. (*People v. Amondina*, 220 SCRA 6, 7, March 17, 1993)

## V. FINAL WORD

For the sake of variety, cadence and emphasis, some of these foregoing rules may be set aside once in a while. Note these famous quotations:

- “To be or not to be – that is the question.”
- “Four score and seven years ago.”
- “Only in the Philippines!”

If one has a way with words – a sense of rhythm – one may get away with the unconventional. Some call it “artsy-craftsy,” or “literary license,” or even “legal craftsmanship.”

But keep in mind T.S. Eliot’s words: “It is not wise to violate the rules, until you know how to observe them.”

# Decision Writing

*Justice Lucas P. Bersamin\**  
*Court of Appeals*

I.	INTRODUCTION .....	55
II.	FORM AND CONTENTS OF WRITTEN LEGAL DECISIONS .....	55
III.	WHY FACTUAL AND LEGAL FINDINGS SHOULD BE STATED IN THE DECISION .....	57
IV.	STYLE AND LENGTH OF DECISIONS .....	58
	<i>A. Clear and Distinct</i>	
	<i>B. Length of a Decision</i>	
	<i>C. Short and Lucid Opinions</i>	
	<i>D. Synthesize, Summarize, Simplify to Get to the Point and to Get There Fast</i>	
	<i>E. Separate the Material from the Immaterial</i>	
	<i>F. Decision Should Make for Pleasurable and Instructive Reading</i>	

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\* Justice Lucas P. Bersamin was appointed Associate Justice of the Court of Appeals on March 12, 2003. He obtained his law degree from the University of the East in 1973 and placed 9th in the Bar Examinations given that year with a general weighted average of 86.30%, and a 100% rating in Criminal Law. Immediately thereafter, he engaged in the practice of law until November 1986 when he was appointed Regional Trial Court Judge in Quezon City. His court was designated by the Supreme Court as one of the special criminal courts in the National Capital Judicial Region to try and decide cases involving heinous crimes. He was a recipient of the Foundation for Judicial

V.	DECISION AND OPINION, DISTINGUISHED .....	60
VI.	QUALITIES OF AN EFFECTIVE DECISION .....	61
	A. <i>Familiarize Thoroughly with Facts Before         Determining Law Applicable</i>	
	B. <i>Short, Concise, Explicit, and Intelligible</i>	
	C. <i>Avoid Discourteous, Self-Righteous, and Other         Unnecessary Comments</i>	
	D. <i>Ex Facto Oritur Jus – The Law Arises from the Fact</i>	
	E. <i>Presentation of the Facts Should Be Orderly and         Understandable</i>	
VII.	POWER OF WORDS IN COMMUNICATING THE INTENDED MEANING FORCEFULLY .....	64
VIII.	REFERENCES .....	65
	A. <i>Referencing to the Records</i>	
	B. <i>Referencing to Authorities</i>	
	C. <i>Signs and Symbols</i>	
	1. <i>op. cit.</i>	
	2. <i>id. and ibid.</i>	
	3. <i>supra</i>	
	4. <i>infra</i>	
	5. <i>e.g.</i>	
	6. <i>i.e.</i>	
	7. <i>et seq.</i>	
	8. <i>Cf.</i>	
	9. <i>See</i>	
	10. <i>Contra</i>	

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Excellence Awards 2000 for Best Decision in Civil Law and Criminal Law. He was also chosen by the same Foundation as one of the three Most Outstanding RTC Judges for the year 2002. He is a Professor at the University of the East College of Law, and author of *“Appeal and Review in the Philippines.”*

## I. INTRODUCTION

A decision or judgment is rendered and issued after hearing the parties and the proceedings have been *duly terminated* for the purpose of resolving the *issues* of fact or law, or both fact and law, submitted for consideration and resolution. This discourse focuses on the form and contents of such decisions.

## II. FORM AND CONTENTS OF WRITTEN LEGAL DECISIONS

Decisions and resolutions in judicial proceedings are required to be in writing and, in general, must conform, both as to form and content, to the applicable Constitutional or legal requirements.

Section 14, Article VIII, of the 1987 Constitution provides:

SEC. 14. No decision shall be rendered by any court without expressing therein clearly and distinctly the facts and the law on which it is based.

No petition for review or motion for reconsideration of a decision of the court shall be refused due course or denied without stating the legal basis therefor.

Section I, Rule 36, 1997 Rules of Civil Procedure states:

SEC. I. *Rendition of judgments and final orders.* – A judgment or final order determining the merits of the case shall be in writing personally and directly prepared by the judge, stating clearly and distinctly the facts and the law on which it is based, signed by him, and filed with the clerk of the court. (1a)

Sections I-5, 2000 Rules of Criminal Procedure states:

SEC. I. *Judgment; definition and form.* – Judgment is the adjudication by the court that the accused is guilty or not

guilty of the offense charged and the imposition on him of the proper penalty and civil liability, if any. It must be written in the official language, personally and directly prepared by the judge and signed by him, and shall contain clearly and distinctly a statement of the facts and the law upon which it is based. (1a)

SEC. 2. *Contents of the judgment.* – If the judgment is of conviction, it shall state (1) the legal qualification of the offense constituted by the acts committed by the accused and the aggravating or mitigating circumstances which attended its commission; (2) the participation of the accused in the offense, whether as principal, accomplice, or accessory after the fact; (3) the penalty imposed upon the accused; and (4) the civil liability or damages caused by his wrongful act or omission to be recovered from the accused by the offended party, if there is any, unless the enforcement of the civil liability by a separate civil action has been reserved or waived.

In case the judgment is of acquittal, it shall state whether the evidence of the prosecution absolutely failed to prove the guilt of the accused or merely failed to prove his guilt beyond reasonable doubt. In either case, the judgment shall determine if the act or omission from which the civil liability might arise did not exist. (2a)

SEC. 3. *Judgment for two or more offenses.* – When two or more offenses are charged in a single complaint or information, but the accused fails to object to it before trial, the court may convict him of as many offenses as are charged and proved, and impose on him the penalty for each offense, setting out separately the findings of fact and law in each offense. (3a)

SEC. 4. *Judgment in case of variance between allegation and proof.* – When there is variance between the offense

charged in the complaint or information and that proved, and the offense as charged is included in or necessarily includes the offense proved, the accused shall be convicted of the offense proved which is included in the offense charged, or of the offense charged which is included in the offense proved. (4a)

SEC. 5. *When an offense includes or is included in another.* – An offense charged necessarily includes the offense proved when some of the essential elements or ingredients of the former, as alleged in the complaint or information, constitute the latter. And an offense charged is necessarily included in the offense proved, when the essential ingredients of the former constitute or form part of those constituting the latter. (5a)

### III. WHY FACTUAL AND LEGAL FINDINGS SHOULD BE STATED IN THE DECISION

The **factual** and **legal** grounds for the decision should be made in the written decisions and resolutions *to inform the parties on the reasons and grounds for the decision.*

Justice Isagani A. Cruz expounded in *Nicos Industrial Corporation v. Court of Appeals*<sup>1</sup>:

It is a requirement of due process that the parties to litigation be informed of how it was decided, with an explanation of the factual and legal reasons that led to the conclusions of the court. The court cannot simply say that judgment is rendered in favor of X and against Y, and just leave it at that without any justification whatsoever for its action. The losing party is entitled to know why he lost, so he may appeal to a higher court, if permitted, should he

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I. 206 SCRA 127; J. Cruz.

believe that the decision should be reversed. A decision that does not clearly and distinctly state the facts and the law on which it is based leaves the parties in the dark as to how it was reached and is especially prejudicial to the losing party, who is unable to pinpoint the possible errors of the court for review by a higher tribunal.

#### IV. STYLE AND LENGTH OF DECISIONS

##### *A. Clear and Distinct*

The Constitution requires the statement of the facts and the laws involved to be clear and distinct.<sup>2</sup>

##### *B. Length of a Decision*

The length of a decision should depend on the nature of the issues involved. The simple case ought not to be given a wordy or lengthy treatment, while the most serious one unquestionably deserves a treatment probably ten times more fully than the former.

##### *C. Short and Lucid Opinions*

An unnecessary discussion of the rules of law in the opinion of a decision or resolution is valueless and may tend to confuse, rather than clarify, the issue being decided. The modern judge is selected because of his knowledge of the law and his ability to analyze facts and apply to them the known rules of law, and not because of his forensic ability and genius in writing high sounding and flamboyant phrases. It has rightly been suggested, therefore, that judges and legal officers would serve better if they would

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2. *Del Mundo v. Court of Appeals*, 240 SCRA 348, 355; J. Vitug.

seek eminence through the route of writing shorter and more lucid opinions.<sup>3</sup>

***D. Synthesize, Summarize, Simplify to Get to the Point and to Get There Fast***

Judges are not stenographers transcribing the testimony of the witnesses *word for word*. They must know how to *synthesize*, to *summarize*, and to *simplify*. Their failure to do so is one of the main reasons for the delay in the administration of justice and also explains the despair of the public over the foot-dragging of many courts and legal offices of the Government, their inability to get to the point and to get there fast.<sup>4</sup>

***E. Separate the Material from the Immaterial***

A decision made unusually long by a *word for word* summary of testimonies, without any effort to separate the material from the immaterial, is to be condemned. In *People v. Francisco, et al.*,<sup>5</sup> Justice Isagani A. Cruz called attention to this mistake, thus:

We find that the decision of the trial judge is unduly long, consisting of no less than sixteen (16) legal-size single-spaced pages. Fifteen of these are devoted to a virtually word-for-word summary of the testimonies of all the witnesses, without any effort to separate the chaff from the grain. What is worse is that the findings of the judge are confined

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3. Marshall F. McComb, Associate Justice of the District Court of Appeals in California, *A Mandate from the Bar: Shorter and More Lucid Opinions*, ABA Journal, Vol. 35, No. 5, May 1949.
  4. *People v. Amondina*, G.R. No. 75295, March 17, 1993; J. Cruz.
  5. G.R. No. 106097, July 21, 1994; 234 SCRA 333, 341; J. Cruz.

to two short paragraphs on the last page, and there is hardly any effort to explain such opinion or to support it with law or jurisprudence.

This is not the way to write a decision. As we said in an earlier case,<sup>6</sup> judges should learn to summarize, to synthesize, to simplify. More important, judges should *judge*. In this case, the trial judge barely complied with the constitutional requirement that the factual and legal basis of the decision should be clearly and distinctly expressed therein.<sup>7</sup>

#### ***F. Decision Should Make for Pleasurable and Instructive Reading***

Besides reaching a conclusion sustained by the applicable law and jurisprudence, a decision should make for *pleasurable* and *instructive* reading. According to Justice Cruz, one function of decision-writing not generally appreciated is to educate the reader on the *intricacies*, and even the *mystique*, of the law, a function which the opinion must perform so that the law and its mandates can be made *less esoteric* or *less inaccessible* to the members of the Bar (and even to the public, in general).<sup>8</sup>

### **V. DECISION AND OPINION, DISTINGUISHED**

*Houston v. Williams*<sup>9</sup>:

The terms 'opinion' and 'decision' are often confounded.  
Yet there is a wide difference between them, and in ignorance

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6. *People v. Amondina*, 220 SCRA 6.
7. Art. VIII, Sec. 14, 1987 Constitution.
8. Concurring opinion, *Republic v. Sandiganbayan*, 204 SCRA 212, 234.
9. 13 Cal. 24, 73 Am Dec 565.

of this, or by overlooking it, what has been a mere revision of an opinion has sometimes been regarded as a mutilation of the record. A decision of a court is its judgment. The opinion contains the reason given for that judgment. The former is entered of record immediately upon its rendition, and can be changed only through a regular application to the court upon a petition for a rehearing or modification. The latter is the property of the judges, subject to their revision, correction, and modification in any particular deemed advisable, until which the approbation of the writer it is transcribed in the records.

The *opinion* of the judge is an expression of the reasons by which he reaches his conclusion. These may be sustained or contradictory, clear or confused. The judgment or decree is the *fiat* or sentence of the law, determining the matter in controversy, in concise, technical terms, which must be interpreted in their own proper sense.<sup>10</sup>

The decree, and not the opinion, is the instrument through which the courts and quasi-judicial offices act.

## VI. QUALITIES OF AN EFFECTIVE DECISION

### ***A. Familiarize Thoroughly with Facts Before Determining Law Applicable***

The decision, upon a legal and factual dispute, must be written only upon a thorough familiarization with every essential fact in the case. The points of law involved must then be determined and the law which is applicable to the facts of the case ascertained.

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10. *State v. Ramsburg*, 43 Md. 325.

### ***B. Short, Concise, Explicit, and Intelligible***

The decision should be as *short, concise, explicit, and intelligible* as possible. A short decision, of itself, is not clearer or more definite than a long one, but a bad short decision will be much worse if lengthened. In the decision, a short opinion mathematically tends to eliminate unwanted *dicta*, the inclusion of which always results in taking up space in the reports without contributing to the discussion and resolution of the particular question necessary for the disposition of the controversy.

In writing the opinion to support his decision, the writer should opt for brevity, for the *short* opinion seem to be the better vehicle for conveying jurisprudence to farther distances. It is also more easily and generally read than the longer one. Although it is much easier and takes much less time to write a long, rambling, unintelligible opinion than to write a concise, explicit, and intelligible decision, the former may often be ineffective in expressing the reasons and the conclusions of the writer.

*Clarity and conciseness* should attend to the narration of the facts. The enumeration of the facts *admitted by both parties* and of *those in controversy*, together with the *substance of the proof* relating thereto in sufficient detail to make it clearly intelligible, with *page references to the record*, if possible, should be made.

### ***C. Avoid Discourteous, Self-Righteous, and Other Unnecessary Comments***

The writer of a legal decision should bear in mind that his foremost duty is to decide the questions raised before his office. He must do so without resort to unnecessary comments which are discourteous and self-righteous, and he should refrain from being personal towards any party or counsel.

#### ***D. Ex Facto Oritur Jus - The Law Arises from the Fact***

It is not inaccurate to speak of the supremacy of the facts in giving rise to law. The phrase *ex facto oritur jus* – the law arises from the fact – expresses a *truism* that cannot be ignored by the decision-writer. The skilled and experienced lawyer is only too well aware of the devastating force of a single fact. Thus, there is a need to concentrate on the facts *before* concentrating on the law, for although a lawyer may be able to demonstrate quite convincingly that a given principle of law does not apply to certain facts, or that a given principle of law should be modified or limited, the facts are not as flexible, but are stubborn and unchangeable.

#### ***E. Presentation of the Facts Should Be Orderly and Understandable***

The presentation of the facts, to be effective, must be *orderly* and *understandable*. To achieve this, the facts must be presented in a chronological manner, with candor and clarity, and with care to avoid the omission of important or central details.

The *chronological presentation* of the facts necessitates placing the facts *in the order of the time of their occurrence* regardless of the order in which the facts were presented at the hearing through the testimony of witnesses and presentation of evidence.

To make the presentation be *more easily understood*, it is often desirable to start the presentation with the *key facts*, which serves as an *orientation*, before proceeding to show *how* that fact came about. The *key facts* are usually those that answer the *what*, *when*, *where*, and *to whom* queries; the rest of the facts are those that relate to the *how* query.

## VII. POWER OF WORDS IN COMMUNICATING THE INTENDED MEANING FORCEFULLY

The *power* of words to communicate or convey meaning forcefully, or otherwise, ought not to be ignored. The choice of words and the awareness of their *denotation*, as well as *connotation*, can be crucial and decisive in preparing the decision. When choosing from among competing synonyms, the judge must pick the better or the best for his purposes. He must recognize, for instance, that the boundary between *vice* and *virtue* is often ill-defined that it becomes desirable to use words that swerve a little from the actual truth – like calling a rash man, “brave;” a prodigal one, “generous;” a mean man, “thrifty;” or the timid one, “cautious.” Words can aggravate, mitigate, modify, or intensify a situation. The choice of words does put a different complexion to any given case, and it requires some skill on the part of the decision-writer to make the appropriate choice.

Therefore, caution in the use and choice of words is advised. High-sounding words are not necessarily appropriate for effective communication. Words can be seductive to the unwary, and there the danger lurks. Hence, the use of simple words, or words and terminology understandable to the ordinary laymen, is always better, if not also safer.

According to one writer:<sup>11</sup>

Knowing the power of words as tools of his profession, in every field of thought and deed, the effective lawyer studies them and loves them. He sees how readily they lend themselves in draftsmanship to precision, clarity, and

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11. B.W. Palmer, *The Right Use of Words: Skill in Phrasing Essential for Lawyers*, American Bar Association Journal, Vol. 34, No. 5 (May 1948), p. 368.

simplicity - in advocacy, to the subtleties of the mind: *'Penetrative words that touch the very quick of truth; cunning words that have a spell in them for the memory and the imagination; old words with their weird influence, bright through the rubbish of some hundred years.'* There are mean words, snivelling words, short words that are like the crack of a rifle on a winter's day, long words in "osity" and "ation" that sometimes suggest the imperial roll of Milton's verse and the autumnal leaves of Vallombrosa but sometimes, alas, pompous inanities and a paucity of thought. For there is always a temptation to make fetishes of tall words. And it is not only poets that have been well-nigh ruined by too exclusive a Miltonic diet. It was the poet Thomson, you may remember, who was referred to by Lowell when he said: *'In him a leaf cannot fall without a Latinism, and there is circumlocution in the crow of a cock.'* And there is similar peril in Boswell's idol. For, sometimes, words are our masters and not our servants. Sometimes men become *'intoxicated with the exuberance of their own verbosity,'* to use Disraeli's phrase of Gladstone.

## VIII. REFERENCES

### A. Referencing to the Records

In the case of references to testimonies of witnesses, *page references* should be indicated by the letters "tsn" (acronym for "*transcript of stenographic notes*"), followed by the date of the testimony and, *where two or more witnesses testified on the same date or occasion*, the family name of the witness, and then by the page of the transcript where the testimonial passage concerned is found.

References to *documentary* or *other evidence* should be by citing the *nomenclature* which appears on the document or exhibit of reference, e.g., Exhibit "A", etc. adopted during the

proceedings. If there has been any remarking of evidence, such fact may be adverted to in passing, if advertence is necessary for clarity, but not otherwise. The goal is to have as few intercalations as can be allowed, and which do not disturb the flow of the narrative of the facts.

### ***B. Referencing to Authorities***

Referencing to authorities may be made either by *parenthetical* or *bracketed* references (called “in-text citations”), or by footnotes.

In-text citation is the recommended mode because footnotes unduly interrupt the reading of the decision by requiring the reader to move his eyes up and down the page.

Footnotes are *recommended*, however, for the following:

1. Excerpts of testimony of witnesses;
2. Incidental, collateral, or additional cases that are not of sufficient importance, but to be cited as authority, and which may prove to be valuable for further study of the reviewing authorities; and
3. References to constitutional and statutory provisions where the texts are necessary to be quoted *verbatim*.

The collection of Philippine jurisprudence is found in the reports, both the official like the Philippine Reports, and the unofficial or private ones like the SCRA and similar others.<sup>12</sup>

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12. Sec. I, Rule 55, *Rules of Court*, requires that the judgments and final resolutions of the Supreme Court shall be published in the *Official Gazette* and in the *Reports* officially authorized by the Supreme Court “in the language which they have been originally written, together with the syllabi therefor prepared by the reporter in consultation with the writers thereof.”

The published law or case report is cited by its *name* and the *volume number* and the *page* where the citation starts in the report (e.g., *Ferrer v. Hon. Bautista, et al.*, 231 SCRA 257), but citing as well the particular page/s of the report, where the

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Memoranda of all other judgments and final resolutions not so published shall be made by the reporter and published in the Official Gazette and the authorized reports.

According to Sec. 3, Rule 55, the published decisions and final resolutions of the Supreme Court shall be called "*Philippine Reports*," (abbreviated as "Phil."), while those of the Court of Appeals shall be known as the "*Court of Appeals Reports*," with each volume containing a table of the cases reported and the cases cited in the opinions, with a complete alphabetical index of the subject matters of the volume, which shall consist of not less than seven hundred pages printed upon good paper, well bound, and numbered consecutively in the order of the volumes published.

Volumes I to 74 of the Philippine Reports were printed and published by the Lawyers Cooperative Publishing Company; subsequent volumes were printed and published by the Bureau of Printing (since reorganized as the National Printing Office). Only decisions deemed of sufficient importance to require publication shall be published in the *Philippine Reports* (Sec. 21, *The Judiciary Act of 1948*).

The *Supreme Court Reports Annotated (SCRA)*, *Supreme Court Advanced Decisions (SCAD)*, and similar publications are *private* and *unofficial* initiatives designed to make up for the delayed publication of decisions and resolutions in the *Philippine Reports*. The *SCRA*, of all the private publications, has come to be accepted even by the Supreme Court as a standard report, as demonstrated by frequent references in decisions and resolutions.

applicable or relevant passage/s are found, is still highly advised (e.g., *Ferrer v. Hon. Bautista, et al.*, 231 SCRA 257, 262).

Commentaries, periodicals, articles, and treatises are referenced by citing them as follows:

1. Single author: (Salonga, *Philippine Law on Evidence*, 3rd Ed. (1964), p. 39);
2. Several authors: (Noblejas, *et al.*, *Registration of Land Titles and Deeds*, 1992 Rev. Ed., p. 561);
3. Treatises: (Wigmore on Evidence, Rev. Ed., 1961, § 2252);
4. Law Journal Articles/Periodicals: (Schoenfeld, *The "Stop and Frisk" Law is Unconstitutional*, *Syracuse Law Rev.*, Vol. 17, No. 4 (Summer, 1966), 627, 633).

The Constitution, statutes, and regulations are referenced by citing them as follows:

1. Constitution: (Sec. I, Art. III, *Constitution*); or (Sec. 4, *Bill of Rights*); or Sec. 12, Art. III, *1987 Constitution*).
2. Codes: (Art. 248, *Revised Penal Code*); or (Art. 8, *Civil Code*); or (Sec. 3, Rule 39, *Rules of Court*).
3. Statutes: Frequently, some statutes are better known by their enacted names, e.g., (Sec. 17, *The Negotiable Instruments Law*) is the same as (Sec. 17, Act 2031).

There are various ways of referring to national statutes or laws. For instance, Commonwealth Act No. 653, as Com. Act No. 653 or as CA 653; Presidential Decree No. 21, as PD 21 or Pres. Dec. No. 21; and Executive Order No. 33 as EO 33 or Exec. Order No. 33.

4. City Ordinance: (Quezon City, *Zoning Ordinance of 1992* (Ordinance No. SP-22, S-1992).

### ***C. Signs and Symbols***

Some *signs* or *symbols* often used in legal writing are the following:

#### **1. “*op. cit.*”**

This is an abbreviation for the Latin phrase, *opera citato*, meaning “*from the work cited*,” and it is used when the reference is to the *same* work or treatise of an author already cited in the legal writing. To illustrate, if the decision or resolution earlier cited is “Salonga, *Philippine Law on Evidence*, 3rd Ed. (1964), p. 39,” and there is a need to cite from the *same* work or treatise, but at a different page, the writer may merely write “Salonga, *op. cit.*, p. 63,” which indicates that the same work of Salonga, *Philippine Law on Evidence*, at page 63, is cited as authority.

#### **2. “*id.*” and “*ibid.*”**

These are abbreviations for *idem* and *ibidem*, Latin words which mean *from the same place*. Where, in a text or footnote reference, there is a complete citation of a case or other authority, and another reference is made to that case or authority on the *same* page and without intervening citations either in footnotes or in succeeding notes, “*ibid.*” is sufficient. But where the citation is to a different page, cite “*id.* at page \_\_\_.” For example, if the immediately preceding citation in the decision or resolution is “Salonga, *Philippine Law on Evidence*, 3rd Ed. (1964), p. 39” and the next citation refers to the same book or treatise in a different page, the writer writes “*id.* at p. 63.”

### 3. “*supra*”

This Latin term literally means “over” or “above,” and indicates a reference to a citation of authority or a part of a discussion made *earlier* in the decision or resolution.

### 4. “*infra*”

This Latin term literally means “below,” and indicates a reference to a *later* part in the decision or resolution.

### 5. “*e.g.*”

This is an abbreviation of the Latin phrase, *exempli gratia*, which means “for the sake of example,” that is used for illustration of a statement or to give an example of it.

### 6. “*i.e.*”

This is an abbreviation of the Latin phrase, *id est*, which means “that is.” It is used to illustrate or specify an example of the antecedent or precedent statement.

### 7. “*et seq.*”

This is an abbreviation of the Latin phrase, *et sequentiae*, which literally means “and the following.” It is used to refer to matters following the *cited* portion of an authority, giving the specific page, and is usually indicative of related discussions or subjects (e.g., “Salonga, *Philippine Law on Evidence*, 3rd Ed. (1964), p. 39, *et seq.*”).

### 8. “*Cf.*”

This symbol means either *analogous* or *compared with*. In legal writing, it is used *either* to refer to a citation of a case that contains a legal proposition analogous to the proposition for which it is

cited, or to indicate a *dictum* that is to be compared with or distinguished from the proposition discussed. If used in the latter sense, the specific page of the *dictum* is included.

9. **“See”**

In its *italicized* form, the word is used to cite a case for *dictum* contained therein, or to indicate a reference to some theory or contention found in a secondary authority, like a law book or treatise (e.g., *See* Schoenfeld, *The “Stop and Frisk” Law is Unconstitutional*, *Syracuse Law Rev.*, Vol. 17, No. 4 (Summer, 1966), 627, 633). In its *unitalicized* form, the word directs the reader to some discussion relevant to the subject for which it is cited.

10. **“Contra”**

This Latin word denotes a holding of opinion *squarely* to the contrary.

# Writing and Writing Style

*Justice Lucas P. Bersamin\**  
*Court of Appeals*

I. LEGAL WRITING .....	74
A. <i>Four Characteristics Common to Legal Writers         that Contribute to Difficult-to-Read Documents</i>	
1. Complicated Topic	
2. Time-Constraint	
3. No Writing Class	
4. Familiarity	

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\* Justice Lucas P. Bersamin was appointed Associate Justice of the Court of Appeals on March 12, 2003. He obtained his law degree from the University of the East in 1973 and placed 9th in the Bar Examinations given that year with a general weighted average of 86.30%, and a 100% rating in Criminal Law. Immediately thereafter, he engaged in the practice of law until November 1986 when he was appointed Regional Trial Court Judge in Quezon City. His court was designated by the Supreme Court as one of the special criminal courts in the National Capital Judicial Region to try and decide cases involving heinous crimes. He was a recipient of the Foundation for Judicial Excellence Awards 2000 for Best Decision in Civil Law and Criminal Law. He was also chosen by the same Foundation as one of the three Most Outstanding RTC Judges for the year 2002. He is a Professor at the University of the East College of Law, and author of *“Appeal and Review in the Philippines.”*

B.	<i>How to Make Your Legal Writing Alive Again</i>	
1.	Envision your audience.	
2.	Concentrate on your reader's priorities.	
3.	Make the reading clear.	
4.	Don't be ashamed to get help.	
C.	<i>Qualities of Good Legal Writing</i>	
1.	Accuracy	
2.	Clarity	
3.	Conciseness	
D.	<i>Visual Improvement of Density</i>	
1.	Margins	
2.	Spacing	
3.	Formal Tabulation	
4.	Tabulation	
5.	Enumeration	
6.	Informal Tabulation	
7.	Headings and Subheadings	
E.	<i>Organizing Your Opinions and Reports</i>	
F.	<i>Content and Style of Your Opinions and Reports</i>	
II.	REFERENCES .....	85
A.	<i>Types of References</i>	
1.	The Reports	
2.	Treatises, Textbooks and Commentaries	
3.	Articles, Essays, Monographs and Lectures	
4.	Legal Encyclopedias and Digests	
B.	<i>Use of References - Citations and Footnotes</i>	
C.	<i>How to Cite Authorities</i>	
1.	Commentaries, Periodicals, Articles and Treatises	
2.	Constitution, Statutes and Regulations	
3.	Signs and Symbols	
III.	CONCLUSION .....	92
A.	<i>Care Needed in Legal Writing Preparation</i>	
B.	<i>Practice Can Make Perfect Legal Writing</i>	

## I. LEGAL WRITING

Generally, Philippine lawyers write well, but we do encounter specimens of writing which we may not easily accept to have come from a lawyer's pen. Much of the problems in Philippine legal writing can be attributed to the shortness of time in preparing our written work. My own experience tells me so, and the product of such hurried work needed a lot of editing and rewriting. As a judge, who literally spoke through the written word, I took extra efforts and went to great lengths to improve my written work. Let me share some practical and theoretical methods which have served me in good stead as a judge.

We, lawyers, exist to communicate well. Our main product – which is doing legal work for others, whether we are in the courts as judges or writers or researchers, or in the private sector as practitioners or authors or lecturers – is explaining issues well, recording facts faithfully, and persuading others to accept our conclusions and findings. All good lawyers are, or should be, indeed, communication experts. Thus, attention to prose style is just as important as attention to legal doctrine. That most lawyers do their most important communication through the written word is accepted without debate. We who serve the cause of justice in our respective offices in the courts and quasi-judicial bodies are no exceptions. It is during this day-to-day writing done by us that we can sharpen our writing skills by focusing on the technique and impact of our words.<sup>1</sup>

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I. Paraphrasing Hon. Thomas R. Phillips, Chief Justice of the Supreme Court of Texas, in his Foreword to Dr. Terri LeClercq's *Expert Legal Writing*.

### ***A. Four Characteristics Common to Legal Writers that Contribute to Difficult-to-Read Documents***

Let us first distinguish the reasons why your readers often find difficulty reading or appreciating your legal writings. The following are generally considered true for the legal profession.

#### **1. Complicated Topic**

What lawyers write is a concrete discussion of an abstract concept, which is difficult writing.

#### **2. Time-Constraint**

Legal writers have too much to do and in too little time. That time-crunch forces you to resort to submitting a first draft as a final draft.

#### **3. No Writing Class**

Even expert attorneys admit to having had no writing class since their early teens. A majority of us have been running on sheer native intelligence that we should not wonder why some of us have missed a subtle point or two in grammar and organization.

#### **4. Familiarity**

You write so much that you no longer see your legal writing as a challenge. It is hard for you to take pride in any particular document because you have so many others to complete. It is more important to get them done than to get them right. When one writes all day, as most lawyers do, one may get complacent and then perhaps sloppy.<sup>2</sup>

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2. Terri LeClercq, *Expert Legal Writing*, pp. 16-17.

### ***B. How to Make Your Legal Writing Alive Again***

After engaging in legal writing over a period of time, whether long or short, you sometimes realize that the challenge to write well and effectively is missing. I confess that, as a judge, I do encounter that point, but time and again, I do manage to get over it.

#### **I. Envision your audience.**

Your prose level should tend to appease the reader you envision. In practice, our frequent readers would be the litigants and their lawyers who may probably be too busy to want to spend too much time on another boring legal writing.

#### **2. Concentrate on your reader's priorities.**

You have to approach your rough draft with your target reader in mind. For instance, if you are preparing an order, resolution, or decision for a court, be explicit and direct about what you want him or her to know, to or for whom, and why. The public expects to be informed quickly and well, and this can be made possible if you introduce right in the first paragraph the parties, the issues, and the intended resolutions. When such initial information is not there, your readers, including your superiors (*i.e.*, the justices and judges you write for) can get irritated.

#### **3. Make the reading clear.**

See to it that your legal prose resembles the prose of other educated people. Avoid characteristics of legal writing that separate it from mainstream writing, or edit them out of your prose. Take out long sentences.

#### **4. Don't be ashamed to get help.**

For this additional help, get someone else to edit your legal writing, or study to overcome your deficiencies, like taking a short course on writing in general; or get a contemporary reference book, like a new dictionary and a current grammar text.<sup>3</sup>

### ***C. Qualities of Good Legal Writing***

Good legal writing should be characterized with *accuracy*, *clarity*, and *conciseness* in the presentation of both factual and legal situations. Thus, we focus on these qualities:

#### **I. Accuracy**

The first quality of good legal writing is *accuracy*. This quality is primarily concerned with the way you make your *statements of facts* if legal writing refers to court matters or other justiciable cases, or to your *statements of the situations* if the legal writing refers to non-judicial matters. Regardless of where the legal writing is to be used, accuracy in the statements is a demand of the first order.

Accuracy requires an attorney to set forth the facts and the law with honesty, candor and specificity. Rest assured that regardless of where your legal writing is to be used, your narrative will be presumed to be fair and accurate until somebody else proves otherwise. This presumption of accuracy is rooted in the legal presumption of good faith pervading our legal system. There is no sense in withholding unfavorable facts from your legal writing unless your purpose is dubious or your intention is to suppress them. And you will pay the price for any inaccuracy you commit because at a later time, your duplicity or your inaccuracy, especially

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3. Terri LeClerq, *Expert Legal Writing*, pp. 17-20.

if deliberate, will be discovered and you will be made to pay for it, often very dearly. In your line of work, the price will be your colleagues and superiors losing their trust in your abilities.

Candor and honesty will certainly inspire confidence. For instance, you should see to it that all your assertions of facts must be supported by the record because a diligent litigant's counsel or your superior or a reviewing justice or judge will in time ferret out such material.

Inaccuracy in the statement of facts, whether arising from mistake or from intentional misstatement, inevitably tends to invalidate the conclusions drawn therefrom. Irrespective of the ethical considerations which should prevent resort to any such dishonesty, an intentional misstatement or distortion of the facts is almost certain to be discovered and brought to the attention of the court or board you work for, with the natural and just result of creating a suspicion against the offending writer. Thus, accuracy is rightly the *first essential of effective legal writing*.<sup>4</sup>

Accuracy should also characterize your statements of the law involved or the relevant jurisprudence. The requirement along this line is to cite the law without misrepresentation as to its applicability or meaning, and to rely on jurisprudence which is appropriate and relevant. We have heard of penalties visited on the unscrupulous members of the Bar who have deliberately misquoted the texts of the law, or intentionally misplaced the punctuation marks in their quotations of jurisprudence, or otherwise placed an obviously wrong slant or interpretation of settled doctrines and principles.

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4. Redfield, H., *The Brief on Appeal; Brief Making and the Use of Law Books*, 3rd Ed., p. 369.

## 2. Clarity

The second essential quality of writing is *clarity*.

To secure clarity in any kind of legal writing, you have to be *orderly* and *logical* in your presentation of the facts and the law. You can do this only if you possess *a keen apprehension of which facts are material and of the reasons why the others are immaterial*. The power of selecting and grouping the controlling facts so as to emphasize your *theory of the case*, or the *specific need of your office* for whom you write, a lucidity of style, and a power of condensation of facts and the law, are needed. Giving these requirements is, however, much easier than satisfying them, for it has often been truly spoken of that he who can do all these “*is a man of rare ability*.”

Clarity always begins with straightforward thinking, for clarity of understanding must precede clarity of expression.<sup>5</sup> Once you have the facts clearly in mind, the task of conveying that knowledge to your reader begins. You will base any legal discussions you set out to make on the facts that you have settled on. Only upon clearly stated facts should your legal discussions and resolutions rest.

There is no excuse for an attorney, even though not a man of rare ability, who has obtained a thorough understanding of a factual or legal problem, but yet presents a statement of the facts and of the law that is verbose and discussive, by mingling material and immaterial facts. Cardozo typifies such attorney as *a man who shows his lack of diligence rather than his lack of ability*.<sup>6</sup>

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5. Re and Re, *op. cit.*, p. 5.

6. Redfield, *op. cit.*, p. 370.

### 3. Conciseness

The third essential ingredient of good legal writing is *conciseness*,<sup>7</sup> which means putting only so much as needed into your legal writing.

Of course, conciseness should never be secured at the expense of clarity. Without sacrificing clarity, a carefully condensed statement of facts and a brief and direct-to-the-point legal discussion constitute the ideal for your legal writing. Thereby, you save the time of your intended readers, who may be your presiding judge, justice, or commissioner, or even the parties and their respective counsel. Conciseness is much more likely to make a strong and lasting impression on your readers than a diffused presentation. If the writing is done in a hotly disputed case, such an ideal statement can prove to be convincing in regard to the soundness of the theory and principles of law by which the case is determined.

Legal writing should be taut, clean, and clear, without “*an ounce of fat or an excess of word.*”<sup>8</sup> Yet, achieving conciseness is a difficult and time-consuming task, which is possible only after you have mastered the facts and the law. Good and concise legal writing can only result from careful planning, condensation, and attention to the essentials.

#### ***D. Visual Improvement of Density***

Increase white space in dense legal documents. Practically all legal writing is frequently dense, *that is*, difficult to read. The format

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7. Bryan Garner, the lawyer-lexicographer who revised Black’s Law Dictionary for its seventh edition, prefers to use the term “*concision*” in his book, *Elements of Legal Style*.
  8. Godbold, *Twenty Pages and Twenty Minutes – Effective Advocacy on Appeal*, 30 Sw. Law Journal, 801, 816 (1976).

– *the visual impression* – does not have to match its density. You may add some balancing *white space* to create the appearance of a less-dense document by manipulating the *margins*, *paragraph length*, and *line spacing*. You can also incorporate the stylistic devices of *enumeration*, *tabulation*, *headings*, and *subheadings*.

### **1. Margins**

Margins should be generous. My personal standard in my word processor is a *left margin* of two inches (2”), but I frequently reduce this margin to 1.8 inches if the number of my pages exceeds ten (10); my *right margin* is generally 1 inch (1”) while my top margin is 1.3 inches and the *bottom*, 1 inch (1”). Generous margins give the reader’s eyes some rest.

### **2. Spacing**

Double spacing contributes to more white space. Many legal documents, opinions, and resolutions are single-spaced, but as much as possible, double or 1 ½ spacing should be adopted for better visual effect.

### **3. Formal Tabulation**

A formal tabulation is a listing of grammatically parallel items that follow either no punctuation or colon, thereby producing white space. The items tabulated should belong to the same class and be parallel in structure, with a common idea introduced before the tabulation. If each tabulation item makes up an integral part of the introductory sentence, no punctuation is needed before the list. When tabulating, you should not forget to indent all of and number each item; end each item, except the last, with a common or semi-colon; use a comma or semi-colon and *and* or *or* on the penultimate item; and conclude the last item with a period *unless* the list does not conclude the sentence.

#### **4. Tabulation**

Tabulation is helpful in making emphasis. For instance, if you want to emphasize errors or issues, tabulating will definitely highlight them. Also, tabulating can help summarize the important materials or items in a long discussion or opinion.

#### **5. Enumeration**

Enumeration within sentences can be resorted to if a list is not important enough to highlight items, by using semicolons and commas to signal parallel items following the introductory sentence. Enumeration within a sentence also requires less space.

#### **6. Informal Tabulation**

Informal tabulation is a listing that follows asterisks, bullets, or dashes, recommended only for informal documents (like inter-office memos and confidential opinions or reports) because they allow you, as writers, the freedom to jot down grammatically unrelated material. The content of the documents dictates the practicality of informal tabulation.

#### **7. Headings and Subheadings**

The use of headings and subheadings enhance readability because they readily accent the major points and counterpoints of any argument or discussion, particularly the extended ones. Their placements, their capital letters, their underlining or bold accentuations, and the white space around them yell for the reader's attention, literally speaking. If headings can help briefs and memoranda of litigants, they do the same thing for your writing of opinions and reports.

### ***E. Organizing Your Opinions and Reports***

In legal writing, your main task is to be persuasive and authoritative. Otherwise, your purpose will not be served.

Organization of your positions on the facts and the law should proceed *logically* and *directly* to the desired conclusion. You should write an outline of the points, seeing to it that there are not too many *point headings*, or that points are not merely subdivisions of other headings, instead of being separate headings in themselves. Your *initial* outline may contain five (5) or more *point headings*, but upon re-examination and revision, it may be reorganized into only two (2) or three (3) *point headings*. You should bear in mind that a case is not necessarily strengthened by using numerous grounds for resolving, for *frivolous issues can cast a shadow of doubt on meritorious ones*.<sup>9</sup>

### ***F. Content and Style of Your Opinions and Reports***

General platitudes, *clichés*, and useless metaphors must be avoided. Additional words used almost as *interchangeable synonyms* do not tend weight to the assertion in the argument. The *overstatement* of the discussion is as bad as the substitution of general platitudes for specific supporting reasons; it could indicate *ignorance* of the *limitations* and *exceptions* of propositions being urged. The categorical statements of propositions, when there are acknowledged exceptions, injures very seriously the integrity of the opinion or report or resolution.<sup>10</sup>

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9. Re & Re, *op. cit.*, p. 125; Rahdert & Roth, *Practice Before the Fifth Circuit: Brief Writing and Oral Advocacy – A Way To Do It*, 8 Texas Tech Law Review, 847, 857 (1977).

10. *Id.*, p. 135.

An aspect of legal writing that ought not to be ignored is the power of words to communicate or convey meaning forcefully or otherwise. This is important in preparing the opinion or report or resolution where, to be persuasive, the choice of words and the awareness of their denotation as well as connotation can be crucial and decisive. Frequently, you make a choice from among competing synonyms, and you must pick the better or the best for your purposes. It is recognized, for instance, that the boundary between vice and virtue is often ill-defined that it becomes desirable to use words that swerve a little from the actual truth – like calling a rash man brave, a prodigal man generous, a mean man thrifty, or the timid man cautious. Words can aggravate, mitigate, modify, or intensify a situation, depending from whose side they originate. The choice of words does put a different complexion to any given case, and it requires some skill on your part to make the choice.

Caution in the use and choice of words is advised. High sounding words are not necessarily appropriate for effective communication. Words can be seductive to the unwary, and there the danger lurks. A writer has observed:<sup>11</sup>

Knowing the power of words as tools of his profession, in every field of thought and deed, the effective lawyer studies them and loves them. He sees how readily they lend themselves in draftsmanship to precision, clearness, and simplicity – in advocacy, to the subtleties and sinuosities of the mind: *‘Penetrative words that touch the very quick of truth; cunning words that have a spell in them for the memory and the imagination; old words with their weird influence, bright through the rubbish of some hundred*

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11. B.W. Palmer, *The Right Use of Words: Skill in Phrasing Essential for Lawyers*, American Bar Association Journal, Vol. 34, No. 5 (May 1948), p. 368.

years.' There are mean words, snivelling words, short words that are like the crack of a rifle on a winter's day, long words in "osity" and "ation" that sometimes suggest the imperial roll of Milton's verse and the autumnal leaves of Vallombrosa but sometimes, alas, pompous inanities and paucities of thought. For there is always a temptation to make fetishes of tall words. And it is not only poets that have been well-nigh ruined by too exclusive a Miltonic diet. It was the poet, Thomson, you may remember, who was referred to by Lowell when he said: *'In him a leaf cannot fall without a Latinism, and there is circumlocution in the crow of a cock.* And there is similar peril in Boswell's idol. For sometimes, words are our masters and not our servants. Sometimes men become *'intoxicated with the exuberance of their own verbosity,'* to use Disraeli's phrase of Gladstone.

Your high responsibility as a legal writer cannot be understated in the preparation of your written resolutions, opinions and reports. This is more true when the record contains voluminous transcripts of testimonies and numerous exhibits, which have to be analyzed, synthesized, digested, and collated for the demands of the cases before you. After all, the objective of the kind of legal writing you do is to inform and persuade your readers.

## II. REFERENCES

### A. *Types of References*

#### I. The Reports

The standard reference works for legal writing in the Philippines are the decisions of the Supreme Court, which are the authority for what the law is at any given time. These decisions are required

to be published in the Official Gazette and in the Reports officially authorized by the Supreme Court “in the language in which they have been originally written, together with the syllabi therefor prepared by the reporter in consultation with the writers thereof.” Memoranda of all other judgments and final resolutions not so published shall be made by the reporter and published in the Official Gazette and the authorized reports.<sup>12</sup>

The published decisions and final resolutions of the Supreme Court are called “*Philippine Reports*,” (abbreviated as “**Phil.**”), with each volume containing a table of cases reported and cited in the opinions, with a complete alphabetical index of the subject matters of the volume, which shall consist of not less than seven hundred (700) pages printed upon good paper, well bound and numbered consecutively in the order of the volumes published.<sup>13</sup>

Volumes I to 74 of the Philippine Reports were printed and published by the Lawyers Cooperative Publishing Company; subsequent volumes were printed and published by the Bureau of Printing (since reorganized as the National Printing Office). Only the decisions deemed of sufficient importance to require publication shall be published in the *Philippine Reports*.<sup>14</sup>

The *Supreme Court Reports Annotated (SCRA)*, *Supreme Court Advanced Decisions (SCAD)*, and similar publications are private unofficial initiatives designed to make up for the delayed publication of decisions and resolutions in the Philippine Reports. The SCRA, of all the private publications, has come to be accepted by the Supreme Court as a standard report, as demonstrated by frequent references in decisions and resolutions.

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12. Sec. 1, Rule 55, *Rules of Court*.

13. Sec. 3, Rule 55, *Rules of Court*.

14. Sec. 21, *Judiciary Act of 1948*.

It will be sufficient if the published case report is cited by its *name* and the *volume number* and *page* where the citation starts in the report (e.g., *Ferrer v. Hon. Bautista, et al.*, 231 SCRA 257), but citing as well as the particular page or pages of the report where the applicable or relevant passage or passages are found is still highly advised (e.g., *Ferrer v. Hon. Bautista, et al.*, 231 SCRA 257, 262).

## **2. Treatises, Textbooks and Commentaries**

Treatises, textbooks and commentaries have traditionally been used as authoritative reference works that are useful in legal writings. They give you easy sources of support for legal discussions and opinions on otherwise difficult issues or problems.

## **3. Articles, Essays, Monographs and Lectures**

Articles, essays, monographs and lectures published in law journals and legal periodicals are often considered references to buttress legal discussions and opinions. The authors should be the recognized authorities in the field of law involved in the problem. The publication itself must be considered reliable among lawyers themselves.

## **4. Legal Encyclopedias and Digests**

Often regarded lightly as sources of authorities worthy of citation of legal writing, the legal encyclopedias and digests do have their value as research tools, for they readily provide a quick review of the state of the law and jurisprudence on the given topic, depending on the edition. Most encyclopedias contain profuse citations useful for a variety of purposes. Research efforts are made that much simpler and better with the encyclopedias' and digests' logical arrangements.

### ***B. Use of References – Citations and Footnotes***

The audience of your legal writing more often than not expect you to put citations in your product. In fact, most lawyers consider it a necessity to make citations.

Citations of authorities, if they have to be made, should be placed so as to make them available, but out of the way of the reading. You must subordinate the citations to the statements they support, which are more important than the former. To accomplish this, you must generally end the statements supported and put the supporting citation.

Citations may either be through parenthetical or bracketed mid-sentence references or by footnotes. Although both types are disruptive of the reading process, I recommend the former because the latter unduly interrupts the flow of the argument by requiring the reader to move his eyes up and down the page.

Outlawing footnotes would oppress the responsible users, for footnotes sometimes provide invaluable, as in a treatise that gives holdings, jurisdiction by jurisdiction, on a particular point of law. Such a treatise is intended as a reference work, and not as a book to be read from cover to cover.

For legal writings to be filed in court, footnotes are *recommended* for:

1. Excerpts of testimony of witnesses;
2. Incidental, collateral, or additional cases which are not of sufficient importance, but to be cited as authority, and which may prove to be valuable for the court's further study; and
3. References to constitutional and statutory provisions where the texts are necessary to be quoted verbatim.

### **C. How to Cite Authorities**

#### **I. Commentaries, Periodicals, Articles, and Treatises**

##### **i. Single author:**

(Salonga, *Philippine Law on Evidence*, 3rd Ed. (1964), p. 39).

##### **ii. Several authors:**

(Noblejas, et al., *Registration of Land Titles and Deeds*, 1992 Rev. Ed., p. 561).

##### **iii. Treatises:**

(Wigmore on Evidence, Rev. Ed., 1961, § 2252).

##### **iv. Law Journal Articles/Periodicals:**

(Schoenfeld, *The "Stop And Frisk" Law is Unconstitutional*, *Syracuse Law Rev.*, Vol. 17, No. 4 (Summer, 1966), 627, 633).

#### **2. Constitution, Statutes and Regulations**

##### **i. Constitution:**

(Sec. I, Art. III, *Constitution*); or (Sec. 4, *Bill of Rights*); or (Sec. 12, Art. III, 1987 *Constitution*).

##### **ii. Codes:**

(Art. 248, *Revised Penal Code*); or (Art. 8, *Civil Code*); or (Sec. 3, Rule 39, *Rules of Court*).

##### **iii. Statutes:**

Frequently, some statutes are better known by their enacted names, e.g., (Sec. 17, *The Negotiable Instruments Law*) is the

same as (Sec. 17, Act 2031); or (Sec. 4, *The Dangerous Drugs Act*, as amended), as (Sec. 4, Rep. Act 6425, as amended).

Various ways of referring to national statutes or laws exist. For instance, Republic Act No. 6425 may be cited either as *R.A. 6425* or as *Rep. Act. 6425*; Commonwealth Act No. 653, as *Com. Act 653* or as *C.A. 653*; Presidential Decree No.21, as *P.D. 21* or *Pres. Dec. No. 21*; and Executive Order No. 33 as *E.O. 33* or as *Exec. Order No. 33*.

iv. **City Ordinance:**

(Quezon City *Zoning Ordinance of 1992*; Ordinance No. SP-22, S-1992).

3. **Signs and Symbols**

i. **“*op. cit.*”**

Abbreviation for *opere citato*, meaning, *from the work cited*, when the reference is to the same work or treatise of an author already cited. If you earlier cited (Salonga, *Philippine Law on Evidence*, 3rd. Ed. (1964), p. 39), and you need to cite him again from the *same* work or treatise, but in another page, you may merely write (Salonga, *op. cit.*, p. 63), which indicates that the same work of Salonga, *Philippine Law on Evidence*, at page 63, is cited as authority.

ii. **“*id.*” and “*ibid.*”**

Abbreviations for *idem* and *ibidem*, which mean *from the same place*. Where in a text or footnote reference, there is a complete case citation or other authority and upon the same page and without intervening citations either in footnotes or in succeeding notes, another reference is made to that case or

authority, "*ibid.*" is sufficient; but where the citation is to a different page, cite "*id.* at page \_\_\_".

If the immediately preceding citation is (Salonga, *Philippine Law on Evidence*, 3rd Ed. (1964), p. 39), and the next citation refers to the same authority, but found in a different page, you write "*id.* at p. 63." If the reference is to the same page, "*ibid.*" suffices.

### iii. "*supra*"

The term, which literally means "over" or "above," indicates a reference to a citation of authority or a part of a discussion made *earlier* in a presentation.

### iv. "*infra*"

The term, which literally means "below," indicates a reference to a *latter* part of the discussion.

### v. "*e.g.*"

This is an abbreviation of the Latin phrase *exempli gratia*, which means "for the sake of example." This signal is used for illustration of a statement or to give an example.

### vi. "*i.e.*"

Abbreviation of the Latin phrase, *id est.*, which means "that is." This signal is used to illustrate or specify an example of the antecedent or precedent statement.

### vii. "*et seq.*"

Abbreviation of the Latin phrase, *et sequentiae*, which literally means "and the following." This is used to refer to matters following the *cited* portion of an authority, giving

the specific page, and is usually indicative of related discussions or subjects (e.g., Salonga, *Philippine Law on Evidence*, 3rd Ed. (1964), p. 39, et seq.).

**viii. “Cf.”**

This means either *analogous* or *compared with*. In legal writing, it is used either to refer to a citation of a case that contains a legal proposition analogous to the proposition for which it is cited, or to indicate a dictum that is to be compared with or distinguished from the proposition discussed. If used in the latter sense, the specific page of the dictum is included.

**ix. “See”**

In its *italicized* form, this is used to cite a case for *dictum* contained therein; or to indicate a reference to some theory or contention found in a secondary authority, like a law book or treatise (e.g., “See Schoenfeld, *The “Stop and Frisk” Law is Unconstitutional*, *Syracuse Law Rev.*, Vol. 17, No. 4 (Summer, 1966), 627, 633). In its *unitalicized* form, it is used to direct the reader to some discussion relevant to the subject for which it is cited.

**x. “Contra”**

This denotes a holding of opinion squarely to the contrary.

### III. CONCLUSION

#### ***A. Care Needed in Legal Writing Preparation***

Care in legal writing can never be over-emphasized. Everyone who gets to read what you write has a reasonable expectation that you have prepared well your legal writing. Often, as the pages of

our law reports show, even the Supreme Court has excoriated the negligence of lawyers who display lack of care in the preparation of their legal writing, like briefs and memoranda.

Every legal writer develops in time his/her own peculiar method and style. The novice writer should not consider it to be beneath him/her to refer to the legal writings of seasoned and experienced legal writers before him/her and learn from them. In the writing that you do, pretending not to remember court rules and procedures is never a wise habit. Since your goal is both to inform and to persuade, you should strive for the ability to make clear quick statements.

Good legal writing is seldom the product of a short or brief moment of study and writing. It is rather the fruit of hard work and evolution. Most of the fine and effective legal writers start by dictating or writing all their thoughts for the *first* draft, which turns out to be a document of large proportions. From there, they delete, condense, summarize, refine, alter, cut and revise until satisfied that the draft is ready for final printing. Nothing less should be done, no matter how tedious the process.

The most difficult part of legal writing concerns substance and style. Haphazard and careless preparation of legal writings, be they opinions, reports, draft decisions or resolutions, or even discussions and lectures, irritate and do not perform their main function of informing and persuading. Avoid tendering points through fractured syntax, which have absolutely no place in any legal record, since they cannot persuade but, worse, only produce much waste of valuable time. Such irritants symptomize defects in the training processes of lawyers.

Courtesy and temperate language and style are as much a necessity as substance. Scandalous matter should never find its

way into your writing. Subdue your feelings or prejudices and avoid inserting criticisms upon the personal character, professional ability, and conduct or motives of anyone, particularly the counsel of the parties and the parties themselves. Criticism is not an element of strength in legal writing.

### ***B. Practice Can Make Perfect Legal Writing***

Dr. Terri LeClerq, a language expert who is not a lawyer, has written a book on legal writing entitled, *Expert Legal Writing*. There she gives good counsel to members of the law profession who have a genuine desire to improve their legal writing:

**Any practice in writing can help your legal writing.**

Write a complaint to your mechanic and spend some time editing it; read an essay from *Time* and substituting your own topic, mimic the prose. Read a short short chapter from a stylebook that examines one element of style and then spend some time reviewing your documents, looking only at that particular element of style. Any of these activities involves you in the conscious evaluation of prose rather than content, and any of these can help you develop your own prose style.<sup>15</sup>

Rather than embarking on a global reformation to “become a better writer,” it will be helpful if you pinpoint one short-term goal and break down the steps it will take to reach that goal. If your goal is to be more succinct, for instance, try daily for one week to reduce each document by a half page. Another week, substitute stronger verbs to replace wordy noun clusters and adjectives. Then compare your old documents with these conscious writings and determine your progress.

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15. At pp. 5-6.

x x x receive advice [and] feedback from a professional. Perhaps another experienced attorney can read a few samples of your writing and offer you some seasoned advice. Perhaps a non-legal friend can read your document and let you know if you communicated well to the lay audience. Perhaps a writing professional can evaluate your prose and suggest techniques for improvement. It is difficult to know how to improve your prose until someone helps you pinpoint the problem. After that, x x x you're on your own to develop the twists and turns that will make you successful.

Not all work on your writing has to be accomplished at the moment of writing a major brief or crucial letter; indeed, the real work and real progress will occur through daily, deliberate, repeated experiments with technique. Revise your standard letter format. Evaluate the style of your pleadings. When you read during the day, you can make it a point to consciously notice other writers' sparkling prose in magazines, newspapers, and even in other legal writings; you can learn from it right then. Right then is a great time to experiment with your own writing rather than waiting until you can formally attend a writing seminar or when you have "extra" time. Your daily writing tasks then become mini-lessons to reinforce writing skills.<sup>16</sup>

No one can exercise for you. An instructor can help inspire you and direct you, but you have to fight through every self-improvement step yourself. The attorney who asks his office partner to "take notes at the writing seminar for me" obviously is not going to get as much out of the notes as the participant did by listening to and following the exercises from an expert. Similarly, just reading about writing

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16. At p. 7.

does not automatically make you a more efficient writer. You have to consistently apply what you have read. Even writing more often, but without feedback, will only [mean] more, but not better, written.<sup>17</sup>

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I7. At p. 13.

# Writing of Decisions and Resolutions

*Justice Hugo E. Gutierrez (ret.)\**  
*Supreme Court*

I.	INTRODUCTION .....	99
	A. <i>Writing of Good Decisions as a Form of Effective Communication</i>	
	B. <i>Transmission of Ideas</i>	
II.	TWO-FOLD NATURE OF OBJECTIVES .....	99
	A. <i>No Trade-off Between Quantity and Quality</i>	
	B. <i>Excellence in Quantity</i>	

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\* Justice Hugo E. Gutierrez (ret.) was an Associate Justice of the Court of Appeals before his promotion to the Supreme Court where he served as Senior Associate Justice until his retirement on March 31, 1993. He was also Chairman of the Senate Electoral Tribunal and Member of the Revision of the Rules of Court Committee of the Supreme Court. Among the positions he held in his forty (40) years of public service are: Assistant Solicitor General; Associate Law Professor, University of the Philippines (U.P.); Head of the Publications Division, U.P. Law Center; Executive Director, Presidential Investigation and Recovery Commission; Assistant Manager of Field Services, Social Security System; and Supervising Attorney, United States Veterans Administration. Writer, editor and author, he has lectured extensively in seminars sponsored by government and private institutions. In 1990, he was given the honor of “Jurist of the Decade” by the U.P. Alumni Association. He obtained his law degree from the University of the Philippines and his Master of Laws degree from the University of Michigan.

	<i>C. Excellence in Quality</i>	
	<i>D. Need for Continuous Upgrading of Skills</i>	
III.	REQUIREMENTS OF LAW AND THE RULES OF COURT ....	101
	<i>A. Philippine Constitution, Section 14, first paragraph of Article VIII</i>	
	<i>B. Rules of Court, Rule 36, Section I</i>	
IV.	DECISION, JUDGMENT AND RESOLUTION .....	102
	<i>A. Decision</i>	
	<i>B. Judgment</i>	
	<i>C. Resolution</i>	
V.	PARTS OF THE DECISION .....	103
	<i>A. Caption and Case Number</i>	
	<i>B. Nature of the Action</i>	
	<i>C. Facts of the Case</i>	
	<i>D. Issues Raised by the Parties</i>	
	<i>E. Resolution of the Issues</i>	
	<i>F. Dispositive Portion</i>	
	<i>G. Predictable Pattern</i>	
	<i>H. Template or Form</i>	
VI.	STATEMENT OF THE FACTS OF THE CASE AND THE APPLICATION OF LAW TO THOSE FACTS .....	104
	<i>A. Summarizing System</i>	
	<i>B. Reportorial Method</i>	
	<i>C. Summarizing Method</i>	
	<i>D. Composite Method</i>	
	<i>E. Apply the law and precedents to those facts.</i>	
	<i>F. Prepare a good dispositive portion.</i>	
	<i>G. The decision proper and the judgment should put an end to the controversy.</i>	
	<i>H. Flexibility</i>	
	<i>I. Fairness and Objectivity</i>	

VII. ADDITIONAL POINTS TO CONSIDER ..... 106

VIII. ATTENTION TO FORM AND STYLE ..... 108

    A. *Careful Preparation and Organization*

    B. *Coherent and Logical Presentation*

    C. *Need for Clarity*

    D. *Need for Brevity*

    E. *Need for Sincerity*

    F. *Need for Correct English*

IX. THE PERSONALITY OF THE JUDGE ..... 110

    A. *Appearance*

    B. *Essential to Quality and Quantity*

## I. INTRODUCTION

### A. *Writing of Good Decisions as a Form of Effective Communication*

1. The communicator and his encoding;
2. The message and the medium – there should be no alteration, diminution, or expansion of what is sought to be conveyed;
3. The recipient and his decoding.

B. *Transmission of ideas* from formulation in the mind to placing them in written form is hampered by failure to improve communication skills.

## II. TWO-FOLD NATURE OF OBJECTIVES

A. *No trade-off between quantity and quality.* One cannot be used to explain poor performance in the other.

### ***B. Excellence in Quantity***

1. Problem in backlogs. Adopt a scientific or management-oriented **system** in meeting production goals and eliminating backlogs. Do not allow things to get out of hand. You should have your own monitoring and reporting system. Some judges leave this entirely to the clerk of court.
2. Problems of **attitude**, of lethargy and lack of ambition, of just coasting along. One judge's reply to me when I asked why he was not on the list of top producers: "That is not one of my priorities."

### ***C. Excellence in Quality***

1. Ordinary talent, through constant practice and desire for improvement, becomes excellent. Average can be upgraded to above average.
2. A product is only as good as its ingredients and how they are put together.
3. There is also the problem of finding a regular time to write decisions and not make it an *ad hoc* or a spur of the moment proposition. Try between hearings, afternoons, upon waking up, etc. There should be flexibility in this respect. Also, try the method of jotting down something right away to avoid the problem of recalling an important idea.

### ***D. Need for Continuous Upgrading of Skills***

Adopt a correct attitude. Recognize that we have been recognized with appointments to the Judiciary, and so there is no reason to relax, or worse, backslide.

1. There is no excuse for senseless errors or omissions which will require extra work for the judge, counsel, and appellate courts. Efforts should be increased and recognition of the problem should be improved as one is promoted in the judicial hierarchy.
2. Turn on the judicial mind. Get the facts straight. Look for excellent precedents. Apply your techniques of analysis and visualization. Apply creative imagination to the results of efforts in communication.
3. Remember: We can look for substantive law in books, but writing good decisions is something all judges have to develop. The need for correct attitude is paramount.

### III. REQUIREMENTS OF LAW AND THE RULES OF COURT

#### A. *Philippine Constitution, Section 14, first paragraph of Article VIII, provides:*

No decision shall be rendered by any court without expressing therein **clearly and distinctly the facts and the law** on which it is based.

In *SONCUYA v. National Investment Co.* (69 Phil. 602 (1940)) and *Bacolod Murcia Milling Co. v. Henares* (107 Phil. 560 (1960)), also *Mendoza v. CFI* (51 SCRA 369, (June 27, 1973)), *Ariola v. Auditor General* (58 SCRA 7 (July 18, 1974)), it was already established that the requirement of a clear statement of facts and law had reference to a decision rendered after previous presentation of proof in an ordinary civil or criminal case. It did not apply to orders resolving incidental matters.

**B. Rules of Court, Rule 36, Section 1 provides:**

All judgments determining the merits of cases shall be in writing personally and directly prepared by the Judge, stating clearly and distinctly **the facts** and **the law** on which it is based, signed by him, and filed with the Clerk of the Court.

#### IV. DECISION, JUDGMENT AND RESOLUTION

**A. Decision**

The term “*decision*” is a popular, and not a technical, legal word. It is a very comprehensive term, having no fixed legal meaning. (*CMS Stock Brokerage, Inc. v. Reyes*, 46745-R, November 6, 1974)

As defined in *Philippine American Life Insurance v. Social Security System* (20 SCRA 163 (1976)), it is “the adjudication or settlement of a controversy.”

**B. Judgment**

As used in the Rules of Court and in the Constitution, the words “judgments” and “decisions” have the same meaning, or at least, no substantial difference between the two words is indicated. But, sometimes, judgment is used to refer to the “dispositive portion” of the decision.

**C. Resolution**

A court resolution does not decide a case on its merits. It does not consider and dispose of the issues involved, and does not determine the respective rights of parties concerned. It merely adopts a rule of conduct – the manner of disposing a question.

A decision goes into the roots of the controversy, makes a searching examination of the facts and issues in the case, applies the law and considers the evidence presented, and finally determines the rights of the parties. (*People v. Gagui*, 26338-R, January 24, 1962)

## V. PARTS OF THE DECISION

### A. *Caption and Case Number*

The names of the parties, both petitioner/s, complainant/s, and respondent/s, are stated in the caption of the decision. It is desirable that the names of all parties be mentioned in the body of the decision in order to avoid any misconception as to the reach of the decision. This applies as well to an order or a resolution.

### B. *Nature of the Action*

It is best to let the reader of the decision know from the start what the case is all about.

### C. *Facts of the Case*

### D. *Issues Raised by the Parties*

**E. *Resolution of the Issues*** through application of the law to the facts. Discussion of the merits of the case.

### F. *Dispositive portion*

**G.** Subject to flexibility when called for, the judge should use a ***predictable pattern*** in preparing his decisions.

**H.** Can a *template* or *form* be used in the writing of decisions?

1. Remember that we are custom tailors and not RTW. Templates are suggested for routine forms, but then care has to be exercised in their use. Typists sometimes copy something even if it makes no sense or is wrong.
2. It is better to have a good checklist of what should appear in your decisions, and then check it for anything that should be added.

## VI. STATEMENT OF THE FACTS OF THE CASE AND THE APPLICATION OF LAW TO THOSE FACTS

### A. *Summarizing System*

Develop a *system of summarizing* and presenting the facts. It should be truthful and objective, but it should not contradict your conclusions and the dispositive portion. It should be prepared in a manner as to convince.

1. Get the facts straight and be faithful to these facts.
2. Determine the persons involved and their respective roles.
3. Determine what they did or said.
4. Do not assume facts not in the records. Practice care in judicial notice.
5. Avoid facts that cannot be inferred from facts in the record.

### B. *Reportorial method*

Ask a researcher or do it yourself. Briefly state what each witness stated and what each exhibit is intended to show. This makes the decision voluminous and it can be a boring part of the decision. However, it is useful on appeal.

### ***C. Summarizing method***

The judge should prepare his own statement of facts. It is gleaned from the testimony and other evidence, then written in an organized form. It should be thorough while at the same time concise. Requires effort and talent on the part of the judge.

### ***D. Composite Method***

Use the above two methods as dictated by the circumstances and the needs of the decision.

### ***E. Apply the law and precedents to those facts.***

Answer the important arguments of the parties, discussing in detail the side of the party who shall lose the case. When you start writing the decision, you have already made up your mind on who will win the case. You do not discover the winner while writing it.

### ***F. Prepare a good dispositive portion.***

It should be written after the judge has reviewed the decision itself and the prayers of the parties in their previous pleadings. Avoid an order that cannot be enforced. If the parties can locate a reason to justify a motion for clarification, then this can be unsettling to the judge.

### ***G. The decision proper and the judgment should put an end to the controversy.***

The matter in issue should be disposed of in a manner that enables the parties to determine, with reasonable certainty, the extent to which their rights and obligations are resolved.

### ***H. Flexibility***

Even as you adopt your own style and use your pattern as much as possible, there should be *flexibility* in their use. Writing of good decisions is a work of art. You should also enjoy reading your own decision and taking pride in it. A little editorializing and use of quotable or newspaperable pontificating can be done if you know how to do it.

### ***I. Fairness and Objectivity***

There should always be *fairness* and *objectivity* without losing track of the philosophy involved and what the correct result shall be. Avoid partiality and most important, deliberate error.

## **VII. ADDITIONAL POINTS TO CONSIDER**

- A. Isolate the main issue or go for the jugular. Avoid being unnecessarily engrossed in side or minor issues.
- B. Identify the unavoidable side issues or subordinate, but important, issues. Avoid trivia or minutiae. Do not abet *pro forma* items by giving them importance.
- C. You may have to explain briefly why some arguments or issues are ignored or treated *sub silencio*.
- D. Do not handle attacks and personal criticism in the decision, e.g., 90% was given to the personal criticism and only 10% to the issues.
- E. Be aware of pitfalls in factual presentations and problems in sifting through the mass of testimony and exhibits. There is

also the problem of answering or discussing the arguments and submissions of the parties, especially when their counsels can hardly be understood. Be aware of the problems of suspicious litigants and lawyers who downgrade the court by looking for items that can be criticized, or those who downgrade fellow lawyers.

- F. Always use the latest pronouncements, not a law or regulation already repealed or amended, and not a decision already reversed or modified. Accuracy in citing a statute or decision is essential. Check the errors of your researcher or stenographer.
  - 1. You may be certain of the principle of law involved, so limit efforts to look for it in primary sources. Law includes the Constitution, codes, statutes, decisions found in the Reports, treaties, ordinances, administrative rules and regulations, rules of procedure, and amendments or modifications.
  - 2. Know how to use basic codes, compilation of statutes, compendiums, law dictionaries, and careful use of textbooks, newspapers, and abstracts of decisions. You cannot know all these, but you should know where and how to look for them.
- G. Have appreciation for and willingness to approximate excellent decisions of the Supreme Court, Court of Appeals, those of your own colleagues, and foreign decisions.
- H. Some useful hints from experts in the handling of evidence:
  - 1. Find the preponderant evidence or that which is beyond reasonable doubt.

2. Give attention to the manner of testifying, intelligence, means of knowing the facts whereof they testify, probability or improbability of testimony, interest or want of interest, personal credibility, and number of witnesses.
3. Separate the controverted from the uncontroverted. See the overall picture, not piece by piece. Look into self-contradictions, innocent mistakes, or deliberate falsehood.
4. Reconcile any contradiction if it is proper to do so. Deal with inherently improbable testimony. Pass upon the demeanor, gestures, postures, nervousness, and movements of the hands or legs.

## VIII. ATTENTION TO FORM AND STYLE

### *A. Careful Preparation and Organization*

Before you start preparing your decision, examine first the records of the case. Determine whether the records are complete and the pleadings chronologically filed, *i.e.*, complaint, answer, position papers, affidavits, annexes, evidence and exhibits, transcripts of stenographic notes, minutes of hearing, and memoranda of parties.

### *B. Coherent and Logical Presentation*

Do not use the Agatha Christie style of mystery throughout the decision where the outcome becomes known only at the very end.

### *C. Need for Clarity*

Decision is for others and not for yourself. If you have difficulty understanding it, how can you expect others to do so?

#### ***D. Need for Brevity***

1. The *bikini principle*: concise yet comprehensive.
2. Examples: *People v. De Leon* (128 SCRA 121 (1984)) and (*People v. Banayo*, 129 SCRA 725 (1984)).
3. Wade through voluminous transcripts and citations, and include them in a concise decision.
4. Edit your own work. Know how to cut out your own work, which you prepared with great effort and difficulty. Do not hesitate to cross out what is not necessary.

#### ***E. Need for Sincerity***

1. Decisions should appear *bona-fide*, authentic and serious. Avoid affected and artificial form and style.
2. Correct use of citations. No altering or misquoting to suit your convenience.
3. Need for accuracy, completeness, and relevance in citations.

#### ***F. Need for Correct English***

1. Explore the wealth of the language – warmth, strength, beauty, extremely wide range and variety.
2. Mortal sins of grammar and composition - tenses, agreement of subject with predicate, overloaded and too long sentences, misplaced clauses, dangling modifiers, split infinitives, awkward clauses and sentences.
3. Avoid legalese and archaic or stilted language - heretofore, hereunder, hereunto, above-described, etc.

4. Know the correct use of the Thesaurus, the dictionary and law dictionary. Use these frequently and ensure correct legal bibliography.
5. Some preferred ways of spelling and writing down of words and use of punctuations. Examples: goodbye or good-bye; hyphenated words like 'door-to-door,' co-workers; pre-existing; reglementary; Sept. 7 or 7th day of September; P1.00 but 75 centavos; 15 minutes; 10 years old; attorney's fees or attorneys' fees.

## IX. THE PERSONALITY OF THE JUDGE

**A. Appearance** like clean fingernails or neck of his shirts.

### **B. Essential to Quality and Quantity**

1. Uphold the integrity and independence of the Judiciary. Order and proper decorum. Courtesy but with discipline. Prompt disposal of court's business. Professional competence in court management, not lackadaisical and unsystematic. Development of personnel. Proper representation of the Judiciary and higher courts in his community, but avoiding administrative positions, except civic duties like most outstanding teachers in Metrobank search. Model of leadership and behavior.
2. Integrity, objectivity, punctuality and promptness in acting on business matters.
3. The extra factor of **creativity**.

# The Architecture of Argument\*

*Dr. James C. Raymond, PhD\*\**

I. INTRODUCTION .....	112
II. THE UNIVERSAL LOGIC OF THE LAW .....	113
III. A UNIVERSAL OUTLINE FOR JUDGMENTS, BRIEFS, MOTIONS, AND OTHER SUBMISSIONS .....	114
IV. A SEVEN-STEP RECIPE FOR ORGANIZATION .....	117
A. <i>Identify and partition the issues.</i>	
B. <i>Prepare an OPP/FLOPP analysis for each issue.</i>	
C. <i>Arrange the analysis of issues like rooms in a         shotgun house.</i>	
D. <i>Prepare an outline with generic and case-specific         headings.</i>	
E. <i>Write a beginning.</i>	
F. <i>Write an ending.</i>	
G. <i>Review your draft with a checklist and a friend.</i>	

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\* Delivered at the *Lecture on Judicial Writing*, on May 21, 2002, at the PHILJA Conference Room, Manila. Copyright James C. Raymond 2002.

\*\* Dr. James C. Raymond, PhD, has been teaching legal writing to judges and lawyers from North America to Australasia for more than twenty (20) years. He has conducted a series of lectures and seminars upon the request of Supreme Courts, legal and judicial organizations, and educational bodies. His books on legal writing include *Clear Understandings: A Guide to Legal Writing, Moves Writers Make, English as a Discipline, Literacy as a Human Problem, and Writing (Is An Unnatural Act)*.

## I. INTRODUCTION

I once had the following exchange with a gracious judge who allowed me to review his work in a tutorial session.

**“I had trouble figuring out what’s going on in this case until I got to page 15,” I said. “This is where you get around to mentioning the issues.”**

**“Yes, Professor, I can see that.”**

**“And now that I know what the issues are, it seems to me that probably twelve of the first fifteen pages could be omitted, since they have nothing to do with any of these issues.”**

**“Yes, Professor, I agree.”**

**“Just out of curiosity, why did you wait until page 15 to enunciate the issues?”**

**“Well, Professor, to tell the truth, I didn’t know what the issues were myself until I got to page 15.”**

It was an instructive admission. Writing is often a means of discovering what we think. It is not unusual for judges and lawyers to discover the case as they write it.

They make a mistake, however, when they require their readers to wander through the same process of discovery – to follow them down blind alleys, wrong turns, false starts, and irrelevant facts until the issues finally pop up like mushrooms after rain.

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He has also written articles for the Pepperdine Law Review, Alabama Law Review, and The Judicial Review: Journal of the Judicial Commission of New South Wales, as well as the preface to *Decisions: A Practical Handbook for Judicial Writing*.

## II. THE UNIVERSAL LOGIC OF THE LAW

Every legal argument can be distilled to the same simple structure, a variation of the classic categorical syllogism:

**These facts (*narrate facts*)...  
viewed in the context of this law/contract/regulation/  
precedent/section of the Constitution/principle of  
equity (*choose one*)...  
lead to this conclusion (*relief sought*).**

The logic never varies. At trial, the judge's job is to discover this pattern of thought in the morass of facts, distortions, outright lies, genuine issues, and spurious arguments that the contending parties allege. And the attorney's job is to assist the judge in reducing the facts and evidence to this pattern.

In jurisprudence, only three arguments can occur – one about facts, the other two about the law:

1. The litigants may contest factual allegations.
2. Or they may claim that the other side has cited the wrong law.
3. Or they may concede that the other side has cited the right law, but misinterpreted it.

Every case boils down to some combination of these three basic disputes; there are no others. Even when some procedural issue is argued (venue, for example, or timeliness), the argument will always be the same. One side will allege certain facts in the context of a controlling law, or principle, or standard, and the other side will either dispute the facts, or argue that the wrong law has been cited, or that the right law has been misinterpreted.

When several issues are involved, each must be resolved with the same logic: certain facts, considered in the context of a particular law, lead to an ineluctable conclusion.

The logic of jurisprudence is the same in trial courts and courts of appeals. The only difference is that at trial, litigants are likely to argue about both facts and law, whereas in courts of appeals, arguments tend to focus on the law – the appellant arguing that the court below has applied the wrong law or misinterpreted the right one. Appellate courts are not equipped to examine the quality or quantity of the evidence itself. They cannot call in witnesses, or examine exhibits, or indulge litigants in the lengthy, unpredictable and often disorderly proceedings that are characteristic of a trial. Courts of Appeals may hear arguments about the admissibility or sufficiency of certain evidence, but except in rare circumstances, they will not second-guess trial courts on the inferences drawn from whatever evidence they deem admissible.

Because the pattern of legal logic is always the same, the structure of an effective pleading, at any level, is identical to the structure of a judgment. These genres have different audiences, but the same purpose: to persuade. There is one important difference: a judgment has the advantage of authority. A judge can issue an order, instead of merely asking for one.

### III. A UNIVERSAL OUTLINE FOR JUDGMENTS, BRIEFS, MOTIONS, AND OTHER SUBMISSIONS

If the logic of the law is so simple and repetitive, why do judges and lawyers have so much trouble organizing what they write?

Because despite the *appearance* of logic, litigation is always messy and uncertain. It relies on “facts” inferred from observations

that cannot be replicated, reported by witnesses who may or may not be telling the truth, or by experts who are generally contradicted by opposing experts. Inferences made from events described by witnesses are never as reliable as scientific inferences, which are made from replicable observations. Even expert evidence that claims to be “scientific” can be contested by other data or other interpretations of the same data.

Nor do the issues arise from the facts, with a logical inevitability. Good lawyers can find many issues in any set of allegations, some more likely than others to benefit their client’s position. Unanticipated issues and surprising facts may arise during the trial, and sometimes on appeal. Even when opposing lawyers agree on the issues, they can frame them differently to gain an advantage.

In addition, the logic of the law often melts like a pocket watch in a surreal painting. Analogies, which are the basis of common law (the claim that the case at bar is essentially like a precedent), always limp. Precedents are *always* distinguishable.

Furthermore, the language of the law is rotten with ambiguity. Despite the best efforts of legal drafters, a motivated reader can find more than one meaning in any text. A word like “murder” may seem plain enough – until we have to decide how it applies in cases of abortion or assisted suicide. A term like “marriage” may seem plain enough – until we have to decide when cohabitation becomes marriage, or whether one member of a same-sex union can claim spousal benefits on the other’s insurance policy. Absolutely no word in the law is immune from the ambiguity it might contract, like a contagious disease, in the context of a novel set of facts. What seems like “plain meaning” when a legal text is drafted disappears in a swirl of indeterminacy when the text is applied to facts the drafters did not anticipate.

Despite these problems, the credibility of common law depends upon the ability of lawyers and judges to control the chaos by conveying their reasoning in a form that reflects the universal logic of jurisprudence. Instead of controlling the chaos, however, they often reproduce it, failing to provide their readers with the issues that form a context in which individual facts have meaning, rambling through facts and allegations without distinguishing the credible from the implausible, switching from one party's version to the other's as if they were court reporters, reproducing the testimony instead of analyzing it. Their arguments meander, just as their own thoughts must have meandered. They produce a stream of consciousness instead of an orderly sequence, a diary of dawning awareness instead of an engine of logic in which a result emerges from an application of law to fact. They forget that the goal of jurisprudence is to pluck the essential issues, the relevant facts, and controlling laws from the maelstrom of arguments, allegations, precedents, principles, and pretensions that rage about during a trial. It is not an easy task, but it would be easier if advocates would remember the simple logical structure that must underlie the resolution of every issue in every case.

Many jurisdictions publish rules to assist lawyers in organizing their submissions. These rules generally make excellent sense. *"First, tell us what the issues are,"* they seem to say, reflecting an awareness that facts have no significance until they are placed in the context of an issue. *"Then tell us what the case is about"* – reflecting the frustration of judges who have to read dozens of pages before discovering the basic fact situation from which the case arises. And finally, *"Organize the rest of the judgment in a logical and predictable order"* – a plea from readers who are continually surprised by what pops up next in an argument.

Paradoxically, judges and lawyers sometimes forget that, as readers, they want precisely what their readers want from them. Rules for pleading or for appellate procedure generally work just as well on either side of the Bench, and at every level, all the way up to the Supreme Court.

#### IV. A SEVEN-STEP RECIPE FOR ORGANIZATION

Here is a recipe for organizing a pleading or a judgment in even the most complex case:

##### ***A. Identify and partition the issues.***

Plan the body of the pleading or the judgment *before* settling on an introduction.

Use a stack of note cards, or half sheets of paper, or the equivalent space on a computer screen. On each card write the word *ISSUE*, followed by a *brief* statement of any question the court must decide. If the issues change as the case proceeds, prepare separate cards for the new ones and discard those that become irrelevant.

**Determining the issues early is essential to efficiency in the writing process and economy in the result.** You cannot distinguish relevant facts and arguments from pointless digressions until you have determined precisely what questions the court is being asked to settle.

Partitioning the issues is essential to the structure of your argument. Unless each issue is clearly separated from the others, your argument will seem like a vast swamp, shapeless and devoid of direction. Dividing your argument into discrete issues enables you to focus your analysis on each one individually. It also enables

your reader to move from one issue to the next with a sense of orderly progression.

***B. Prepare an OPP/FLOPP analysis for each issue.***

The easiest way to organize the analysis of each issue is to follow this pattern:

**OPP (Opposing Party's Position)**

**FLOPP (Flaw in Opposing Party's Position)**

**CONCLUSION**

(If you are a judge, change "OPP" to "LOPP," or "Losing Party's Position.")

**OPP: Respondent contends that he had not been informed of the penalty clause in the contract.**

**FLOPP: The evidence shows that both the respondent and his attorney received the contract thirty (30) days before signing it.**

**CONCLUSION: Therefore, respondent's contention that he was unaware of the penalty clause has no merit.**

The first sentence in this pattern would be followed by supporting details, perhaps by quoting the respondent's contention verbatim; and the second sentence would be followed by citing evidence, indicating that respondent had received the contract beforehand and had plenty or enough time to examine it.

When the conclusion is obvious, it may be effective to leave it unstated and allow your readers to complete the syllogism on their own. Judges, of course, have to make their conclusions explicit in the form of findings or orders, usually at the end of

the ruling as a whole. Sometimes it is effective to refer to an unstated conclusion as if it were so obvious that it can be safely tucked away in a subordinate clause (e.g., “Because respondent had ample time to examine the contract before signing it. . .”). Understatement of this sort can be more powerful than rhetorical excess. It implies that any reasonable reader would agree with you.

Be careful about using highly charged language to characterize the opposing party’s position. Charged language is a rhetorical weapon that often backfires. It pleases readers who agree with you in advance, but it alienates impartial readers and infuriates the opposition and anyone who may be sympathetic to the opposition’s point of view. Charged language is often a sign that an argument is based on passion rather than the law. Normally, judges try to rise above emotion. They want you to give them reasons, not feelings nor even ideals, that will survive scrutiny on appeal. If you are a judge, you should be able to express the losing party’s position as effectively as you can – as if you were representing that party yourself – and then identify the flaw in that position with surgical detachment. If you cannot find the flaw in your best statement of the losing party’s position, you may need to reconsider your conclusion.

The OPP/FLOPP pattern can be effective even when the writer is the moving party and the opposing party has not yet expressed a position. The OPP in this situation is whatever the opposing party has done or said (or failed to do or say) that motivates you to file this particular motion or application. The FLOPP explains why the opponent’s words or actions are factually inaccurate or incompatible with some law or legal principle.

One exception to the LOPP/FLOPP pattern occurs when the controlling law is not so much a law as a principle of equity

or a matter of judicial discretion. In determining custody or visitation rights, for example, Family Court judges can help calm raging emotions by downplaying the notion of a “losing” party. An adverse ruling in Family Court is never easy to accept, but disappointed parents will find it easier to respect a decision that focuses on the child’s best interest rather than on a finding that either party has been found a less competent parent. Even when the decision is actually based on the unsuitability of one parent, it does no harm to acknowledge whatever parental strengths the judge can attribute to that parent, even if, for the record, it also mentions the weaknesses that are critical to the decision.

Bankruptcy cases and contract disputes – where assets have to be divided equitably in the absence of clear language or mathematical formulae – are often best resolved by downplaying the notion of a winner and a loser. In cases like these, judges sometimes have little to rely on other than a subjective sense of fair play. Whenever possible, the tone of the judgment can ease the disappointment of the litigants, even though both parties are likely to be dissatisfied with the result.

Another exception to the LOPP/FLOPP pattern occurs when judges are finding facts. It generally makes sense to begin with the position of the party with the burden of proof, whether that party loses or wins.

**Plaintiff argues that the value of the condominium at the time of divorce was \$150,000.**

**Respondent, however, presented evidence that the value was roughly half that amount.**

**After carefully weighing the evidence presented by each side, I find that...because...**

Again, in an actual judgment, each of the first two sentences would be followed by a summary of the evidence presented, and the third sentence would be followed by an indication of why the judge found one party's evidence more persuasive than the other's.

This is a tricky business. Many trial judges believe, with good reason, that by expressing reasons for findings based on credibility of experts or other witnesses, they invite the United States Court of Appeals to second guess them and to reach different conclusions. On the other hand, failure to give reasons can tempt the Court of Appeals to remand on grounds that the findings were not supported by sufficient evidence. Balance is the key. Support your findings with sufficient reasons to show that they are not arbitrary and capricious, but do not provide so much detail that your readers will be tempted to draw inferences of their own. You, after all, were present to observe nuances in the testimony that will not be available to the Court of Appeals.

In general, though, litigants benefit from a judgment that is as definitive as an umpire's call at home plate or a line judge's verdict in a tennis match. Even if we know that they are occasionally wrong, we do not want referees to have doubts. We want them to be decisive so we can get on with the game – or with our lives.

Perhaps, more importantly, the OPP/FLOPP pattern helps judges and lawyers think clearly about the application of fact to law. It helps lawyers determine whether they have a case or not, and whether they should advise their clients to settle rather than enter into litigation they are likely to lose. It also keeps judges honest, protecting them from their own biases. Nothing is more frustrating to the Bar and to the public than a high profile decision that is not supported by a clear and logical application of law to

facts. And nothing can be more damaging to public trust in the integrity of the judiciary.

***C. Arrange the analysis of issues like rooms in a shotgun house.***

The most frequent cause of obscurity in jurisprudence on both sides of the Bench is not technical language or complex issues or arcane subjects. It is haphazard organization compounded by facts and allegations that have no bearing on any of the issues.

The easiest way to organize a judgment or a pleading is to imitate the structure of what in some parts of the United States is called a ***shotgun house***— a house in which each room follows the other in a straight line: front porch, back porch, and a series of perfectly parallel rooms between.

The front porch is the introduction, the back porch the conclusion. Each room between contains the analysis of a particular issue. This pattern can be effective whether there is one issue or fifty.

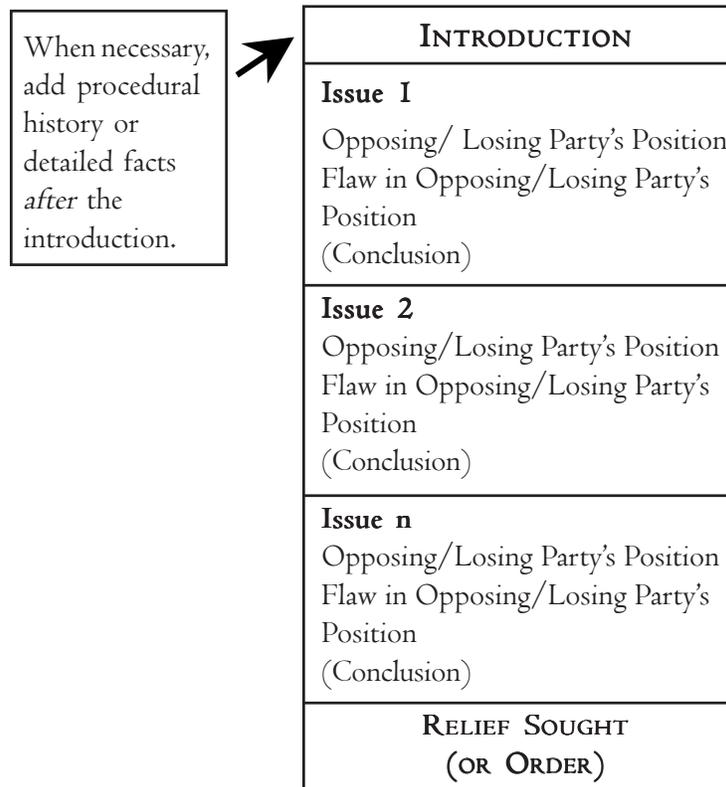
Once you have determined the issues, arrange them in a sequence that makes sense. If you have written each issue on a separate card, you can spread the cards across a table and select the sequence that works best.

Sometimes there would be threshold issues (e.g., standing), and normally these are dealt with first. Sometimes issues can be grouped in categories (e.g., three dealing with the admissibility of evidence, two dealing with jury instructions, five dealing with sentencing). Sometimes the issues can be arranged in a logical chain, each issue dependent on the other for its viability. Sometimes each issue is completely independent of the others. In this situation, consider arranging the issues chronologically, if

the material allows it. Or consider arranging them for their rhetorical effect, perhaps beginning with those for which you have your best analysis, with the alternative arguments trailing behind.

The analysis of each issue should be self-contained, like a stanza in a poem or a room in a shotgun house (*stanza* actually means “room”). You should have as many rooms as you have issues.

In some cases, another section needs to be added to the structure: the rhetorical equivalent of a foyer, an antechamber just after the introduction and just before the analysis of the first issue. This section is necessary in cases that cannot be understood without a detailed narration of facts.



Although a “foyer” for extended facts, background, or procedural history may be necessary at times, more often than not, it can be avoided by writing a beginning that provides an essential overview, and mentioning necessary details in the analysis of the issue to which they are most relevant. Narrating the detailed facts twice – in the beginning and in the analysis of the issues – creates unnecessary work for your readers.

***D. Prepare an outline with generic and case-specific headings.***

If a pleading or judgment is very short – two or three pages – it may need no headings. In longer texts, headings are essential.

At the beginning of a document, *i.e.*, in the table of contents, headings provide a roadmap, foreshadowing the journey you want your reader to take. Within the document, headings serve as signposts marking the boundaries between various stages of the journey. They show where each argument ends and another begins. To serve these functions effectively, headings must be as brief as possible. They should not be entire arguments (though it is often effective to put a brief summary of an argument immediately *after* a heading).

There are two kinds of headings: **generic** and **case specific**. Words and phrases like “Introduction,” “Background,” “Order,” “Relief Sought,” “Cases Cited,” “Issues,” and “Findings of Facts” are generic headings. Generic headings can be transferred from case to case, regardless of the facts and issues. They can be very useful, and sometimes they are required.

In addition to generic headings, however, are case-specific headings, like “Was the Warrant Valid?” or “What is the meaning of ‘obscenity’ in Section 905?” Case-specific headings are

extremely useful when they mark boundaries between analyses of separate issues.

There are three ways to phrase a case-specific heading. You can phrase it as an argument:

**The University of Montevallo is not an Agency of the State.**

You can phrase it as a question:

**Is the University of Montevallo an Agency of the State?**

Or you can phrase it as a topic:

**State Agency.**

Some lawyers prefer argumentative headings, never wanting to pass up an opportunity to press their point of view. Others think topics or questions are more effective as headings because they convey a sense of detached objectivity, which is in itself a persuasive stratagem. It is a matter of personal preference, based upon the authorial persona you want to create and on the way you think a particular reader or set of readers is likely to react.

Even though you should write every pleading and judgment *as if* you expected your readers to follow it from beginning to end, chances are they won't. Effective headings will aid those readers who raid your text like marauding pirates, looking for what interests them and ignoring the rest. The safest policy is to let them know where they can find whatever they are looking for — those issues in which they are most interested in your argument. No matter how you phrase them, however, they should be clearly foreshadowed by the end of the introductory section.

### ***E. Write a beginning.***

It may seem odd to suggest writing an introduction at this stage, after you have already developed the heart of your argument. But you are not in a position to write an introduction until you know what you are going to introduce. Sometimes you have no idea what the issues are, or how many, or how they should be resolved, until you have drafted an OPP/FLOPP analysis for each issue.

Avoid beginning with technical, dry, or uncontested assertions. Imagine, for example, the reaction of a weary judge with a busy schedule and other things to do when she or he reads an opening paragraph like this:

**I. Pursuant to this Court’s Rule 25.5, appellees City of New York, et al., respectfully submit this Supplemental Brief responding to an argument made by the Solicitor General for the first time in his Reply Brief on the merits. Appellants have claimed that appellees’ invocation of jurisdiction under 28 U.S.C. § 1331 in the district court failed because that statute “does not create a cause of action, much less authorize adjudication of a suit against the government absent an independent waiver of sovereign immunity.” Reply Brief for the Appellants (“Reply Br.”) at 3 n. 1. Appellants failed to raise these arguments below, in their Jurisdictional Statement to his Court, or in their opening brief on the merits.**

If you are a typical reader, you probably did not read this example in its entirety. You skipped over it as soon as you glazed over. Yet some lawyers are convinced that they are bound by tradition, rules, or logic to begin their pleadings in this way. A

judge is likely to react to a beginning like this in very much the same way you reacted to it when you read it – or failed to read it.

Similarly, judges should try to imagine the reaction of their readers when they encounter opening lines like these:

**Declaratory Judgment (Article 453 C.P.C.)**

**This Court, having examined the proceedings and the exhibits, considered the arguments of counsel, and duly deliberated, doth now render the following Declaratory Judgment:**

This self-congratulatory gambit serves no purpose. It is a sort of judicial throat clearing. It enables the judge to put *something* on paper before getting around to the case at hand. Why not just get around to it? Skip the throat clearing.

A perfect introduction provides two things: a **synopsis of the facts** and a **brief statement of the issues**. Imagine how you would begin if you were telling a neighbor about the case. Start with the issue if it has far-reaching implications. Otherwise, start with a thumbnail sketch of the facts, a *brief* story indicating the human conflict, “who did what to whom,” followed immediately by a concise statement of the questions (the issues) that the court needs to decide.

This combination of facts and issues in a nutshell provides the context in which your arguments will make sense and be worth reading. In addition, by delineating the issues in a few lines, you can foreshadow the structure of the argument to follow. Here is an example:

**Harry Saunders was convicted of assault, battery, rape, and murder, each in the first degree. According to the evidence, Saunders wore gloves**

**and a mask when he committed these crimes, concealing his identity from his victim and from witnesses on the scene.**

**In this appeal, Saunders argues that the lineup in which he was identified was suggestive, that articles of clothing used in his identification were illegally seized from his apartment, and that he had no access to counsel at key points during the investigation.**

This beginning is exceptional not only for what it does, but perhaps more importantly for what it does *not* do. It does not establish standing or jurisdiction with the ubiquitous phrase, “Pursuant to Rule 123 appellant asks. . . .” It has no legal jargon or long, tangled sentences. In fact, there is nothing in this opening that would seem odd or technical in a good newspaper. And *that*, despite whatever misgivings you might have about the media, is an excellent standard for legal writing.

The writer (a judge in Idaho) also avoided citing specific sections of the code and specific references to precedent. He did not feel obliged to tell us that assault, battery, rape, and murder are illegal activities (e.g., “contrary to sections w, x, y, and z of the Criminal Code”). Nor did he feel obliged, at this stage, to tell us what statutes, precedents, or standards the appellant had invoked in support of his claims. This may be essential information at some point – the precedents will have to be cited and distinguished, the statutes and standards may have to be quoted if there is any dispute about their meaning or the application to this particular set of facts. But details of this sort should be saved for the sections in which issues are analyzed. No need to clutter the opening paragraph with more information than the reader needs at this point.

This beginning provides the necessary context for understanding the analysis that follows. You can even predict the heading: “Line-up Identification,” “Search and Seizure,” “Access to Counsel.” And in predicting the headings, you are predicting the structure of the rest of the document. You are, in effect, promised an easy and interesting read. Although lawyers are not obliged to make their writing interesting, doing so does have the effect of helping the reader pay attention to the argument.

In this case, the writer felt the need to interpolate a detailed narration (foyer) between the opening paragraphs (the front porch) and the analysis of first issue (the first in a series of rooms). He did this by telling the story of the lineup in which Mr. Saunders was identified, beginning with, “There were three lineups. The first occurred. . . . The second occurred. . . . The third occurred. . . .”

In most cases, however, a simple story-plus-issue is the best way to gain the reader’s interest and attention. But the temptation to write abstractly is hard to resist. Here is the opening paragraph in a case about unlawful detention:

**[I] This is an application supported by an affidavit in which the applicant is seeking to be admitted to bail pending her trial. The affidavit discloses that the applicant who has been in custody since October, 1985 was on 3<sup>rd</sup> December, 1985 committed to the High Court for trial for the offence of Infanticide. On 18<sup>th</sup> December, 1985 she applied to the High Court at Kitwe to be admitted to bail pending her trial.**

This is an adequate beginning, but it reads like an abstract problem in the law instead of what it really is, a case about a young woman who has been improperly held in jail without bail.

Starting with the story would have given the case the sense of urgency and human significance it deserved:

**[I] Rosemary Chilufya has been in jail for nearly five months, awaiting trial on a charge of infanticide. The High Court has refused to set bail, on the ground that infanticide is a form of murder, and murder is not a bailable offense. A threshold issue in this case, however, is whether the Supreme Court has the authority to...**

Stating the issues effectively requires steering a course midway between too much detail and too little. The example below provides too much detail because it overwhelms the reader and predicts what follows in bewildering specificity:

**I. The issues in this appeal in respect of the Appellant's 1994 taxation year are:**

- a. Whether the Appellant, in determining LCT liability under Part I.3 of the Act, is entitled to deduct the amounts of the Estimates from its "capital," or whether such amounts are to be included in its "capital":
  - i. as "reserves" pursuant to ss.181(I) and 181.2(3)(b), or
  - ii. as "other surpluses" pursuant to s. 181.2(3)(a);
- b. Alternatively, if the Estimates are "reserves" or "other surpluses," whether the Appellant, in computing its income under Part I of the Act, is entitled to deduct the amounts of the Estimates from its revenue;

- c. Whether the Appellant, in determining LCT liability under Part I.3 of the Act, is entitled to deduct the \$37,481,776 amount as a “deferred tax debit balance” within the meaning of s.181.2(3)(h).

The other extreme is to provide too little detail:

**The issue is whether the appellant is entitled to deductions he claimed on his tax returns for 1994.**

This version does not predict the structure of what follows, nor does it give the reader a glimpse of the grounds on which each side bases its argument.

It is also possible to provide too much and too little at the same time – too much by including information the reader does not need at the outset; too little by not explaining what is at stake and by presuming a reader who knows the code by heart:

**The issue is whether the appellant is entitled to deductions pursuant to ss.181(1), 181.2(3)(a), 181.2(3)(b), and 181.2(3)(h) of Part I.3 of the Income Tax Act.**

A good statement of issues foreshadows the structure of what follows, and provides the reader with a glimpse of the grounds of the argument. It does not cite laws, precedents, or records that can be more usefully cited in the analysis section. In this particular case, after a brief description of what the appellant claimed in his tax returns, the issues might have been effectively stated like this:

**The issues are:**

- **Whether the Appellant is entitled to deduct the amounts of the Estimates from its “capital;”**
- **Whether the Appellant is entitled to deduct the amounts of the Estimates from its revenue;**

- **Whether the Appellant is entitled to deduct the \$37,481,776 as a “deferred tax debit balance.”**

Some pleadings (for example, an appellant’s opening brief filed in a United States Court of Appeals) are required by rule to begin with a statement of jurisdiction, even if jurisdiction is not contested. If you are writing such a pleading, minimize the distraction by making it seem like the boiler plate that it is. Give it a heading (“Jurisdiction”) and a single sentence citing the applicable rule. If possible, set it off in a box in a corner of the page – a ritual recognition that you would not be in court if you had no right to be there.

Then use another heading (“Background,” “Introduction,” or “Summary of the Case”) to direct your reader’s attention to your brief narrative and statement of the issues. If jurisdiction is actually contested, list it as your first issue, but save your argument for the analysis section. Avoid getting bogged down in a jurisdiction issue before telling your version of the essential facts. A strategic narrative of the facts may dispose your reader to rule in your favor on jurisdiction when the ruling could reasonably go in either direction.

When jurisdiction and standing are uncontested, starting with “Pursuant to” to answer a non-argument is like putting a hotdog stand on prime real state. The first paragraph and the last are possibly the only places where you can count on the reader’s attention. Why waste this space by filling it with information the reader can be presumed to know?

A good beginning makes the reader *want* to read more. A notable example is this introduction in a *per curiam* by the Ontario Court of Appeals:

[1] Professor Starson is an exceptionally intelligent man. His field of expertise is physics. Although he has no formal qualifications in that field, he is in regular contact with some of the leading physicists in the world. In 1991, he co-authored an article entitled, “Discrete Anti-Gravity,” with Professor H. Pierre Noyes, who teaches physics at Stanford University and is the Director of the Stanford Linear Accelerator Center. Professor Noyes has described Professor Starson’s thinking in the field of physics as being ten years ahead of its time.

[2] Unfortunately, Professor Starson has a history of mental illness, dating back to 1985. He has been diagnosed as suffering from a bipolar affective disorder. On several occasions during the last fifteen (15) years, he has spent time in mental institutions. In November 1998, Professor Starson was found not criminally responsible on account of mental disorder on two counts of uttering death threats. In January 1999, the Ontario Review Board ordered that he be detained at the Centre of Addiction and Mental Health (the Centre).

Notice that this passage does not call attention to itself as *writing*. The words are transparent, invisible, like lenses through which we see characters and events. The writer does not seem to be *trying* to write. The art conceals the artifice. It is *as if* the story wrote itself. But of course it did not. A story is almost always an argument – all the more effective because it does not *seem* like an argument.

In this case, the plot thickens when we find out that the unusual Professor Starson “has a history of mental illness.” And it thickens further when we discover a few sentences later that he

does not want the medication the Ontario Review Board wants to give him, because it would cloud his mind and hinder his ability to conduct his theoretical research.

A beginning like this entices the reader to continue reading. Who would not be curious to know how the case was resolved?

#### ***F. Write an ending.***

If you are a lawyer, do not pass up the opportunity to recapitulate the essence of your argument at the end. Briefly summarize what you want the court to decide, what remedy you want the court to grant, and what grounds the court has for granting it. Write your conclusion as if you suspected that a busy judge might read your ending before reading anything else, hoping to find there your argument in a nutshell.

If you are a judge, your concluding section may include only an order. However, if you think the court above yours, or the press, or the losing party might miss the essence of your analysis, use your conclusion as a summation. Repeat your analysis, but in different words, and succinctly. Brevity is essential. A conclusion that exceeds one page is likely to seem like a new argument instead of a conclusion.

The concluding section also provides an opportunity for *obiter dicta* – instructions to the Bar on related matters that are not logically essential to the case you are deciding. And when your decision is based on common sense or pure equity, the concluding section can include what I like to call the “To-rule-otherwise” trope. Judges rely on this device when they have little or no law to justify their decisions. “To rule otherwise would be to invite...” they say, and then list the horrible, unjust, and illogical things that would follow from a different decision.

The concluding section of a brief or motion provides a similar opportunity for lawyers when justice, equity, or common sense is on their side, but the law is not particularly helpful. Pointing out unjust consequences can be persuasive when the law is a feeble ally.

In a very short pleading, where repeating the reasons would be tedious, a conclusion that specifies the relief sought without repeating the reasons may be adequate.

#### CONCLUSION

**For the reasons above, plaintiff's Motion to Remand is due to be granted. Plaintiff asks this Court to issue an order remanding this action to the Circuit Court for Barbour County, Alabama, Clayton Division. In addition, plaintiff requests that this Court order defendants to pay all just costs and expenses, including attorney's fees, incurred as a result of the improper and groundless removal of this case.**

It would take only minor editing to make this conclusion appropriate for a judgment:

**For the reasons above, plaintiff's Motion to Remand is granted. This action is remanded to the Circuit Court for Barbour County, Alabama, Clayton Division. In addition, defendants will pay all just costs and expenses, including attorney's fees, incurred as a result of the improper and groundless removal of this case.**

In a pleading of any complexity, however, an ending of this sort misses an opportunity to revisit the argument. A *brief* review of the argument, like the one below, can assist the reader.

### CONCLUSION

Defendant, Tarwater Tobacco Co., has succeeded in having this case removed from state to federal court on ground that Tarwater's local agents were named as co-defendants by plaintiff as a ruse ("fraudulent joinder") to obtain a favorable local venue.

The standards for removal on the basis fraudulent of joinder are quite high. In this case, Tarwater would have had to prove either that there is no possibility of a verdict against the local defendants, or that the complaint against them was based on false information.

Tarwater has met neither standard. There is no evidence of fraudulent information in the joinder. Nor is there any question that a jury would find against Tarwater's local agents if the facts alleged are proved at trial.

For these reasons, we respectfully request the court to remand the case to the Circuit Court for Barbour County, Alabama, Clayton Division, from which it was removed.

We also request the court to order that costs and attorney's fees be assigned to Tarwater. Their failure to provide credible evidence for their claim amounts to a frivolous delaying tactic, taxing the plaintiff with unnecessary costs and taxing the resources of this court.

It may seem paradoxical that a good ending resembles a good beginning (which, in turn, often resembles a good head note). The resemblance is not accidental. Judges and lawyers are busy people. They do not necessarily read from top to bottom. If they

get lost in an argument, they may flip to the end, hoping to find a synopsis there. They will not be helped by a conclusion that says merely, “For the foregoing reasons. . .,” sending them right back to the thicket they had just abandoned. An effective conclusion summarizes those foregoing reasons in a nutshell, in plain English, without repeating citations and references that are already included in the body. Here is how the Ontario court concluded the case about Professor Starson:

**[14] Putting aside any paternalistic instincts – and we think that neither the Board nor the appellants have done so – we conclude that Professor Starson understood, through the screen of his mental illness, all aspects of the decision whether to be treated. He understands the information relevant to that decision and its reasonably foreseeable consequences. He has made a decision that may cost him his freedom and accelerate his illness. Many would agree with the Board that it is a decision that is against his best interests. But for Professor Starson, it is a rational decision, and not one that reflects a lack of capacity. And therefore, it is a decision that the statute and s.7 of the *Canadian Charter of Rights and Freedoms* permit him to make.**

**[15] The appeal is dismissed.**

Enough said.

***G. Review your draft with a checklist and a friend.***

Persuade a friend, preferably a non-lawyer with no knowledge of the case, to help you review your draft with the following checklist:

- Ask your friend to tell you, after reading only the first page, who did what to whom and what issues need to be settled.
- Test the overall structure by asking your friend, after reading only the introduction, to guess what headings will follow. If there is a good match between the introduction and the structure that follows, your friend should be able to guess, in substance, the case-specific headings that separate the analysis of each issue from the others.
- Ask your friend to tell you, after reading the last full page, what you decided (or what you want the court to decide) and what grounds you gave for the decision.
- Ask your friend to locate the beginning and the end of the analysis of each issue and to tell you the losing (or opposing) party's argument and the flaw you found in it.
- Check for economy and consistency. If you announced five issues at the outset, be sure that you have analyzed five issues. Delete any information that is irrelevant to the issues. Look for repeated information; see if it can be mentioned in one place and omitted in the other.

If your friend does not answer any of these questions to your satisfaction, do not explain. **Revise.**

A well-written pleading or judgment is as smooth as a grape. There is nothing extra.

**RECOMMENDED READING:**

Garner, Bryan A. *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Court*. New York: Oxford UP, 1999.

Stark, Steven D. *Writing to Win*. New York: Doubleday, 1995.

# Writing Style

*Justice Camilo D. Quiason (ret.)\**  
*Supreme Court*

I. INTRODUCTION .....	141
II. STAGES OF WRITING PROCESS .....	142
A. <i>Pre-Writing</i>	
B. <i>Writing</i>	
C. <i>Rewriting</i>	
D. <i>Revision</i>	
E. <i>Polishing</i>	
III. ELEMENTS OF EFFECTIVE STYLE .....	143
A. <i>Simplicity</i>	
B. <i>Conversational Quality</i>	
C. <i>Individuality</i>	
D. <i>Correctness</i>	
IV. POINTERS ON STYLE .....	144
A. <i>Words</i>	
B. <i>Phrases and Clauses</i>	
C. <i>Sentences</i>	

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\* Justice Camilo D. Quiason (ret.) is a member of PHILJA's Department of Jurisprudence and Legal Philosophy. He was appointed as Associate Justice of the Supreme Court on February 2, 1993 and retired on July 18, 1995. He was formerly Vice President and General Counsel, Meralco Securities Corporation (1972-1973); Designated Special Prosecutor, Department of Justice (1963-1964); Solicitor, Office of the Solicitor General (1956-1966); and Acting City Judge,

## I. INTRODUCTION

According to Fogiel, style is the art of creating a well-balanced writing that flows effortlessly and gives the reader the feeling that the writer knows the subject. He is referring to the manner a writer expresses his ideas. Style is personal to a writer and is said to be a window of his personality. Some writers have a style of writing peculiar to them to the extent that you can identify them just from the way their articles are written.

Style is the product of the writer's experience and is the influence of many things, including his reading habits, academic background, and his knowledge of the rudiments of grammar. If one wants to write well, he must read a lot of good writing.

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Municipal Court of Manila (1958-1964). He is also currently Corporate Secretary and General Counsel of Manila Electric Company; Director of Lopez, Inc. (formerly Benpres Corporation), Enrico Realty Corporation, First Philippine Holdings Corporation, Eugenio Lopez Foundation, Inc., Manila North Tollways Corporation, First Philippine Industrial Development Corporation, Maynilad Water Services, Inc., Semper Investment, Inc., and Quemabar Investment, Inc.; and Founding Partner of the Quiason Makalintal Barot Torres & Ibarra Law Firm. He is a Member of the Academy of American and International Law Alumni Association of the Philippines, Association of Judge Advocate General, Fullbright Scholars Association of the Philippines, Integrated Bar of the Philippines, Philippine Commission of Jurists, Philippine Society of International Law, and the University of the Philippines Alumni Association. He obtained his law degree and Master of Laws degree from the University of the Philippines, and finished Special Studies from Southwestern Legal Center, Dallas, Texas.

To improve your style of writing, you can select some writers you admire and then use them as your model. Select the good qualities in their writings and adapt them in your own style. Carefully analyze the sentence structure, syntax, diction, the use of monosyllabic words, the tone and rhythm, and how the writing unfolds. By doing so, you may discover the weaknesses in your writing.

## II. STAGES OF WRITING PROCESS

The writing process incorporates five stages: pre-writing, writing, rewriting, revising, and polishing.

### ***A. Pre-Writing***

The pre-writing stage consists of the organization of ideas that have to be translated from the writer's mind into written form. The writer collects his thoughts and outlines all the points he wants to make.

### ***B. Writing***

Next, the writer prepares the first draft. This is the writing stage, where the writer should keep on writing without stopping to correct anything.

### ***C. Rewriting***

Rewriting follows the writing stage. The text is moved from the writer-oriented first draft towards a reader-oriented, final draft.

### ***D. Revision***

Revision comes after the rewriting of the draft. It concentrates on sentence structure, grammar, and punctuation.

### ***E. Polishing***

The last stage of the writing process is polishing, which includes checking for grammatical and typographical errors. Failure to polish the legal writing can erode the meaning and import of the writing.

## **III. ELEMENTS OF EFFECTIVE STYLE**

Four elements that contribute to an effective and pleasing style are: simplicity, conversational quality, individuality, and correctness.

### ***A. Simplicity***

Simplicity is expressing one's ideas in terms that are clear, logical, and specifically geared to the level of the persons for whom one is writing. In the case of lawyers, their writings may be intended for other lawyers, judges, and government officials, or for their clients. It goes without saying that the writings intended for clients should have a simpler style.

Simplicity in writing is often more effective than pompous language that makes the writing sophomoric. Shaw says:

Simplicity without substance is childish; but great thoughts, like great inventions of whatever kind, achieve much of their effectiveness and power through simplicity.  
(IV, 38)

### ***B. Conversational Quality***

The conversational quality of what we read helps us to grasp the idea being presented. It also makes the writing more relaxed and sound less didactic.

### ***C. Individuality***

Individuality is the imprint of the writer's personality on his writings.

### ***D. Correctness***

Lastly, the writing must be correct both factually and grammatically. To be grammatically correct, a sentence must be consistent in tense, subject, voice, number, and person.

## **IV. POINTERS ON STYLE**

### ***A. Words***

I. Use economy of words. Economy in the use of words may be achieved through the following methods:

a. **Change adjectives into nouns.**

*Instead of:*

What impressed me most was the fact that he was very frank.  
(12 words)

*Write:*

What impressed me most was his complete frankness.  
(8 words).

b. **Change adjectives into adverbs.**

*Instead of:*

The crowd cheered in a way that was wild. (9 words)

*Write:*

The crowd cheered wildly. (4 words)

c. **Change verbs into nouns.** Use gerunds.

*Instead of:*

Often the beauty of a dress lies in the way it is worn.  
(13 words)

*Write:*

Often the beauty of a dress lies in the wearing. (10 words)

d. **Change verbs into adjectives.** Use the suffixes  
“-able,” “-ed,” and “-ing” to change verbs into adjectives.

*Instead of:*

That was a play you could really enjoy seeing. (9 words)

*Write:*

That was really an enjoyable play. (6 words)

e. **Use the infinitive phrase instead of a clause  
beginning with “that” or “so that.”**

*Instead of:*

Open the window so that you get some fresh air. (10 words)

*Write:*

Open the windows to get some fresh air. (8 words)

f. **Remove words like “who has” or “which is” in  
relative clauses.**

*Instead of:*

Our neighbor, who was the mayor of the town, was always  
very friendly to us. (15 words)

*Write:*

Our neighbor, the town mayor, was always very friendly to us. (11 words)

**g. Use a prepositional phrase to start a sentence instead of an adverbial phrase.**

*Instead of:*

As soon as spring arrives, we will go out to the lake every Sunday. (14 words)

*Write:*

In spring, we will go out to the lake every Sunday. (11 words).

**h. Use a single adjective to do the work of a phrase**

For instance, a brave man for a man of bravery. There are cases, however, when the phrase is better than the single word, as when it yields emphasis or rhythm, e.g., a thing of beauty instead of a beautiful thing.

**i. Delete redundant or unnecessary words.**

**j. Use short words, which are usually clearer, crispier, and more exact.**

If you have a choice between a short and a long word conveying the same meaning, use the former. But when a longer word is clearer and more exact, by all means, use it.

**2. Be accurate in the choice of words.**

3. State the points to be emphasized in concrete and specific terms. The minds of the readers respond more readily to the specific, the tangible, and the concrete. Conversely, the use of abstract terms serve to de-emphasize a point. A hungry man is not interested in an academic discussion like nutrition or nourishment; uppermost in his mind are sizzling steak, crispy *pata* or hamburger.
4. There are various ways of emphasizing a word or group of words:
  - a. Give more space to the more important, rather than the less important idea of a sentence.
  - b. Place the more important part in a prominent position, which is either the beginning or the end of the sentence. The latter kind of sentence is called the *period sentence*.
  - c. Transitive words shall not be placed at the beginning or end of a sentence, unless the sentence is very short.
  - d. The main thought in the sentence should be put in the main clause in order to be emphasized.
5. Do not use “while” in place of “although,” and do not use “since” in place of “because.”
  - a. Although he does not have all the answers, he does know the questions. (With “while,” the sentence can mean during the time he does not have the answers.)
  - b. Because he has talked with the lawyer, we have decided they are serious. (With “Since” instead of “Because,” the sentence can refer to time, *i.e.*, “Since the day he talked with the lawyer...”)

6. For emphasis, a writer may also use parallelism, which is the use of repetition of like words in the same order. Parallelism means like construction for like ideas. An example of parallelism is Julius Caesar's "I came, I saw, I conquered," instead of "After I arrived, I looked, and then I conquered." Parallelism may be formed with two or more words, phrases, dependent clauses, independent clauses or sentences.
7. For a vigorous style, use balance structures. Unlike using similar words as in parallelism, a balance structure uses words which are roughly of the same length and which sound rhythmical to the reader's ear. Rhythmic pattern within sentences increases readability. The Bible uses abundantly the device of balance structure. Another way of attaining a rhythmic flow or sequence of sound is the use of an alternation of stressed and unstressed syllables.

To determine the subject, predicate, and object of a sentence, ask yourself the question: "Who is doing what to whom?" Then focus on these three key elements: the actor (who), the action (doing what), and the object (to whom).

Avoid "wordy" sentences. There are words that can be deleted from the sentence, although not redundant, without changing the thought conveyed, thereby making the sentence crispier and clearer. See to it that the proportion of "glue" words to "working" words is not too high.

8. Be consistent in using the same word for the same idea. Once you used a word in writing, do not use its synonyms in the subsequent portions thereof, for the reader will be wondering if you are changing the sense of what you have said before.

Use short sentences to emphasize a point. A short sentence is easier to read and makes a stronger statement. However, do not use such emphatic sentences in a row, which could cause an impression of an impatient, angry tone. Also, do not use choppy sentences which read like telegrams.

### ***B. Phrases and Clauses***

1. Modifying adjectives, adverbs, phrases, and clauses should be placed close to what they are talking about, and the relationship between these words and their antecedents should be clear and logical. Otherwise, you will have dangling modifiers.

*Wrong:*

Lying in the sun, the day was clear.

*Correct:*

Lying in the sun, I enjoyed the clear day.

Do not use a conjunction followed by a pronoun when linking a subordinate clause to a main clause. A conjunction can only be used when linking grammatical units of the same kind. A phrase cannot be joined to a clause.

2. Put your minor ideas in subordinate clauses or phrases and your main ideas in the main clauses or phrases.
3. Avoid mixing metaphors. Mixed metaphors result when the writer uses incongruous words in comparing objects.

*Wrong:*

The long arm of the law smelt the criminals in their hideout.

*Correct:*

The long arm of the law caught the criminals in their hideout.

### **C. Sentences**

- I. To write effective sentences involves matters such as unity, completeness, coordination, word order, and transition:
  - a. A sentence has unity when it contains a single thought or a group of closely-related words.
  - b. A sentence, to be complete, must have both a subject and a predicate.
  - c. Coordination is the placing of important thoughts in main clauses and minor ideas in subordinate clauses.
  - d. The usual word order of the elements of a sentence is: *first*, the subject; *second*, the predicate; and *third*, the object. Start the sentence with its subject. If the subject is placed at the end of the sentence, the reader will have to comprehend all the words that precede it before it appears. For emphasis, the elements of the sentence may be inverted with the predicate at the beginning and the subject at the end. This is the *periodic sentence*, where the full meaning is not initially apparent and appears only at the end. Therefore, the reader is kept in suspense. Keep the subject and the predicate closely together. The sense of the sentence cannot be understood unless the subject and the predicate are used as a unit.
  - e. Transition refers to the method by which writers bridge gaps in what has been covered once he reads them.

2. Express your thoughts in affirmative, not negative, sentences. The reader can understand affirmative sentences more quickly and easily than negative ones.
3. Avoid beginning or ending a sentence with weak and relatively unimportant words or ideas. This is where the attention of the reader is most keen. Reserve the beginning position for the more emphatic word. There are times when a transitional word like “and” or “but,” ordinarily weak words, have to be placed at the beginning of a sentence for emphasis.
4. Avoid the continuous use of only one kind of sentence structure. Intersperse long sentences among short sentences, compound sentences among single sentences, sentences with modifiers at the end, the beginning, or in the middle.
5. Sentences should vary in length. Using several short sentences in succession or in a row can create an impression of an impatient, angry tone. Using only short sentences makes the writing monotonous.
6. Avoid run-on sentences which do not stop.
7. End your sentences swiftly and effectively.

# Plain English\*

*Dr. James C. Raymond, PhD\*\**

I.	INTRODUCTION .....	154
II.	VISIBLE ELEMENTS OF STYLE .....	158
	A. <i>Avoid legalese and foreign languages.</i>	
	B. <i>Substitute ordinary English for lawyerly English.</i>	
	C. <i>Call parties by name rather than by their positions         in court.</i>	
	D. <i>Avoid parenthetical aliases.</i>	
	E. <i>Use as few words as possible.</i>	
	F. <i>Avoid the verb “to be” when it can be replaced         by a more specific verb.</i>	
	G. <i>Avoid “it” and “there” as dummy subjects.</i>	

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\*\* Dr. James C. Raymond, PhD, has been teaching legal writing to judges and lawyers from North America to Australasia for more than twenty (20) years. He has conducted a series of lectures and seminars upon the request of Supreme Courts, legal and judicial organizations, and educational bodies. His books on legal writing include *Clear Understandings: A Guide to Legal Writing, Moves Writers Make, English as a Discipline, Literacy as a Human Problem, and Writing (Is An Unnatural Act)*. He has also written articles for the *Pepperdine Law Review, Alabama Law Review, and The Judicial Review: Journal of the Judicial Commission of New South Wales*, as well as the preface to *Decisions: A Practical Handbook for Judicial Writing*.

- H. *Avoid passive voice.*
  - I. *Avoid using words with overlapping meaning in the same sentence.*
  - J. *If it goes without saying, let it go unsaid.*
  - K. *Avoid block quotations.*
  - L. *Avoid quoting the charge (unless the language of the charge is at stake).*
  - M. *Don't put dates, times, or places in the judgment just because they happen to be in the record.*
  - N. *Write short sentences?*
  - O. *Avoid faulty parallelism.*
  - P. *Avoid redundant doublets and triplets.*
- III. INVISIBLE ELEMENTS OF STYLE ..... 173
- A. *Don't use commas unless you need them.*
  - B. *Put a pair of commas around clauses beginning with "which."*
  - C. *Don't confuse "which" with "that."*
  - D. *Don't put ellipsis dots at the beginning of quoted material.*
  - E. *Avoid misplaced modifiers.*
  - F. *Make sure subjects and verbs agree.*
  - G. *Make sure the verb agrees with the subject, even if it links a plural noun with a singular noun.*
  - H. *Make sure objects are in the objective case.*
  - I. *Use possessives before gerunds.*
  - J. *Don't split infinitives.*
  - K. *Don't end sentences with prepositions*
- IV. TESTING FOR PLAIN ENGLISH ..... 183

## I. INTRODUCTION

From a pragmatic perspective, writing is good if it conveys what the writer wants it to convey to the readers that he/she wants to reach. This is obviously a relative standard. Technical jargon is good if its intended readers know the jargon so well that they hardly notice it. Scientists and engineers are entitled to write to other scientists and engineers in ways that only they can understand. Of course, the rest of us are grateful when they write in ways that we find interesting and easy to read. But there is no reason to hold specialists to this standard when they write for other specialists.

Why then do we complain when lawyers write about the law in a language that excludes non-lawyers?

Because law is rarely an exclusive preserve of experts the way science and technology are. Non-lawyers are expected to understand and abide by the law. Most people can get by without understanding physics or microbiology or cybernetics. But law touches other people's lives more directly than other disciplines, and ordinary people are understandably annoyed when lawyers write to them or about them in a language that only other lawyers can understand.

There is another good reason for lawyers to write in plain English: it enables them to understand one another. In fact, sometimes it enables them to understand themselves.

One of the great myths of the legal profession is that the language of the law is precise and scientific, hallowed and refined by centuries of precedent, as clear to lawyers as scientific and mathematical symbols are to scientists and mathematicians. Nothing could be farther from the truth. Ask a lawyer whether

there is a significant difference between “Will” and “Testament.” Not one in ten can tell you; but they will insist on using both words for fear that something might go wrong if they don’t.

Legal language is not clear if no one understands it. Yet lawyers repeat it, like magical incantations passed from one generation of a secret society to the next, quarantined from the evolution that makes ordinary language intelligible to people who use it.

I sometimes test the notion that legal language is intelligible to lawyers by projecting the following passage onto a screen:

The government’s concern lest the Act be held to be a regulation of production or consumption rather than of marketing is attributable to a few *dicta* and decisions of this court which might be understood to lay it down that activities such as “production,” “manufacturing,” and “mining” are strictly “local” and, except in special circumstances which are not present here, cannot be regulated under the commerce power because their effects upon interstate commerce are, as a matter of law, only indirect.

At first, any roomful of lawyers will claim that the passage is perfectly clear. But then I remove it from the screen and ask, “OK, is the government concerned that the court is going to do something or concerned that the court is *not* going to do something?” Invariably there is no consensus among the group, often no response at all.

Notice that aside from the word “dicta,” there is no technical language to blame for the obscurity. If we changed *dicta* (short for *obiter dicta*) to “asides” or “digressions,” the passage would not be materially improved. The problem with legal language,

then, is not just that it is laden with legalisms and Latin. The problem is that many lawyers get themselves tangled in syntax so knotty that they cannot understand it themselves.

The proof that lawyers *could* write about the law in plain English with precision is that some of them do. Good models abound. I don't mean just lawyers-turned-novelists, like Turow and Grisham. I mean lawyers who write lucidly about the law: Jeffrey Rosen in the *New Republic* and occasionally in *The New Yorker*; Linda Greenhouse in *The New York Times*. Every year lawyers publish books that are perfectly intelligible and even interesting to non-lawyers. Good examples include *Actual Innocence* (by Barry Scheck, Peter Neufeld, and Jim Dwyer); *The TV or Not TV: Television, Justice, and the Courts* (Ronald L. Goldfarb); *One Case at a Time* (Cass Sunstein); *Closed Chambers* (Edward Lazarus); *A Civil Action* (Jonathan Harr); *The Buffalo Creek Disaster* (Gerald M. Stern); and *Getting Away with Murder: The Canadian Criminal Justice System* (David M. Paciocco). *Law and Literature* (Richard A. Posner) is more scholarly in style, but light years ahead of most academic writing in clarity.

And Nina Totenberg of NPR. We may think of Totenberg as a newscaster rather than a writer, but her reports on the U.S. Supreme Court are invariably models of precision and clarity. Nothing in the nature of the law prevents lawyers and judges from communicating with the public in the same way.

Good legal writing is characterized partly by absences: an absence of unnecessary repetition, an absence of irrelevant detail, and an absence of tangled sentence structure. In good writing, every word counts. Remove one and you miss it, just as you would miss a piece left out of a jigsaw puzzle. If you are an experienced reader of legal arguments, you know how tedious they can be,

not because the concepts are difficult, but because they have been obscured by verbiage that serves no purpose.

Good legal writing is also characterized by an absence of unnecessary jargon. Of course, every profession has its special language. Even non-lawyers have to accept expressions like “estoppel,” *habeas corpus*, and arguable *decree nisi*, if there are no handy equivalents in ordinary English. But there is no excuse for phrases like *inter alia* when there are handy English equivalents (“among other things”). And while it may be understandable that lawyers would speak to one another of filing a *pro hac* petition, *nunc pro tunc*, they should probably tell their clients that they are seeking permission, retroactively, to practice in a jurisdiction other than their own.

Nor is there any reason for lawyers to use ordinary words (“such,” “same,” “said”) in ways that ordinary people do not use them. In his “A Primer of Opinion Writing for Four New Judges,” George Rose Smith of the Arkansas Supreme Court tells new judges to test for legalisms by imagining how a phrase would sound if in ordinary conversation. You would never say, “I have mislaid my keys, dear, have you seen same?” You would never say, “Sharon Kay stubbed her toe. Such toe is mending now.” You would never say, “May I have another slice of pie? Said pie is the best you ever made.” Nor would you say, “Let me tell you something funny about our dog, hereinafter called Mo.” This sort of mumbo jumbo may impress the uneducated, but it makes lawyers the laughing stock of literate society.

To be fair, lawyers have the good grace to laugh at themselves. Hardly a year goes by without someone sending Christmas greetings that parody the worst habits of the profession. One year it was a card that began, “From us (‘the wishor’) to you (hereinafter called ‘the wishee’).” Another year it was a well known

Christmas tale that began, “Whereas, on or about the night before the Holiday of which one can take judicial notice is commonly called Christmas.”

To write parodies like these, someone, presumably a lawyer, has to say, “How can I modify perfectly lucid language to make it sound as though a lawyer wrote it?”

The cure for legalese is to reverse this process. Rules for plain English may heighten your awareness, but the main thing is attitude and determination. If you want to sound like an ordinary person instead of like a lawyer, ask yourself at every turn, “How would I say this if I were speaking to my next door neighbor or to my mother-in-law?” – assuming, of course, that your next door neighbor and your mother-in-law are not lawyers.

## II. VISIBLE ELEMENTS OF STYLE

The rules below will help you identify legalisms and locate situations in which you could tighten up your flabby prose. Follow these rules and your prose will be visibly improved.

### ***A. Avoid legalese and foreign languages.***

Legal writing has a few legitimate terms of art – words or phrases that either cannot be easily translated or perhaps *should* not be translated because the original language triggers a doctrine that lawyers might not recognize by any other name (e.g., *habeas corpus*, *estoppel*). Aside from exceptions like these, however, the law works best even for lawyers when non-lawyers can make sense of it.

#### ***INSTEAD OF THIS:***

Hotstuff has to establish (*inter alia*) that the peppers were delivered to the right place and at the right time.

***DO THIS:***

Hotstuff has to establish, among other things, that the peppers were delivered to the right place and at the right time.

***B. Substitute ordinary English for lawyerly English.******INSTEAD OF THIS:***

He confessed prior to being advised of his rights.

Mr. Noto signed the contract. Said contract specified a price and a schedule of payments.

***DO THIS:***

He confessed before he was advised of his rights.

Mr. Noto signed the contract that specified a price and a schedule of payments.

***C. Call parties by name rather than by their positions in court.***

Calling parties by positions often requires readers to skip back and forth between the text and the cover sheet (“style of cause” in some jurisdictions).

***INSTEAD OF THIS:***

Respondent and two other shareholders set up Lakeside Realty in 1978.

***DO THIS:***

John McIntyre and two other shareholders set up Lakeside Realty in 1978.

***INSTEAD OF THIS:***

Plaintiff claims that Defendant had failed to provide payment for sixteen carloads of chile peppers delivered over a six week period.

***DO THIS:***

Hotstuff claims that Kiwimart had failed to provide payment for sixteen carloads of chile peppers delivered over a six week period.

Referring to people by their proper names can help avoid confusion on appeal, particularly when the position of the litigants has changed from moving party to responding party. Sometimes, of course, it is impossible to call parties by individual names, particularly when there are multiple plaintiffs or multiple defendants. Then you have no choice but to resort to their positions in court or to group them under some other appropriate heading (e.g., “the survivors,” or “the victims,” or “the Joneses”).

Practice varies regarding subsequent references to persons named in the opening paragraphs. Should you call them by their first names only – which some litigants might regard as excessively familiar? Or by last names only, which some litigants might regard as unmannerly?

Some lawyers think that by calling opposing parties by their positions before the law (e.g., “applicant” or “defendant”), they mask the humanity of opposing parties and make them less sympathetic in the judge’s eyes. Most judges, however, having practiced law themselves, are likely to see that ploy for what it is.

Certainly the most polite option is to refer to litigants with their ordinary titles, (e.g., Mr., Miss, Ms., Lieut., Rev., etc.). This is standard editorial practice in *The New York Times*, even when

dealing with the most heinous criminal. Oddly enough, treating opposing litigants with this semblance of respect may be paradoxically persuasive. If you call someone *Mr. Capone*, and then calmly explain the irregularities in his tax returns, or *Mr. Bin Laden*, and then present compelling evidence of his complicity in terrorism, you seem to be above politics, passion, and personal vendetta. You seem to be a servant of the law, serenely objective, rather than a crusader whose reason may be clouded by emotion.

Using conventional titles for all parties, particularly when there is a legitimate argument at issue, endows judgments and pleadings with a kind of magisterial dignity and mitigates the losing party's embarrassment. And when the losing or opposing party is patently undeserving of respect, there is little danger that a proper title will convey it; if anything, the subtle irony of unmerited deference is persuasive in itself.

***INSTEAD OF THIS:***

Hemphill responded that McIntyre should either invest more capital or personally guarantee a loan.

***CONSIDER THIS:***

Mr. Hemphill responded that Mr. McIntyre should either invest more capital or personally guarantee a loan.

Subsequent references to parties in family law are particularly difficult to manage. If the parties are divorced, they may object to being called "the husband" and "the wife," or "Mr. Jones and Mrs. Jones" (though in this situation, the modern Ms. Jones serves a useful purpose because it implies nothing about marital status). In custody disputes, it is often possible to refer to the parties as "the mother" and "the father." Depending upon the culture and on the parties, first names might seem friendly or inappropriately

chummy. It's all a matter of perception. All you can do is consider the options and choose the one that best suits the circumstances.

Whatever you choose, be consistent. Give everyone proper titles, or call everyone by last names alone, or call them by their positions in court; but do not switch from one convention to another just for the sake of variety.

***D. Avoid parenthetical aliases.***

***INSTEAD OF THIS:***

Hotstuff Chile Pepper, Ltd. (hereinafter called “Hotstuff”) seeks judgment for breach of a contract. Hotstuff had agreed to...(18 words)

***DO THIS:***

Hotstuff Chile Pepper, Ltd. (“Hotstuff”) seeks judgment for breach of a contract. Hotstuff had agreed to...(16 words)

***OR BETTER YET, THIS:***

Hotstuff Chile Pepper, Ltd. seeks judgment for breach of a contract. Hotstuff had agreed to...(15 words)

Sometimes the identity of parties can be easily inferred from the facts. For example, there is no need to waste sentences identifying a father and mother if this information can be easily conveyed in telling the story.

***INSTEAD OF THIS:***

The applicant is John Smith (hereinafter called “the father”). The respondent is Cheryl Ellis (hereinafter called “the mother”).

***DO THIS:***

John Smith and Cheryl Ellis have been trying for years to agree on contact rights that would be satisfactory to themselves and to their three daughters.

***E. Use as few words as possible.******INSTEAD OF THIS:***

He underwent three evidential breath tests by means of an evidential breath-testing device.

It is also necessary to make clear that Officer Rigby accepted that there was no reason to stop the defendant in the first place.

McFarland made the acquisition of three buildings.

***DO THIS:***

He took three breath tests.

Officer Rigby admitted there was no reason to stop the defendant in the first place.

McFarland acquired three buildings.

***F. Avoid the verb “to be” when it can be replaced by a more specific verb.***

To apply this rule, you should memorize all the forms of the verb “to be”— which is the most irregular verb in English. It has eight basic forms:

**am, are, is**

**was, were**

**be, being, been**

This verb has legitimate uses, of course, but your writing will be more forceful and more economical if you replace it with a more specific verb lurking elsewhere in the sentence, disguised as an adjective or an abstract noun.

***INSTEAD OF THIS:***

Boeing's contention is that those shares are worth \$100 million.

Mr. Bledsoe has been resistant to the advice of her counsel.

The argument advanced by Stevens was that. . .

***DO THIS:***

Boeing contends that those shares are worth \$100 million.

Mr. Bledsoe has resisted the advice of her counsel.

Stevens argued that. . .

***G. Avoid "it" and "there" as dummy subjects.***

"It" and "there" are considered dummy subjects ("It was" or "There were") where they stand in for words that might be the real subjects of the sentence. Like the verb "to be," dummy subjects have their legitimate uses. Sometimes, however, they can be replaced by a real subject and a stronger verb.

***INSTEAD OF THIS:***

It was submitted by counsel for the plaintiff that the extension was not qualified by the proviso.

***DO THIS:***

Plaintiff's counsel submitted that the extension was not qualified by the proviso.

**H. Avoid passive voice.**

In passive voice, the grammatical subject receives the action (e.g., “John was kissed by Mary”), as opposed to the active voice, in which the grammatical subject performs the action (e.g., “Mary kissed John”). The passive voice has legitimate uses, but lawyers tend to lapse into it unnecessarily when active voice would be more direct and economical. Active voice is always more economical and forceful.

***INSTEAD OF THIS:***

No other evidence was called by the Defendants to give support to the allegations.

***DO THIS:***

Defendants called no other evidence to support the allegations.

**I. Avoid using words with overlapping meaning in the same sentence.*****INSTEAD OF THIS:***

On appeal, appellant argues that...

The building was round and circular in shape.

***DO THIS:***

Appellant argues that...

The building was round.

**J. If it goes without saying, let it go unsaid.*****INSTEAD OF THIS:***

The parties agreed that this appeal comes before the High Court pursuant to §26 of the Taxation Review

Authorities Act 1994 and Part XI of the High Court Rules.

***DO THIS:***

(Just leave it out.)

If the parties had *not* agreed to this, it would have been raised as an issue. Because it has not been raised as an issue, it belongs among hundreds of other conceivable issues that might have been concocted from the facts – none of which need mentioning.

***INSTEAD OF THIS:***

A special meeting was called and held to reconsider the resolution.

***DO THIS:***

A special meeting was held to reconsider the resolution.

Ordinarily, readers will presume that if a meeting has been held, it must have been called. Only the exception to this presumption – an uncalled meeting, a surprise meeting, a secret meeting – would have to be signaled.

***INSTEAD OF THIS:***

Mr. Justice LeDain, for the majority, considered the issue of when the relevant provision took effect as well as how the effect of the words was to be characterized. LeDain J. held that the phrase “whether or not he believes that she is fourteen years of age or more” defined one of the constituent elements of the offence, the *mens rea*, at the time of the offence, not at the time of the trial.

***DO THIS:***

LeDain J. held that the phrase “whether or not he believes that she is fourteen years of age or more” defined one of the constituent elements of the offence, the *mens rea*, at the time of the offence, not at the time of the trial.

If Mr. Justice LeDain held that the phrase was relevant, it would be safe to assume that he gave the issue some thought.

***K. Avoid block quotations.***

As readers, most judges and lawyers skip over block quotations, hoping to glean their essence from what precedes or follows. As writers, however, they seem to imagine that their readers will be more patient than themselves, carefully examining what they themselves would skip, searching for a nugget of authority buried within a mound of dross.

The best way to avoid this problem is to trust your ability to paraphrase. You, after all, have done the hard work. You have read and deciphered the authority, and you have reached a conclusion about its relevance to the issue at hand. Why make your reader repeat that task? Just say what the passage means, in your own words, instead of pasting the original passage in a form the reader is sure to skip.

If you trust your ability to paraphrase – and if you think your reader trusts your ability – you need not quote. On the other hand, if you would like to provide your readers with the original text for their convenience, just in case they might like to check your paraphrase, then go ahead and quote it. But *precede* the quoted material with your own paraphrase. The paraphrase will assist your readers in deciphering what may be difficult language, like Lord Diplock’s in the passage below; and it will

ensure that readers who are inclined to skip the quoted material will not miss the inference that you want them to draw from it.

***INSTEAD OF THIS:***

All the authorities confirm the fundamental doctrine stated by Diplock LJ in Freeman & Lockyer (A Firm) v. Buckhurst Park Properties (Mangal) Limited [1964] 2 QB 480 at 503 in these terms:

An “apparent” or “ostensible” authority...is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the (“apparent”) authority so as to render the principal liable to perform any obligations imposed upon him by such contracts. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation, but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

***DO THIS:***

Normally, a company is not bound by contracts entered upon by agents who have no authority to do so. However, if someone represents himself or herself as an agent of a company with authority to sign contracts for that company, and if the company does anything that would give the impression that the employee did in fact have

that authority, the company may be considered bound by those contracts. (See Diplock LJ in Freeman & Lockyer (A Firm) v. Buckhurst Park Properties (Mangal) Limited [1964] 2 QB 480 at 503.)

If your pleading or judgment includes paraphrases of more than a few pages, consider attaching the original passages in an appendix instead of in the main text. If your jurisdiction allows you to file pleadings electronically, you might also use hyperlinks to lead readers from the citation to the full text and back again.

***L. Avoid quoting the charge (unless the language of the charge is at stake).***

The language of official charges or complaints is often clumsy and antique. Normally there is no need to quote it, least of all at the beginning of a judgment or pleading, where a short paraphrase is all the reader needs. If you say that “John Jones has been charged with grand larceny,” or that “Mary Callahan is suing her employer for hazardous conditions at work,” you need not quote the charge verbatim. Save the exact language for the body of the argument if it is necessary to prove a point.

***INSTEAD OF THIS:***

Erick Causewell is charged with two offences under the Road Traffic Ordinance 1960 (hereafter referred to as “the Ordinance”). Firstly, that at Eggerston on 8th May 1998 being the driver of a private car number I3646, negligently drove that motor vehicle on Vaitele Street and did thereby cause death to Kristi Posoli, contrary to s.39A of the Ordinance. Secondly, that on the same day and place, when driving the said vehicle, he was under the influence of drink to such extent that he was incapable

of having proper control of the said vehicle, (hereafter referred to as the “drink and drive charge”) contrary to s.40(1) of the Ordinance.

***DO THIS:***

Erick Causewell is charged with negligent driving causing death and with driving under the influence of alcohol.

The extra detail in the charge may be necessary in the discussion of a particular issue, especially if the charge is defective or the meaning of the language is at issue. But it is rarely necessary in an opening paragraph. There all a reader needs is a generic description of who did what to whom – just enough detail to provide a context in which the issues will make sense.

***M. Don't put dates, times, or places in the judgment just because they happen to be in the record.***

On 21 January 1998, the wife commenced proceedings under the Matrimonial Property Act in the Family Court at Auckland. Various conferences and orders followed and on 26 February 1999, the Court directed that the matrimonial property application be set down for a two-day hearing.

Specifics like these burden the reader for no purpose. Better not to put them in unless they affect the resolution of the case.

***INSTEAD OF THIS:***

The defendant was driving his private car – a two-door sedan registered number I3646.

***DO THIS:***

The defendant was driving his car.

Unless there is some question of identity to be settled by the registration number, or some reason to distinguish a private car from some other sort of car, these details should be omitted. Details of this sort distract readers, who think for a moment that they must be significant, or else they would not be there.

The court reporter's job is to reproduce the record. The job of the attorney and the judge is to *interpret* the record. By the time you write the facts, you should have drawn some inference from them. It is a mistake to deploy the evidence as if you were a secretary recording minutes – a blow by blow summary of what one side said followed by what the other side said.

Your disposition of the facts, then, should be designed to lead the reader to the same inference. In practical terms, this requires distinguishing between essential facts – facts that support the inference you consider important – and everything else in the record.

#### ***N. Write short sentences?***

I put a question mark after this rule, because some of the finest sentences in law and literature are long ones. A more accurate rule would be, “If you don't know how to write a good long sentence, stick to short ones.”

The problem with many legal sentences is not their length, but their tangled syntax – clauses and phrases jumbled like a spilled box of toothpicks. The obvious solution is to break long sentences into two or three short ones. It also helps to look for suppressed narratives in long sentences. If the sentence contains two or three events, try putting the events in short sentences arranged chronologically.

***INSTEAD OF THIS:***

The government's concern, lest the Act be held to be a regulation of production or consumption rather than of marketing, is attributable to a few *dicta* and decisions of this court which might be understood to lay it down that activities such as "production," "manufacturing," and "mining" are strictly "local" and, except in special circumstances which are not present here, cannot be regulated under the commerce power because their effects upon interstate commerce are, as a matter of law, only indirect.

***DO THIS:***

In the past, this court has held that production, manufacturing, and mining are local activities, which are normally not subject to the commerce power. Now the government is concerned that we will exempt marketing from federal regulation, on the theory that it is a local activity with only indirect effects on interstate commerce.

***O. Avoid faulty parallelism.***

When you write a series of any kind, make sure the elements in the series are parallel in form and content.

***INSTEAD OF THIS:***

None of these cases involved patients who were terminally ill, a process hidden from the public, involving secrecy, lies, the destruction of evidence or the treating physician acting alone.

***DO THIS:***

None of these cases involved patients who were terminally ill. None of them involved secrecy, lies, a decision process hidden from the public, or the destruction of evidence. None of them involved a physician acting alone.

***P. Avoid redundant doublets and triplets.***

Some conventional doublets and triplets (e.g., “Will and Testament,” “give, bequeath, and devise”) can be traced to historical periods when English law was an unstable mixture of Old French, Latin, and Anglo-Saxon. Lawyers back then were careful to cover all bases. In modern usage, if the second and third words are intended to signal a distinction, that distinction is likely to have been lost in the annals of history.

***INSTEAD OF THIS:***

null and void

ordered, adjudged, and decreed

changed or altered

rest, residue, or remainder

***DO THIS:***

void

ordered

(choose one)

(choose one)

**III. INVISIBLE ELEMENTS OF STYLE**

Punctuation and grammar are invisible elements of style. People will never congratulate you for correct grammar, any more than they would recommend a book for its flawless punctuation. But make a mistake, even a trivial one, and the damage to your credibility can be completely out of proportion to the error.

In some cases, punctuation and grammar are more than cosmetic flaws. The rules, which are not nearly as absolute as one

might imagine, are often invoked to determine the precise meaning of a clause in a contract, a statute, or a precedent – the presumption being that the judge or lawyer or legislator actually knew the rules. Sometimes millions of dollars hang in the balance. Sometimes, in fact, it is a matter of life and death.

Rule books about punctuation and grammar are too numerous to mention. Some are more comprehensive than others, some are easier to use than others, but they all agree about the essentials. The important thing is to choose one or two favorites and keep them close at hand when you write.

One frequently overlooked source is somewhat misleadingly called, “A Handbook of Style,” which you can find at the back of every *Webster’s Collegiate Dictionary*. It does not have a thumb tab, so you have to check the Table of Contents at the front of the dictionary to find it. Once you do, glance at it quickly just to get a sense of what it covers. Then, when you have a punctuation question, you will know where you can find an answer.

The *American Heritage Dictionary* has no comparable guide to punctuation, but it does offer more explicit guidance in matters of usage. If you worry about whether *data* should be singular or plural, for example, or when you should use *between* as opposed to *among*, this dictionary will let you know what its usage panel prefers. A usage panel is no more scientific than a focus group, but you might find its opinion worth considering when you have no strong opinion of your own. Even more useful in these matters, however, is *A Dictionary of Modern American Usage*, now available in a much improved edition by Bryan Garner, who is also the editor of the current edition of the indispensable *Black’s Law Dictionary*.

In addition, every court system, law review, legal reporter, publishing house, or newspaper may have its own set of rules or

its preferred rulebook. Consult these when you write for publication.

There is no point repeating here the rules you already know: begin every sentence with a capital letter, end it with a period or question mark (you won't find many exclamation points in legal writing), put quotation marks around quoted material. Everybody knows these things. The rules below are intended to cover just those situations that seem to be common problems for lawyers and judges.

**A. *Don't use commas unless you need them.***

This rule presumes that you know where you *do* need commas. Ordinarily, commas are used in three situations:

1. To set off clauses or phrases tucked within a sentence.

Justice O'Connor, in a passionate dissent, reviewed the history of *habeas corpus*.

The defendant, who had twice escaped custody, was escorted into the court with chains on his hands and feet.

2. To set off clauses and phrases at the beginning or the end of a sentence.

In a passionate dissent, Justice O'Connor reviewed the history of *habeas corpus*.

When the defendant entered the courtroom, the jurors were startled to hear a chain rattling between his feet.

At the date of separation no formal appraisal was available, although the parties had some rough estimates.

3. To separate independent clauses joined by *and*, *or*, *but*, *for*.

The accident occurred in California, but the suit was filed in Oklahoma.

The defendant rose slowly from his chair, and the foreman intoned the verdict in a tone reeking of self-satisfaction.

Competent editors disagree about whether you should put a comma before *and* or *or* joining the last two elements in a series of three or more.

The judgment was verbose, obscure, and just plain wrong.

The judgment was verbose, obscure, and just plain wrong.

I prefer the comma in this situation because it seems more “normal” to me – that is, I see it more often than not in what I read. Both versions are defensible; it is a matter of personal preference. But be consistent: don’t switch randomly from one convention to the other.

***B. Put a pair of commas around clauses beginning with “which.”***

The appraisal, which was filed at this hearing, indicated a value of \$13,000.

One comma is enough if the *which* clause occurs at the end of a sentence.

The wife signed the agreement, which was then signed by the husband.

**C. Don't confuse "which" with "that."**

When you *cannot* put a comma before a *which*, you probably should have written "*that*."

The agreement satisfied all claims, which either party might have against the other under the Matrimonial Property Act. (WRONG)

*Which* is normally used to insert non-essential information into a sentence. This is why *which* clauses are normally set off by parenthetical commas. But because the final clause in the example provides *essential* information, the comma should be omitted and the *which* changed to *that*.

The agreement satisfied all claims that either party might have against the other under the Matrimonial Property Act. (RIGHT)

This may stike you as an obscure and pedantic rule, but in some circumstances it affects the meaning of a sentence. Notice the difference between the following two examples.

The appraisal, which was filed at this hearing, indicated a value of \$13,000.

The appraisal that was filed at this hearing indicated a value of \$13,000.

The first version implies that there was only one appraisal. The second suggests that there may have been others.

**D. Don't put ellipsis dots at the beginning of quoted material.**

According to the police officer's report, the defendant's jeep "...would have been travelling at least 80kph." (WRONG)

The ellipsis dots are unnecessary because the initial lower case *w* in “*would*” indicates that words have been omitted at the beginning of the quoted sentence.

According to the police officer’s report, the defendant’s jeep “would have been travelling at least 80kph.”  
(RIGHT)

### ***E. Avoid misplaced modifiers.***

A modifier is misplaced if it seems to describe the wrong word.

The Constable, based on previous experience with the defendant, felt it best to contain him in the vehicle.  
(WRONG)

Based on the foregoing testimony I find that the defendant intentionally concealed the marijuana. (WRONG)

These sentences suggest that the constable and the judge were themselves somehow biased on what they observed.

### ***F. Make sure subjects and verbs agree.***

The limits of police powers to stop a vehicle on a road are not entirely clear and has been debated for some time.  
(WRONG)

The subject of “has been” in this example is “limits.” Every competent speaker of English knows that “limits has been” is wrong, but writers sometimes get confused when the subject and the verb are separated, as they are in this case, by intervening words.

The limits of police powers to stop a vehicle on a road are not entirely clear and have been debated for some time. (RIGHT)

**G. Make sure the verb agrees with the subject, even if it links a plural noun with a singular noun.**

Defenses based on sovereign immunity has become a vexed question. (WRONG)

Defenses based on sovereign immunity have become a vexed question. (RIGHT)

If the correct version seems awkward to you, rephrase the sentence entirely.

The courts have given mixed signals regarding sovereign immunity.

**H. Make sure objects are in the objective case.**

The Master asked my learned opponent and I to submit additional evidence. (WRONG)

Between you and I, there are no significant issues in this case. (WRONG)

Linguists call this error “hypercorrectness”: trying too hard to get it right – a result, no doubt, of the unfortunate writer’s having been corrected by schoolmarm and schoolmaster for saying things like “Mickey and me went to the movies.”

The error normally occurs when there are words between the verb or preposition and first person pronoun (I/me). The solution is to remove the intervening words and trust your ear. You wouldn’t say, “The Master asked I to submit additional evidence.” Nor would you say, “Between I and you” in any context. So don’t let the intervening words confuse you about the correct form of the pronoun.

The Master asked my learned opponent and *me* to submit additional evidence. (RIGHT)

Between you and *me*, there are no significant issues in this case. (RIGHT)

### ***I. Use possessives before gerunds.***

A gerund is the “-ing” form of a verb used as a noun. (It is not to be confused with a present participle, which is the “-ing” form of a verb used as an adjective or part of a compound verb.)

This agreement was conditional upon the plaintiff securing suitable premises in the North Mall in Ulster Street Hamilton. (WRONG)

Constable Brew remained on the property despite the defendant telling him to leave. (WRONG)

Officer Noble, almost as an afterthought, mentioned that he felt the defendant’s driving warranted him being stopped and spoken to.” (WRONG)

This is a rule few people understand; but those who do will take notice if you get it wrong. Notice that in the last example, the writer gets it right at first (“the defendant’s driving”), but then errs at the end (“him being stopped”).

This agreement was conditional upon the *plaintiff’s* securing suitable premises in the North Mall in Ulster Street Hamilton. (RIGHT)

Constable Brew remained on the property despite the *defendant’s* telling him to leave. (RIGHT)

Officer Noble, almost as an afterthought, mentioned that he felt the defendant’s driving warranted *his* being stopped and spoken to.” (RIGHT)

If the correct version sounds awkward, rephrase the sentence entirely.

Constable Brew remained on the property even though the defendant had told him to leave.

***J. Don't split infinitives.***

An infinitive is the form of a verb preceded by “to” (e.g., “to file,” “to argue,” “to grant,” “to deny,” etc.).

Was there a lawful basis to initially search the defendant's apartment? (WRONG)

This is a silly rule, but it has been around for so many centuries that people are accustomed to seeing it observed. It is based on a faulty analogy with Latin, in which infinitives consist of one word instead of two, and are therefore impossible to split. If you can avoid splitting an infinitive, you should do so rather than risk distracting those few readers who would care.

Was there a lawful basis to search the defendant's apartment initially? (RIGHT)

When the correct version strikes you as awkward, rephrase the sentence. Sometimes, however, you may choose to defy convention and split an infinitive just because you prefer it that way.

***K. Don't end sentences with prepositions.***

Prepositions are words that show relationships, including relationships in time, space, or agency (e.g., “by,” “for,” “with,” “before,” “on,” “upon,” etc.).

The rule against ending sentences with prepositions is also based on a faulty analogy with Latin, and it occasionally does violence to the natural idiom of English. In Latin and in languages derived from Latin, prepositions are a group of words that just

don't make any sense unless they have a noun after them. That's why these words are called "pre-positions." They *must* have another word after them. You can't imagine a sentence ending with *cum* in Latin any more than you could imagine one ending with *avec* in French or *con* in Spanish.

But English is different from these other languages. It is basically a Germanic language, and in Germanic languages, words that sometimes behave like prepositions *can*, in fact, occur at the end of a sentence, as illustrated in the following example, which occurred in the highly respected *New York Times Book Review*:

One is Heidi Franklin, an art historian whom he observes to be as homely as himself and whom he resolves to later hit upon.

Even though it makes no sense to subject English to the rules of foreign languages, the notion that we *should* imitate Latin in this matter has been with us for so long (since the eighteenth century) that many people accept **it as sacred**. Violating this rule, then, is likely to distract people who happen to know it.

At times, though, following the rule is more awkward than violating it. Robert Stone, the author of the example above, *could* have written the following sentence instead:

One is Heidi Franklin, an art historian whom he observes to be as homely as himself and upon whom he resolves to later hit.

That's a bit stilted and antique. Stone was right to follow the natural inclinations of the English language and ignore the artificial rule.

You may have noticed that Stone also splits an infinitive: “to later hit.” So to be perfectly “correct,” he should have written this sentence:

One is Heidi Franklin, an art historian whom he observes to be as homely as himself and upon whom he resolves to hit later.

If you read this sentence aloud, you will probably agree that the rules were broken with good reason. Still, it is good to know the rules, so you can observe or break them by choice rather than by accident.

#### IV. TESTING FOR PLAIN ENGLISH

Give your best draft to a non-lawyer who knows nothing about the case, and ask that reader to circle any words or phrases that she or he has to read twice, along with any words or phrases that she or he does not understand. Translate these words or phrases to plain English if you can – unless they belong to the handful of exceptions that can be justified as terms of art. Do not defend yourself by saying, “Oh, lawyers would know what I mean.” That’s an excuse the best legal writers avoid. Law is not just for lawyers. And even within the law, legal documents routinely find their way to lawyers who may not be familiar with terms that seem ordinary to those who are working within a specific subspecialty.

Proofreading normally requires a second pair of eyes. Give your draft to someone who knows the rules. Give that person free reign with a blue pencil – the tool editors traditionally use to repair faulty punctuation and grammar, and to banish words that do not earn the space they occupy.

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- Garner, Bryan A. *A Dictionary of Modern American Usage*. New York: Oxford UP, 1998.
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- Wydick, Richard C. *Plain English for Lawyers*. 4<sup>th</sup> edition. Durham: Carolina Academic Press, 1998.

## Case Analysis and Legal Writing

*Commissioner Myrna S. Feliciano\**

To be of any use,  
the language of the law (like any other language),  
must not only express, but convey thought.

David Mallingby  
THE LANGUAGE OF THE LAW (1963)

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\* Commissioner Myrna S. Feliciano of the National Commission on the Role of Filipino Women (NCRFW) is also the Executive Director of the Supreme Court's Mandatory Continuing Legal Education (MCLE) Committee, the Chairperson of PHILJA's Department of Legal Method and Research, and Professor at the University of the Philippines (U.P.) College of Law. She was also former Director of the U.P. Institute of Judicial Administration. Indeed, she is well known in both legal and judicial circles. Aside from a law degree, she also holds a degree in Master of Library Science from the University of Washington, and another Master of Laws degree from Harvard University. She has been a Consultant to both governmental and non-governmental agencies, foremost among which are the Senate Policy and Studies Group of Congress, the Department of Foreign Affairs Sub-Committee on Legal Issues, the Committee on Legal and Political Issues of the National Preparatory Committee for the World Conference on Women, and to various projects on women and gender issues of the United Nations.

I. INTRODUCTION .....	188
II. BASIC CHARACTERISTICS OF JUDICIAL OPINIONS .....	190
A. <i>Judicial opinions reflect the principal activities of courts in the legal system.</i>	
B. <i>Unlike legislatures, courts must wait for litigants to present disputes to them for decision, and these disputes must be real ones.</i>	
C. <i>Except in limited circumstances, courts must decide cases within the scope of their subject-matter jurisdiction.</i>	
D. <i>The Philippine system of litigation is an adversary one, and judicial opinions necessarily reflect the parties' positions and arguments.</i>	
E. <i>Courts state the reasons for their decisions in their opinions.</i>	
F. <i>Judges state the facts of the case in their opinions.</i>	
G. <i>When legislation does not govern a dispute, courts will use the common law to resolve the matter.</i>	
H. <i>In their opinions, courts articulate general rules that cover a class of disputes or situations.</i>	
I. <i>Judicial decisions need not be unanimous.</i>	
J. <i>Judicial opinions vary in style, completeness, accuracy, and clarity.</i>	
III. BRIEFING A CASE .....	194
A. <i>Parties, Their Relationship, and How the Matter Reached This Court</i>	
B. <i>Legal Theories (Cause/s of Action and Defense)</i>	
C. <i>Facts</i>	
D. <i>Relief Requested</i>	
E. <i>Issues</i>	

F. <i>Holding/s and Disposition</i>	
G. <i>Reasoning</i>	
H. <i>Resulting Legal Rule/s</i>	
I. <i>Dictum</i>	
IV. ANALOGIZING AND SYNTHESIZING .....	197
A. <i>Steps in Applying Analogy</i>	
B. <i>Synthesizing</i>	
V. FORMULATING ARGUMENTS AND USING PERSUASIVE WRITING TECHNIQUES .....	200
A. <i>Types of Arguments</i>	
1. Logical	
2. Emotional	
3. Ethical	
B. <i>Basic Methods of Formulating Arguments</i>	
1. Standard Logical Technique	
a. Inductive Reasoning	
b. Deductive Reasoning	
c. <i>A Fortiori</i> Argument	
2. Handcuff Technique	
3. Emphasizing the Purpose of a Rule	
4. Paradigm Case	
5. Hypothetical Cases	
6. Extreme Consequences Technique	
7. Policy Arguments	
a. Lesser of Two Evils	
b. Floodgates Arguments	
i. Difficulty of Circumscribing the Area of Liability	
ii. Fraudulent Claims	
iii. Unlimited Liability	
iv. Burden on the Courts	

	c. Economic and Social Policy Arguments	
	i. Distribution of Costs	
	ii. Who Can Avoid the Costs Most Cheaply?	
	iii. Economic Efficiency	
VI.	CASE RESOLUTION .....	209
	A. <i>Findings of Facts</i>	
	B. <i>Factors to Consider in Burden of Proof</i>	
	C. <i>Weighing the Evidence</i>	
	D. <i>Statement of the Law</i>	
	E. <i>Dispositive Portion</i>	
VII.	RULES IN LEGAL WRITING .....	215
	A. <i>Use words in their literal sense.</i>	
	B. <i>Omit archaic legalisms.</i>	
	C. <i>Use the same words to refer to the same thing;         use different words to refer to different things.</i>	
	D. <i>Use simple, familiar words.</i>	
	E. <i>Use concrete rather than abstract words.</i>	
	F. <i>Use words that are consistent in tone.</i>	
	G. <i>Avoid equivocations.</i>	
	H. <i>Use unqualified nouns, adjectives and verbs.</i>	
	I. <i>Avoid jargon from other fields.</i>	
	J. <i>Watch out for redundancy in legal writing.</i>	
VIII.	CONCLUSION .....	222

## I. INTRODUCTION

The most basic function of lawyers is solving legal problems. The problems with which lawyers must deal are infinitely varied. Many of these problems are subsumed in a category requiring a reliable prediction of the probable consequences of a particular state of affairs. As Professor Marjorie D. Rombauer puts it,

reliable prediction requires identification of five (5) problem elements<sup>1</sup> (not necessarily in the order given):

1. Raw facts;
2. The law which may possibly control;
3. Legal question/s;
4. Legally significant facts; and
5. The law which will probably control.

The raw facts are given in the problem at hand and presented for resolution, while the law which may possibly control is found in the legal research procedure. In the search for the law in the broader sense, one also looks for precedents. These are decisions in individual cases which may serve as authority for decisions in future cases. Under our legal system, the courts will “stand” by these decisions and will not disturb settled points.<sup>2</sup> This is the doctrine of *stare decisis*.

There are several justifications for using *stare decisis* in our jurisdiction:

1. It encourages even-handed treatment of those who come before the courts;
2. It saves time and energy because the courts do not have to hear the same arguments on a point over and over again;
3. By contributing to the predictability of the law, it facilitates planning by private parties and encourages settlement of disputes;

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1. *Legal Problem Solving* I (1973).

2. *Black's Law Dictionary* 1261 (5th ed., 1979).

4. It provides a certain degree of protection from capricious or arbitrary judicial rulings; and
5. It helps maintain public faith in the Judiciary.<sup>3</sup>

Nevertheless, the Philippine Supreme Court recognizes that *stare decisis* does not require that clear error be continued, especially if such is inconsistent with subsequent developments like constitutional amendments or new legislation.

One important aspect of the doctrine of *stare decisis* is that judicial decisions do not have the same weight of authority. Some decisions are binding or mandatory while others are, at most, persuasive. Recognizing the difference between *mandatory* and *persuasive* precedents is critical to legal writing. In our court system, decisions of trial courts, or inferior appellate tribunals, do not make binding precedents. Under the *stare decisis* doctrine, inferior courts have a duty to adhere to the decisions of the Supreme Court until those decisions have been overruled or altered by legislation.

## II. BASIC CHARACTERISTICS OF JUDICIAL OPINIONS

In considering the nature of decisions from a broader perspective, Professor Larry L. Teply notes that the following are basic characteristics of judicial opinions that should be recognized and remembered:<sup>4</sup>

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3. L.L. Teply, *Legal Writing and Oral Arguments* 156 (1990) citing the case of *Morgana v. U.S. Marine Lines*, 398 U.S. 375, 403-5 (1970).
  4. L.L. Teply, *supra* note 3 at 103-5.

***A. Judicial opinions reflect the principal activities of courts in the legal system.***

Courts review the validity of legislative enactments, interpret their meaning, and determine their application. They perform a similar function with respect to administrative and executive actions. Courts also develop and enforce the unwritten common law through their decisions, and maintain the procedural and administrative integrity of the judicial system through their orders, rules, and regulations. It is one or more of these matters with which judicial opinions will be concerned.

***B. Unlike legislatures, courts must wait for litigants to present disputes to them for decision, and these disputes must be real ones.***

Judicial opinions are based on actual controversies, not hypothetical situations that may or may not arise. Furthermore, the courts must wait for the litigants to present these controversies for decision.

***C. Except in limited circumstances, courts must decide cases within the scope of their subject-matter jurisdiction.***

Subject-matter jurisdiction (a court's authority to hear certain types of cases) is determined by constitutional and statutory provisions. Judges cannot avoid deciding cases within their jurisdiction because the issues are too controversial or difficult. Occasionally, however, judges will devote a judicial opinion to explaining why they are refusing to decide a matter. The most common reasons include mootness, ripeness, and political questions.

***D. The Philippine system of litigation is an adversary one, and judicial opinions necessarily reflect the parties' positions and arguments.***

Courts refer frequently to the parties' contentions in the text of opinions, and sometimes reporters will summarize the parties' arguments. The parties' briefs are often available separately. Clearly, knowing what each party argued enhances one's understanding of the opinion. However, failure to distinguish between what a party has asserted and what the court has decided frequently confuses the reader of judicial opinions.

***E. Courts state the reasons for their decisions in their opinions.***

In their opinions, courts usually state the reasons for their decisions. This practice forces a court to carefully consider its decision and to inform the parties why it decided the case the way it did. This practice also assists others in predicting how the court may rule in similar situations in the future. Thus, in reading judicial opinions, significant emphasis should be placed on the reasoning articulated by the court.

***F. Judges state the facts of the case in their opinions.***

Judicial opinions ordinarily state in detail the facts of the case. Such statements ordinarily go beyond those facts that might be viewed as strictly relevant to the stated bases for the decision. These detailed factual statements play an important role in the process of growth and change in the law.

***G. When legislation does not govern a dispute, courts will use the common law to resolve the matter.***

The early English courts developed the Common Law by applying principles of justice, reason, and common sense to the particular situations presented for decision, which were also the sources of the American Common Law. Over time, American courts developed and modified this body of law, which was then applied to meet Philippine conditions and circumstances. Article 8 of the Civil Code provides that:

Judicial decisions applying or interpreting the laws or the Constitution shall form part of the legal system of the Philippines.

This is reinforced by the provision that:

No judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the laws.<sup>5</sup>

***H. In their opinions, courts articulate general rules that cover a class of disputes or situations.***

The courts usually articulate general rules that cover a class of disputes or situations in their opinions. In this way, judicial opinions are important sources of legal rules that order society and regulate human behavior. However, remember that over time, courts may find that they have stated a rule too broadly or too narrowly, or that exceptions should displace the rule.

***I. Judicial decisions need not be unanimous.***

Judges do not always agree. In deciding a case, the opinion of the majority of the court determines the outcome. Concurring and

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5. *Civil Code*, Art. 9.

dissenting opinions may be filed. These opinions are often useful for understanding the rationale of the majority of the court.

***J. Judicial opinions vary in style, completeness, accuracy, and clarity.***

In your research, it is necessary to take the time out to find the important rulings which are applicable to your problem under consideration.

### III. BRIEFING A CASE

Why is there a need to brief cases? The reason for briefing cases is that you will understand and remember them better than if you merely read them. This will also facilitate the organization of memorandum of law or appellate brief, as well as oral arguments before a court. Briefing involves three steps:

1. Carefully reading an opinion;
2. Selecting data from the plethora that the opinion contains; and
3. Inserting the data in an outline. Professor Gertrude Block suggests the following nine-point outline for briefing cases:<sup>6</sup>

***A. Parties, Their Relationship, and How the Matter Reached This Court***

The names of the parties usually appear in the caption at the beginning of the opinion. Their relationship also appear there, the plaintiff/s first, followed by the defendant/s after the “v.” (for “versus”). When multiple parties are involved, list only the

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6. *Effective Legal Writing* 94-96 (1988).

last name of the first litigant on each side. These are the names that appear in the body of the opinion. Even in captions reading, “In re...” or “In the Matter of...,” there are at least two opposing parties, and their names should appear in your brief. In this section of your brief, indicate as well the status of each party, e.g., “employer” and “employee,” “appellant” and “appellee,” “petitioner” and “respondent.”

In “how the matter reached this court,” briefly note any prior proceedings and explain why this court is now involved. Most of the cases you will brief are appellate court cases and their previous history should appear at the beginning of the opinion.

### ***B. Legal Theories (Cause/s of Action and Defense)***

These are the legal rules that form the basis of the plaintiff’s claim. The plaintiff always advances one or more legal theories in order to obtain his desired objective. The defendant may also advance one or more legal theories if, instead of merely denying the validity of the plaintiff’s cause of action, he raises a separate claim (an ‘affirmative defense’), called a ‘counterclaim.’

### ***C. Facts***

The fact section of your brief contains a succinct summary of the salient information, often called “key facts,” of the opinion. Key facts are those facts upon which the court based its holding, and most importantly, those facts that could not be omitted or altered without changing the decision.

### ***D. Relief Requested***

The plaintiff states here what he hopes to achieve by going to court, *i.e.*, his ‘remedy.’ In some cases, the relief requested is in the form of money.

### ***E. Issues***

Issues are the precise legal questions that must be resolved by the court in order to reach its decision in the case under consideration. Often the issues are expressly stated in the opinion. If not, such can be identified by reading the court's holding and the reasons given to support it. The complete issue is the rule of law applied to the key facts of the case at hand.

### ***F. Holding/s and Disposition***

The holding is stated as the court's affirmative or negative response to the issue. In its entirety, it contains the rule of law that was applied and the key facts of the case. In your own briefs of case opinions, however, you will probably include only a short answer to the issue (*i.e.*, 'yes' or 'no') because you have already completely stated the rule of law and the key facts in the issue statement.

The disposition is whatever the court says it will do procedurally as a result of its holding. Stated in a few words, it usually comes at the end of the opinion (*e.g.*, "vacated and remanded").

### ***G. Reasoning***

In its reasoning, the court justifies its holding on each issue. When the case presents more than one issue, the court may intermingle the reasoning behind its holding on several issues, but it should still separate the court's statements and the reasoning applied to each issue. To identify the reasoning of the court, look for its reasons for agreeing with one party and disagreeing with the other, for accepting some legal precedents and rejecting others, and for extending or limiting other courts' opinions. Also look for the court's citation of enacted law and its interpretation of the intent of that law.

### ***H. Resulting Legal Rule/s***

The legal rule is a broad statement of principle developed by or applied in this decision. The rule may then become precedent for analogous cases in future decisions. Few decisions enunciate a new legal rule; many cite a rule previously developed and applied in the case at hand. This item and that which follows, 'dictum,' are often omitted from briefs. However, they are helpful in placing the case under consideration into perspective, with respect to cases that have preceded or will follow it.

### ***I. Dictum***

Dictum (the plural of which is 'dicta') is an official, but incidental and gratuitous, language that is unnecessary to the decision of the case under consideration. Since courts are supposed to reach decisions only on the narrow questions before them, decisions theoretically should not contain dicta, but they sometimes do. Dictum can be recognized as any statement a court makes based on facts other than those presented in the controversy, or any conclusion a court reaches based upon law that is not applicable to the controversy. Dictum should be identified because courts may agree later with the view expressed as such, although it is not binding on subsequent court decisions any more than the minority decision.

## **IV. ANALOGIZING AND SYNTHESIZING**

Analogizing cases involves selecting information from your case briefs and applying it to other cases or fact situations in order to make predictions about the decision a court will reach, at the same time considering new facts presented by the problem at hand.

### ***A. Steps in Applying Analogy***

Analogizing, or pointing out similarities and differences among cases, is the primary form of legal reasoning. It is of great importance to legal arguments because of the doctrine of *stare decisis* which rests upon the presumption that justice requires the law to treat persons similarly in similar circumstances.

You will rely on precedent when you compare your case or fact situation to earlier cases or fact situations. You cannot apply precedent to the facts of your case, however, unless:

1. Your case is analogous in significant respects to the case you are comparing it with; and
2. The opinion in the earlier case is either binding upon your case or persuasive to it.

A case is considered analogous to a previous case if its key facts and the rule of law to be applied are similar. Conversely, if either the key facts or the applicable rule of law is different, then the case can be distinguished from the preceding case and the doctrine of precedent will not apply.

To apply analogy, there are four (4) steps to be followed:

1. Compare and contrast the key facts of the precedent cases with your facts;
2. If the key facts are similar, extract from the earlier cases the legal principle/s upon which these cases were decided;
3. Apply these principles to your case;
4. Arrive at a conclusion based upon the application of those principles to your case.<sup>7</sup>

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7. G. Block, *supra* note 7 at 125-6.

### ***B. Synthesizing***<sup>8</sup>

A case synthesis is a summary of two or more cases, describing their similarities and differences. Through synthesis, it can be discovered why appellate courts sometimes reach similar conclusions in cases with seemingly different facts, as well as different conclusions in seemingly similar cases. Case syntheses also illustrate how legal rules are expanded, narrowed, or abandoned by court opinions.

In writing a case synthesis:

- I. Make an introductory statement broad enough to include all of the cases you are comparing, but narrow enough to exclude other cases.
2. Show, by analyzing your briefs of the cases, how the cases resemble each other and how they differ. (That is, analogize and distinguish the cases.) In your analysis, discuss the following:
  - a. Causes of action;
  - b. Issues raised;
  - c. Holdings of the courts;
  - d. Rule/s formulated, applied, expanded, narrowed, or overturned; and
  - e. Reasoning of the courts.
3. Come to some conclusion/s as a result of your analysis. For example, what legal rule/s would result from these decisions? What trend do the decisions indicate? Can you predict the outcome of similar cases? (That is, will the

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8. Taken from G. Block, *supra* note 7 at 93-4, 134.

legal rule be retained intact, expanded, narrowed, or abandoned in subsequent cases?)

## V. FORMULATING ARGUMENTS AND USING PERSUASIVE WRITING TECHNIQUES

Persuasion is one of the important skills used by lawyers. It is used in memoranda in support of motions, position papers, trial and appellate briefs, and settlement proposals and letters.

### A. *Types of Arguments*<sup>9</sup>

According to Professor Teply, persuasive writing in law practice is ordinarily a blend of three types of arguments:

#### I. **Logical**

Persuasive legal writing uses logical arguments – principally deductive reasoning and analogy. These arguments most often rely on the authority of prior decisions or the application of statutes.

#### 2. **Emotional**

Persuasive legal writing uses, in part, emotional arguments – principally fairness and bias. Courts are sensitive to appeals contending that the application of the “letter of the law” may result in unfairness. Usually, judges are receptive to resolutions that avoid harsh or undesirable results. Moreover, lawyers have traditionally argued in subtle ways for positions that aid the poor, the feeble, the oppressed, and the suffering. Arguments based on

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9. L.L. Teply, *supra* note 3 at 304.

such biases, however, are to be distinguished from appeals to prejudice.<sup>10</sup>

### 3. Ethical

Persuasive writing in law uses, in part, ethical arguments – principally the honesty, good faith and straightforwardness of the attorney and his client. This type of argument is achieved by:

- a. Appearing to present arguments in a fair, well-balanced and reasonable manner by not inserting too much emotion into the presentation; and
- b. Carefully characterizing the client's action in a favorable manner.<sup>11</sup>

If appropriate, the dishonesty, unreasonableness, duplicity, or morally reprehensible conduct of opposing counsel or party can be carefully mentioned. This type of appeal most significantly affects the tone of the presentation.

#### ***B. Basic Methods of Formulating Arguments***<sup>12</sup>

Lawyers use several basic methods of formulating arguments that include:

##### **I. Standard Logical Technique**

Of the standard logical techniques, inductive reasoning, deductive reasoning, and *a fortiori* argument are the most often used approaches.

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10. R. Aronson & D. Weckstein, *Professional Responsibility* 300 (1980).

11. L. Squires & M. Rombauer, *Legal Writing*, 196-97 (1982).

12. Taken from L.L. Teply, *supra* note 3 at 310-11, 315-20.

### a. Inductive Reasoning

When the *ratio decidendi* of a judicial decision that a lawyer wants to assert is not specifically or clearly stated in a court's opinion, a lawyer must formulate it. Even when the legal proposition has been stated, the lawyer may want to reformulate it in light of other decisions. This formulation or reformulation process often involves inductive reasoning.

Thus, a lawyer might analyze the facts of several cases that, when viewed together, form the basis for a proposition that had not been articulated before. This process of analysis, as we have seen, is aided by the use of analogy.

Use inductive reasoning to formulate or generalize a legal proposition from a series of particular holdings or applications.

### b. Deductive Reasoning

Deduction starts with a major premise, such as a legal doctrine that is accepted as true. The minor premise places the particular situation or case within the class or terms described by the major premise (usually a factual statement of the case at hand).

Lawyers often assert a *ratio decidendi* of a judicial decision or proposition based upon a statute as the major premise of a syllogism.

A proposition derived through inductive reasoning can be the major premise in a deductive argument.

The facts of the case argued by lawyers form the minor premise. The conclusion is then, supposedly, apparent. As previously noted, the debate usually centers on whether the facts of the current case are as the lawyer asserts them to be and whether these facts have been properly classified.

### c. *A Fortiori* Argument

Another standard logical technique used in persuasive legal writing is the “*a fortiori*” argument. Such an argument is “to the effect that because one ascertained fact exists, therefore, another, which is included in it, or analogous to it, and which is less improbable, unusual, or surprising, must also exist.”<sup>13</sup>

Use *a fortiori* reasoning to draw a conclusion that is inferred to be even more certain than another.

## 2. Handcuff Technique

The handcuff technique uses a logical chain of propositions emanating from a simple general proposition or premise that the reader would not readily dispute. Often, the premise is relatively abstract in nature.

An example of a simple starting proposition for the defendant is: “The law of negligence is based on fault.” From this proposition, the defendant’s lawyer could lead the reader to the following conclusion: “Because the defendant’s mental illness was sudden and unexpected (and, thus, not the defendant’s fault), the defendant was not negligent.”

## 3. Emphasizing the Purpose of a Rule

In considering the potential application of a rule, particularly a statutory rule, conclusions are often reached based on the purpose of the rule.

Assume that a statute provides that “no vehicle may be brought into the park.” When someone tries to drive a tank into the park, the statute applies without doubt. A tank is commonly

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13. *Black’s Law Dictionary* 56 (5th ed. 1981).

understood to be a “vehicle.” But what about a boy riding a bicycle? Is a bicycle a “vehicle” for purposes of the statute? If the purposes of the statute are to maintain peace and order within the park, certainly a boy riding a bicycle is not violating this purpose.

Legal rules are not self-executing. A good way to determine how a rule should be applied is to examine the purpose/s of that rule.

#### **4. Paradigm Case**

Another accepted means of formulating legal arguments is to use the paradigm case. A paradigm is an outstandingly clear or typical example. Use the paradigm (along with decided cases) for comparison.

Assume that the application of a statute is in issue. For purposes of developing an argument, a lawyer may present a case which he asserts is covered by a statute – without regard to whatever else may also be covered by the statute. The lawyer then asserts that the instant case is or is not significantly different from the paradigm case.

In some instances, the paradigm may be a hypothetical situation, perhaps derived from the legislative history of the statute or the apparent purpose of the enactment. In other instances, the paradigm may be derived from a prior judicial decision applying the statute. In theory, the court should decide the instant case “different from that of decided cases and from the paradigm cases under statutes only if it can point to a significant difference between the instant case and each of the decided cases and paradigm cases.”<sup>14</sup>

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14. Citing Christie, *Objectivity in the Law*, 78 YALE LJ. 1131, 1134 (1969).

## 5. Hypothetical Cases

Closely related to arguments based upon the paradigm cases is using hypothetical cases for the purpose of comparison. A hypothetical case is one in which facts are assumed for the purpose of explaining and discussing the applicable law.

Christie explains the use of hypothetical cases as follows:

In deciding the case before it, the court may also refer to hypothetical cases posed by the parties or by the court itself. The consideration of hypothetical cases is an important adjunct to the use of the paradigm case for hypothetical cases are of material assistance in establishing the relation of the instant case to the prior cases and to the paradigm cases. To be pertinent, a hypothetical case must be one not significantly different from the instant case. A court which has constructed or which is referred to such a hypothetical case must then determine whether the hypothetical case is itself significantly different from the prior cases and the pertinent paradigm cases. For the court to decide the instant case in a particular way, not only the instant case, but also all pertinent hypothetical cases, must be significantly different from the prior cases and the paradigm cases pointing to a contrary result. Only then can it be said that the instant case is truly significantly different from these cases and not just apparently significantly different.

The use of hypothetical cases thus broadens the scope of a court's inquiry and helps it to deal with the body of law which it is administering. Hypothetical cases, for example, help a judge to appreciate the reach of his decision by indicating the extent to which, in deciding the instant case, he is committing himself to decide future cases in a particular way. Similarly, hypothetical cases are a bridge between the instant case and previously decided cases whose

relevance to the instant case the judge has not initially appreciated. In this way, hypothetical cases broaden his understanding of existing legal materials and help him to comprehend more fully their restraining influence on the choices available to him in the instant case. At the same time, this approach requires that hypothetical cases themselves pass the significant difference test and thereby prevent their use from degenerating into a ludicrous and improper *reductio ad absurdum*, the so-called “parade of horrors” which law students are quite properly told to avoid.<sup>15</sup>

The best approach to attacking a hypothetical case is to show that it is significantly different from the case at hand.

## 6. Extreme Consequences Technique

The extreme consequences technique demonstrates the potential adverse effects of a rule. Hypothetical cases are usually directed to possible applications of a rule. The extreme consequences technique focuses on the effects of a rule – its costs, disruption, and potential harm.

To counter an extreme consequences argument, consider carefully whether the asserted consequences are likely to occur. Watch also for improper *reductio ad absurdum* in the guise of legitimate use of the extreme consequences technique.

## 7. Policy Arguments

Policy arguments can be critical to the outcome of cases in which conflicting legal rules may be applicable.

Sometimes a court is faced with two or more rules that could apply plausibly to a situation before it. In addition to using

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15. Christie, *supra* note 16, at 1336-37.

precedent, legislative history, hypotheticals, and the like, a lawyer will often attempt to bolster the argument in favor of a particular rule by using policy arguments. This subsection considers the various types of policy argument.

**a. Lesser of Two Evils**

Sometimes none of the solutions available in a case offers a particularly satisfactory resolution of the matter. In that situation, an argument can be made that a solution should be chosen because it is the lesser of two evils.

**b. Floodgates Arguments**

In deciding whether a particular rule should be adopted, several variants of a floodgates argument are sometimes made. Floodgates arguments generally focus on the expected subsequent adverse consequences of an initial decision (if made in a certain way).

**i. Difficulty of Circumscribing the Area of Liability**

One form of a floodgate argument is that there is no rational way to confine liability within reasonable limits.

**ii. Fraudulent Claims**

Another type of floodgates argument relates to a potentially dramatic increase of fraudulent claims.

**iii. Unlimited Liability**

The problem of unlimited liability is another type of floodgates argument.

#### **iv. Burden on the Courts**

Sometimes the floodgates argument is specifically focused on the burden that increased litigation would place on the courts. This type of argument seems to be more frequently accepted in federal courts.

### **c. Economic and Social Policy Arguments**

#### **i. Distribution of Costs**

When the proper rule is in doubt, a variety of economic arguments can often be made. One approach is to consider the distribution of costs.

#### **ii. Who Can Avoid the Costs Most Cheaply?**

This argument focuses on who can avoid the costs most cheaply. It is unusual for a court to be this directly articulate about cost efficiency. The underlying policy argument, however, is one that can be used effectively.

#### **iii. Economic Efficiency**

Economic efficiency is another policy argument that may be used in support of, or against, a particular rule. Such arguments may arise in a variety of contexts. For example, in contract law, it is argued that:

Repudiation of obligations should be encouraged where the promisor is able to profit from his default after placing his promisee in as good a position as he would have occupied had performance been rendered... To penalize such adjustments through over compensation of the innocent party is to discourage efficient reallocation of community resources.

Another aspect of economic efficiency sometimes considered is transaction costs.

## VI. CASE RESOLUTION

The requirements of form and content of a resolution is more or less the same as that of a decision rendered by a judge or an administrative officer. Section 14, Article VIII of the 1987 Constitution provides that:

No decision shall be rendered by any court without expressing therein clearly and distinctly the facts and the law on which it is based.

The purpose of this requirement is to inform the person reading the decision, especially the parties, of how it was reached by the court after consideration of the pertinent facts and examination of the applicable laws.<sup>16</sup> A similar provision is found in Section I, Rule 36 of the Rules of Court. Thus, in the form of the decision or resolution, matter should dominate manner, *i.e.*, the reader should be left with the thought that the arguments are complete and convincing. However, the essence of effective legal writing is communication that should be brief, accurate and clear.

The traditional part of a decision consists of four parts:

1. Nature of the case if a decision is involved or the issue to be presented if an order is involved;
2. Findings of fact;
3. Applicable law; and
4. Dispositive ruling.

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16. *Francisco v. Permskul*, G.R. No. 81006, May 12, 1989.

### ***A. Findings of Facts***

The former Justice Ricardo Puno identifies the following forms in narrating the findings of facts:

In regard to facts, we have two basic types of narration: the “reportorial” type and the “synthesis.” A cross between the reportorial type and the synthesis is the “semi-reportorial” type. The reportorial type is the easiest to handle. As the term indicates, it is nothing more than a report of what happened during your trial. It usually consists of a summation of what the witnesses testified to. It is a stereotype kind of narration.

You begin in a criminal case, for instance, with the usual opening: “The accused stands charged with the crime of bigamy allegedly committed as follows:” Then you copy the information. “The prosecution presented witnesses A, B, C, D and E. A, testified as follows:” Then you just narrate everything that he testified to. “B, testified as follows:” Narrate everything that B said. After the parage of prosecution witnesses, then you shift to the defense: “On the part of the accused, he presented three witnesses, namely, X, Y and Z. “X, testified as follows:” After summarizing all these testimonies, you make a brief summation of what you consider as the correct version.

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In the synthesis type of decision-making, the judge summarizes the factual theory of the plaintiff or prosecution, as the case may be, and after that the version of the defense. After summarizing both versions, the judge will state which version he takes as true and correct, and then renders the adjudication.

In the semi-reportorial type, the judge summarizes the version that he accepts, and then “reports” on the version that he rejects.

There is a fourth type which is a sub-classification of the synthesized decision. In this last type, the court just summarizes the version that it accepts and adopts, without at all narrating or explaining what the other version is. After the summation of that particular accepted version, then the judge renders his decision.<sup>17</sup>

### ***B. Factors to Consider in Burden of Proof***

In deciding cases, there are certain standards which must be met. In civil cases, the party having the burden of proof must establish his case by a preponderance of evidence.<sup>18</sup> In a criminal case, the defendant is entitled to an acquittal, unless his guilt is shown beyond reasonable doubt.<sup>19</sup> In determining where the preponderance of evidence lies, the court may consider the following:

1. All the facts and circumstances of the case;
2. The witnesses' manner of testifying;
3. Their intelligence;
4. Their means and opportunity of knowing the facts to which they are testifying;
5. The nature of the facts to which they are testifying;
6. The probability or improbability of their testimony;

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17. Cited by Justice Reynato S. Puno in his “*Lecture on Decision Writing.*”

18. *Rules of Court*, Rule 133, Sec. 1.

19. *Rules of Court*, Rule 133, Sec. 2.

7. Their interest or want of interest;
8. Their personal credibility so far as the same may legitimately appear upon the trial; and
9. The number of witnesses, though the preponderance is not necessarily with the greatest number.<sup>20</sup>

In an administrative determination of contested cases, which are judicial by their nature, there is no requirement for strict adherence to technical rules since the atmosphere is one of expeditiousness and as restricted by technical or formal rules of evidence. Nevertheless, it is essential that due process be observed, for requirements of fair play are not applicable in judicial proceedings only.<sup>21</sup>

In the judicial review of decisions of administrative agencies, the Supreme Court uses the substantial evidence rule which means more than a scintilla or relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if other minds equally reasonable might opine otherwise.<sup>22</sup>

### ***C. Weighing the Evidence***

Justice Reynato Puno mentions several techniques used by judges in the difficult task of weighing evidence:

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20. *Rules of Court*, Rule 133, Sec. 1; *People v. Maisug*, G.R. No. L-22187, March 28, 1969, 27 SCRA 742 (1969).

21. C.L. Lopez, *Philippine Administrative Law* 64 (1994); See *Ang Tibay v. Court of Industrial Relations*, 69 Phil. 642 (1940) for rules in administrative due process.

22. *Lansang v. Garcia*, G.R. No. 33964, December 11, 1971, 42 SCRA 480 (1971).

1. The uncontroverted facts must be separated. They come from the pleadings, pre-trial proceedings, and evidence during the trial in the forms of admission, uncontradicted allegations, clear implications, etc. These uncontroverted facts are helpful to measure the truth or falsity of other evidence.
2. In interpreting the testimony of a witness, his whole testimony must be considered, *i.e.*, his direct cross examination, redirect and recross. The truth in testimony cannot be distilled in a chopped fashion.
3. Self-contradictions by a witness usually happen. In assessing self-contradictions, the judge should determine whether they are due to innocent mistakes or deliberate falsehood. Innocent mistakes usually cover minor details. If the self-contradictions are innocent, then these should be disregarded. If deliberate, then these should be counted against the witness.
4. Contradictions between witnesses also commonly occur. Initially, the judge should try to reconcile them. If they cannot be reconciled, the judge has to make a choice as to which testimony to adopt as true and reject as false. To guide him in his choice, he has to consider the character of the witness, his ability and willingness to speak the truth, his means of knowledge, motives, manner and demeanor, the consistency or inconsistency as well as the probability or improbability of his statements.
5. Contradictions between testimony on the witness stand and prior affidavit are also common. If they are irreconcilable, affidavits should normally prevail. Oral testimony is often unreliable due to passage of time.

6. Testimony that is inherently improbable must be rejected. To be credible, evidence must coincide with the common experience of mankind.
7. Demeanor of witness is an important factor to be considered in weighing his testimony.<sup>23</sup>

#### ***D. Statement of the Law***

How do you discuss the applicable law in your decision? Again, there is no hard and fast rule. If the applicable law is clear, then its simple recitation will suffice. Its further explanation will more often than not be a mere exercise in redundancy. One legal writer said:

It seems that reverence for citation is the greatest handicap of lawyers and judges. We delight in cumulative authority. We think that one citation is not enough if we can cite twenty, even though the proposition is obvious enough to require no citation at all. x x x It will suffice to cite one case if it is controlling, along with a reference to a reliable text or encyclopedia.

However, if the applicability of the law is arguable, then you have to justify your choice of law. Your discussion may take quite a length. You may have to go through its history. You may have to summon analogous rulings even of foreign courts. You may have to invoke abstract concepts of justice and equity. In any event, this is where you have to display your legal scholarship. Always remember that substance should not be sacrificed for style.

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23. *Lecture on Decision Making* 12-13 (1994).

### ***E. Dispositive Portion***

The dispositive ruling must be complete. This is the test of completeness:

1. The parties know their rights and obligations.
2. The parties should know how to execute the decision under alternative contingencies.
3. There should be no need for further proceedings.
4. It terminates the case by according the proper relief. The proper relief usually depends upon what the parties asked for. It may be merely declaratory of rights, or it may command performance of positive prestations, or order the party to abstain from specific costs.
5. It must adjudicate costs.

Thus, the judgment of a case is what is contained in the dispositive portion. The general rule is where there is a conflict between the dispositive part and the opinion, the former must prevail over the latter on the theory that the dispositive portion is the final order while the opinion is merely a statement ordering nothing.<sup>24</sup>

## **VII. RULES IN LEGAL WRITING**

Basic grammatical skills are important in legal writing. Grammatical construction is one method by which courts interpret contracts and statutes. There are many rules on how to

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24. M. Moran, *Comments on the Rules of Court* 194 (1963 ed.).

be concise in writing. Professors Squires and Rombauer in their book, *Legal Writing*, mention only eleven (11) rules in making word choices.

**A. Use words in their literal sense.**

Two common sources of imprecision in legal writing are personification (the givens of human qualities to abstractions or objects, e.g., “coldblooded decision”) and metonymy (the substitution of an attributive oral suggestive word for the word identifying a person or thing, e.g., “stage hand” for “stage worker”). In some writings, this kind of imprecision may be acceptable. However, in legal writing, it may introduce ambiguity.

*Imprecise:* California has so held.

*Precise:* The California Court of Appeals has so held.

**B. Omit archaic legalisms.**

Archaic legalisms are words and phrases such as “hereinafter,” “heretofore,” “aforesaid,” “forthwith,” “herein,” “hereby,” “for purposes hereof,” “notwithstanding anything to the contrary herein,” “so made,” “by these presents,” and “said.” Not only are these words obstacles to the lay reader, but they are also imprecise and, thus, troublesome to the legal reader.

A more serious fault is the way archaic legalisms create the appearance of precision, thereby obscuring ambiguities that might otherwise be recognized. For example, a question that has been frequently litigated is whether “herein” refers to the paragraph in which it is used, to the section, or to the whole document.

***C. Use the same words to refer to the same thing; use different words to refer to different things.***

Never attempt to improve style by introducing synonyms or other word variations that will create confusion or ambiguity. In the following sentence, the substitution of the word “prevailing” for the word “dominant” creates initial confusion.

According to the **dominant** view, this article is applied to periodic meetings as well as to special meetings. The **prevailing** view is that Article 237 of the Commercial Code provides the right for minority shareholders to convene either type of meeting.

Is the author discussing two views? A corollary is to use different words when you mean different things. If the same word is used to mean different things, the reader will be momentarily confused.

***D. Use simple, familiar words.***

When you have a choice between a short and familiar word, such as “call,” and a longer, more elaborate word, such as “communicate,” choose the shorter, simple one. Simple words are understood more quickly, and they require less reading and thinking time.

<i>Simple Words</i>	<i>Elaborate Counterparts</i>
after	subsequent to
before	prior to
begin, carry out	implement, effectuate
happen	eventuate, transpire
inform	apprise
make	render
send	transmit

think	deem
think, see regard	envisage

***E. Use concrete rather than abstract words.***

Concrete words such as “split decision” are easier to understand than abstractions such as “judicial dichotomy.” Legal writers are likely to use abstract, overblown language in part because many of the cases that law students read during their first year reflect an older, overstuffed style that is all too easy to imitate. Legal writers must resist the old style.

Some common abstractions are simple words that can often be eliminated without loss of meaning, for example, “type,” “kind,” “manner,” “state,” “area,” “matter,” “factor,” “system,” and “nature.”

*Example:*

The central thrust of plaintiff’s legal position is dependent on matters having to do with three decisions of the Supreme Court.

*Revised:*

Plaintiff’s argument for summary judgment depends on three Supreme Court decisions.

***F. Use words that are consistent in tone.***

All words have connotation (overtones of meaning) as well as denotation (explicit meaning). Since connotation contributes to tone, the word choices in a particular piece of legal writing should have compatible connotations. Many briefs contain glaring inconsistencies in tone, as in the following excerpt from a fact statement:

A third-party park-sitter, unbeknownst to Plaintiff, contacted said Plaintiff's head with a wine bottle. Plaintiff now has two metal plates and twelve screws holding things together.

### ***G. Avoid equivocations.***

As lawyers, we often hesitate to make direct or dogmatic statements. To protect ourselves or to reflect uncertainty, use either equivocal or qualifying words that undermine their meaning. Typical words and phrases used in this way are: "It seems to indicate," "if practicable," "it would seem," "it may well be," and "it might be said that." If you are uncertain, state the reasons for your uncertainty.

### ***H. Use unqualified nouns, adjectives and verbs.***

Many writers add modifiers to intensify or buttress poorly chosen nouns, adjectives, and verbs. Ordinarily, the right word needs no bolstering. The following modifiers can be removed without compromising clarity.

absolutely	nearly
actually	obviously
basically	particular
certain, certainly	plainly
clearly	practically
completely	pretty much
deepest	quite
extremely	really
frankly	so (as in "so great")
generally	sort of
given	surely
greatly	truly

in effect	various
kind of	very
more or less	virtually

A plain style is usually the best style. If you wish to use figurative language, do so where it would not interfere with the communication of substance.

Cliches come readily to mind during writing. Thus, a standard part of your revision should be to remove or renovate them. Examples of cliches are “height of absurdity,” “day of reckoning,” and “cold light of reason.”

### ***I. Avoid jargon from other fields.***

Words go in and out of fashion. Vague psychoanalytic terms, such as “interaction” and “supportive,” were frequently used for a time before they gave way to computer jargon, such as “interface” and “input.” Avoid word fads altogether. Words in fashion are quickly degraded. Their specific meanings disappear, leaving only a vague general meaning.

### ***J. Watch out for redundancy in legal writing.***

As most lawyers know, redundant wording has a long and respectable past. Our Anglo-Saxon ancestors gave us word pairings, such as “safe and sound.” After the Norman invasion, French synonyms were added to the Middle English word pairs. Thus, many legal terms have come to us in triplicate, for example, “give and take (Old English).” Some word pairings are still commonly used, such as “acknowledge and confess,” “act and deed,” “deem and consider,” “fit and proper,” “goods and chattels,” “keep and maintain,” “pardon and forgive,” “shun and avoid,” “aid and abet,” “cease and desist,” “fraud and deceit,” and “null and void.” Before

automatically adopting an archaic word pairing, consider whether both words are needed.

Unnecessary word pairing continues to be a habit in modern English. If you think about each word you use, then you will be able to avoid redundancies such as the following:

basic fundamentals  
telling revelation  
basic starting point  
terrible tragedy  
false misrepresentation  
true facts  
final result  
unexpected surprise  
if and when  
unless and until  
sufficient enough  
save and except

A more pervasive form of redundancy is a throw-away phrase such as:

a certain amount of  
as a matter of fact  
due to the fact that  
all intents and purposes  
in case of  
the nature of the case is  
in regard to  
the necessity of  
the fact of the matter  
with reference to

Watch out for these phrases and gradually train yourself to omit them. As an editing technique, ask the question, “Do I really need this word or phrase?”

### VIII. CONCLUSION

A good memorandum, brief or resolution is readable. Readability is your goal, but do not lose sight of your objective – the resolution of a problem. Lawyers must focus on precision and exactness of the language to avoid latent ambiguities or disputes about meaning. Being an effective legal writer is not easy; legal writing requires concentration, patience, judgment, and skill. Nothing is included without good reason and nothing of significance is omitted. Almost everything you need to know about writing can be summarized in one principle: Write to communicate.

# Legal Logic

*Fr. Ranhilio C. Aquino, PhD, JD\**

I. INTRODUCTION .....	223
II. STRUCTURE OF LEGAL REASONING .....	224
III. DEDUCTIVE REASONING IN LAW .....	228
IV. ANALOGICAL REASONING IN LAW .....	231
V. INDUCTIVE REASONING IN LAW .....	232

## I. INTRODUCTION

- I. The Constitution requires that judicial decisions be logical, for it requires that every judgment set forth with clarity the facts as well as the law on which it rests. Obviously, then, it is required that a judgment follow from the evidence adduced as well as from the relevant law, and whether or not it does follow is a question of logic.

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\* Fr. Ranhilio C. Aquino, PhD, JD, heads the Academic Affairs Office of the Philippine Judicial Academy (PHILJA) and chairs its Department of Jurisprudence and Legal Philosophy. He is a Research Fellow at the Catholic University of Louvain, Belgium, and at the Commonwealth Judicial Education Institute (CJEI), Dalhousie University, Halifax, Nova Scotia, Canada. He was a member of the Philippine delegation to the Australia-Philippine Judicial Cooperation Project in Sydney, Australia. He graduated *Summa Cum Laude* in all his degrees in Philosophy - Bachelor of Arts, Master of Arts, and Doctor of

2. More basic, however, than the constitutional demand is the requirement of rationality. It is a demand of reason that conclusions be reasonably arrived at, and, in law, this means that they have to be correctly and validly argued.
3. Logically argued conclusions of courts of law contribute to public confidence in the Judiciary. After all, a well-written decision and a compellingly argued judgment need no further defense.

## II. STRUCTURE OF LEGAL REASONING

1. When the judge finds: “Wherefore, this Court finds the accused guilty of violating B.P. Blg. 22 and accordingly sentences him...,” the Court is making a claim. In other words, it is an assertion that the Court sets forth for the acceptance of the parties, their counsel, the Executive Branch of government, and society at large.
2. Before having reached the dispositive portion, however, of the decision, the Court would have stated the following – or a variant thereof:

On July 4, 1998, the accused issued PNB Check No. 12345, his personal check, in the amount of

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Philosophy. He also holds a Doctor of Jurisprudence degree, major in International Law, from the Columbia Pacific University, California, USA. He is also Professor of Law at Cagayan Colleges Tuguegarao; Professor of Philosophy at the University of Santo Tomas and De La Salle University; and Parish Priest at St. Rose of Lima Parish, Annafunan, Tuguegarao, Cagayan Valley.

Twenty Thousand Pesos in payment of a watch purchased from the complaining witness. At the time he issued the aforementioned check, he had already long closed his checking account with the Philippine National Bank. Having been informed of the check's dishonor, he has failed to pay the complaining witness the amount due.

This factual recital constitutes the ground of the judgment. A ground is a statement specifying particular facts about a situation that is invoked to establish the truth, the correctness or the soundness of the claim. "Ground" refers to the specific facts relied on to support a given claim.

3. The judge must then make clear the law that allows him to draw the conclusion that the accused is guilty from the facts established in evidence. She could then cite Section I of B.P. Blg. 22 that punishes as a crime the issuance of any check to apply on account or for value, when the accused knows at the time of issue that he does not have sufficient funds in or credit with the drawee bank for the payment of such check in full upon presentment.

A warrant is what authorizes the drawing of a certain conclusion from a given set of facts. A warrant is, therefore, a step-authorizing statement. In law, the warrant of conclusions is the law or the relevant rule that authorizes that a conclusion be drawn from the facts adduced in evidence.

Ground:

You issued a check in payment of a debt, knowing fully well that at the time of issue, you had already closed your checking account.

Warrant:

Sec. 1 of B.P. Blg. 22 renders punishable the issuance of such checks for which no sufficient funds exist, a fact which the issuer knows.

Claim:

Therefore, you are guilty of the crime punished by B.P. Blg. 22.

4. When one invokes a body of experience that is relied on to establish the trustworthiness of one's way of arguing, then one makes use of a backing. Before a court of law, the question often will be whether or not the judge has correctly applied the law, properly made distinctions, and accurately recognized exceptions. Judicial precedent together with the doctrine of *stare decisis* come to his aid. These supply the backing.

**WARRANT**

Section 1 of B.P. Blg. 22 punishes the issuance of a check for value if the issuer knows that he has insufficient funds to cover such a check at the time of issue.

**BACKING**

This rule is enunciated in *Nieva v. Court of Appeals*, G.R. 95796-97 (May 2, 1997), and other cases.

**CLAIM**

The accused is guilty of a violation of B.P. Blg. 22.

**GROUND**

He issued a check in payment of a debt, when, at the time of issue, he had already closed his checking account.

5. The model of legal reasoning thus presented makes imperative the following demands on the judge:

a. What is the plaintiff's claim? What is the defendant's claim? What does the court, after hearing (or upon perusal of the pleadings), posit to be the claim?

Note: Connected with this is the entire gamut of problems in remedial law such as whether a judge may or may not resolve issues that were not raised by any of the parties, but are necessary towards the resolution of the case. This is also the necessity of a pre-trial order: to set forth very clearly the issues that are to be resolved.

b. What are the facts? Which facts are key facts – those facts, which, if different, would engender a different result?

Note: In law, "fact" should mean "what is judicially established" in conformity with the Rules on Evidence.

c. Do the established facts ground the claims? Do they ground some other possible claim? A traditional way of asking this question in civil law has been: Does the plaintiff state a cause of action? In criminal law, one way of posing the question has been: Do the facts alleged constitute the offense of which the accused is charged?

d. As to the warrant, is the citation by the counsel of law and precedent accurate? Does the law or jurisprudence in fact warrant the conclusion that counsel would have the court draw from the facts? Aside from the warrant already cited by the parties through counsel, is there some law or precedent that has not been considered and that may produce a different result?

- e. Which decision of the Supreme Court is “on four” with the present case? Is there any decision of the High Court that supports the present court’s interpretation and application of the law? Is there any reason to distinguish between the present case and that decided by the Supreme Court which supposedly lays down precedent? Is it really *ratio decidendi* that is relied on or *obiter dictum*?
- f. Where judicial precedent is lacking, what do foreign decisions suggest? What is suggested by legislative history or contemporaneous, executive construction? What conforms with the presumption that the legislature intends that which is just and equitable?

### III. DEDUCTIVE REASONING IN LAW

A contract is a meeting of minds.

Between A who offered to sell a car without any servicing guarantee, and B who accepted to buy the car with a one-year servicing guarantee, there is no meeting of minds.

Therefore, between A and B, there is no contract.

1. This form of reasoning is the most commonly used form in law, and it is governed by the rules of the traditional syllogism already explained by Aristotle and Thomas Aquinas.
2. One must be aware, however, that since Aristotle and Aquinas, a very powerful system of logic – symbolic or mathematical logic – has evolved that allows such valid conclusions as:

All corporations are juridical entities. Therefore, all representatives of corporations are representatives of juridical entities.

Which the entire logic of Aristotle and Aquinas would never have permitted to be drawn.

3. In legal logic, the major premise will be supplied by the law, supported by the judicial precedent involved. However, before the appropriate law or administrative rule is determined and isolated, the facts must be threshed out. It is only after the facts are considered that it can be determined which law controls. And then again, it will be necessary to take note of exceptive clauses, exclusive clauses, the applicability provisions of the law, and other modifying variables.

Example:

A orally agreed with B that B should construct A's house for Php4.5 million. It was further agreed that the construction be completed in eight months. Two and a half years into the contract, A having paid over Php2 million thus far, B is far from complete. A sues for breach of contract, and B pleads unenforceability of the contract since it does not comply with the statute of frauds.

Any contract involving an amount of over Five Thousand Pesos (Php5,000.00) is subject to the statute of frauds.

The agreement between A and B is one such agreement, involving as it does Php4.5 million.

Therefore, the contract between A and B is subject to the statute of frauds.

4. The conclusion is false, not because the reasoning is erroneous, but because the legal (or major) premise is not properly qualified; the correct statement of the law being that where there is partial performance (performance on the part of one of the parties), the statute of frauds is no longer applicable.
5. The minor premise – the key facts – must be so stated as to allow for an application of the law. Put otherwise, the facts must be so stated as to allow a middle term to exist between the statement of the law and the statement of facts. It must be, however, that the evidence adduced and admitted by the court, allows such a statement.

If one starts with the constitutional premise:

Every revenue measure must originate exclusively in the Lower House.

Then, one introduces the statement of fact:

The new tax law was passed on the basis of a bill produced by the Bicameral Conference Committee.

Then, hardly any conclusion can be drawn. Obviously, a question of fact (as well as an interpretation of a legal term – “originate”) will be involved. Did the revenue measure originate in the Lower House?

Since the Supreme Court has ruled that “originate” simply means “initiated by,” one can then construct the syllogism thus:

A revenue measure that the Lower House initiates is valid. The E-VAT was initiated by the Lower House.  
Therefore, the E-VAT is valid.

#### IV. ANALOGICAL REASONING IN LAW

1. The common-law element that has found its way into our otherwise civil law system in this jurisdiction is the doctrine of *stare decisis et quia non movere*.
2. The application of judicial precedent is known even to law students, but some points need highlighting:
  - a. Is the doctrine still maintained, or has it been abandoned or qualified?
  - b. Is the doctrine uniformly stated by the court (considering that different divisions of the same Supreme Court do sometimes produce different results on the same facts)?
  - c. What are the factual similarities and differences that either warrant or do not warrant the application of precedent?
  - d. Which is *ratio* and which is *obiter dictum* in any particular Supreme Court decision?
3. It is obviously not necessary that all facts of the case at Bench correspond to the facts in the judicial precedent. It is of the essence though that the key facts be similar and the constellation of facts be also similar.

*Key facts* – facts that produce a result which, if otherwise, would yield a different result.

*Constellation of facts* – the arrangement of facts and their relation to each other.
4. There are cases that indisputably call for the application of judicial precedent. In penumbral cases, however, the

application (or non-application) of precedent will depend in large measure on whether or not the judge considers the differences significant enough to distinguish or similar enough to apply precedent. And whether or not the differences are significant or similar depends on considerations such as equity and fairness.

5. Whether or not some differences are significant or not, however, does not always depend completely on the judge, but is itself circumscribed by certain rules, e.g., the rule that unless the law itself distinguishes, the courts should not; the rule that minor inconsistencies on the part of a witness' testimony strengthen, not detract from, the probative value of her testimony.

## V. INDUCTIVE REASONING IN LAW

1. It might not be easy at first, seeing how inductive reasoning has a function in law, for it is more frequently encountered in the empirical and experimental sciences. Senior Circuit Judge Aldisert of the United States Court of Appeals insists, however, that inductive reasoning is at the heart of common law. Even if we are not a common law jurisdiction, our legal system in the Philippines has more than just vestiges of it. I have always believed it to be a hybrid of common and civil law systems.
2. Such persuasions, however, as *falsus in unu, falsus in omnibus*, and techniques for the impeachment of witnesses rely on inductive reasoning that would proceed thus:  
  
In Statement 1, the witness lied.  
In Statement 2, the witness lied.

In Statement 3, the witness lied.

In Statement 4, the witness lied.

Therefore, in the present statement, the witness is lying.

It is obvious that the presumption this reasoning works with is that the witness' behavior will be consistent. While there is some consistency in human behavior, the human person, though, can make options for contrary behavior, often without notice or predictability.

3. Similarly, when the court rules that the testimony given is "incredible" because it is contrary to "human experience," the court presumes that it has an idea of what human nature is, or about how human beings behave or react on the basis of familiarity with an indefinite number of individuals.
4. At all times, the problem with inductive reasoning, however, has to be reckoned with: Is it not possible that this person's reaction was different from the reaction of most other people? Should it not be granted that the accused could have behaved otherwise than his usual pattern of behavior suggests? Is it not to be granted that the witness could have been untruthful in some parts of his testimony, but is now being truthful?
5. This is the reason that in reasoning of this sort, cumulative evidence or the concurrence of indicators is more reliable accompanied, of course, by a constant willingness to re-think one's position that, in turn, presupposes a healthy intellectual humility and reticence.