

# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

## ARTICLES

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### A PRACTICAL GUIDE TO APPELLATE JUDGING

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#### I. INTRODUCTION

This article is designed primarily for two groups of people: lawyers or trial judges who are wondering whether to become appellate judges, and people who have recently become appellate judges. But observers of appeal courts may also enjoy a peek behind the curtain.

I write this after twenty-seven years as a justice on three Canadian Courts of Appeal.<sup>1</sup> I have done three studies about how appellate courts and judges do and should operate in the United States and Canada. Two studies were for the Canadian Judicial Council. Some very able and very busy American federal and state appeal courts gave me an intimate view of themselves hard at work; I also have had some part in training

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1. Canada has basically a fused court system: Most superior courts are both federal and provincial. Their judges are all federally appointed (and have tenure to age seventy-five). There are almost no intermediate Courts of Appeal in Canada.

new appellate judges.<sup>2</sup> I keep reading the reforms made by the two top English appeal courts. All that has shown the progress, development, and range of good ways to run an appeal court.

The most helpful approach to summarizing appellate work is to describe the work of an individual judge on an appeal court, so I will do that here. I will emphasize problems and the most effective personal methods to solve them.

## II. WHAT APPELLATE WORK IS

### *A. In General*

A late colleague used to say of an appellate judge's lot that it's all indoor work and no heavy lifting. Readers probably guessed that already. But some appellate judges do have to travel (especially in the federal courts of appeals in the United States). And the volume of paper at times does literally involve heavy lifting.<sup>3</sup>

In practice and in principle, an appeal court daily both corrects error and makes law. It also plays variations on those themes, such as clarifying or reasserting law, or promoting uniformity of results. One chief justice used to say that when he was a trial judge, he had been engaged in a search for truth, but when he went on the appeal court, he switched to searching for error.

What about a typical state with two appellate courts, a supreme court which is supposed to make law, and an intermediate appeal court which is supposed to correct error? Even then, the two tasks overlap. Of necessity, each court does some of both. But there can be trouble when either type of appeal court fails to maintain a proper balance between the two different functions.

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2. And a long time ago, I had some experience in teaching and writing on time management. I have written for years on civil procedure, and chaired Alberta's Rules of Court Committee.

3. The appeal process will continue to involve reams of paper until all appeals are fully electronic. For news of recent developments in this connection, the reader might consult Philip G. Espinosa, *The Paperless Court of Appeals Comes of Age*, 15 J. APP. PRAC. & PROCESS 99 (2014) (describing the technologies adopted by an intermediate appeal court in the state of Arizona as it has moved toward paperless procedures).

What is the aim of appellate work? A judge on a trial court can often do much to produce or aid justice in individual cases, especially when no jury is involved. But on an appellate court, that is often harder to achieve legitimately and safely. The facts are usually fixed. An appellate judge may be tempted to tweak the law, to favor a party for whom justice in that case is just out of reach. But sad experience shows that in the long run, the effect of following that impulse often produces injustice for many future litigants. That long-lasting evil comes from a past effort to help one now-forgotten individual in his or her suit or prosecution.

Hard cases indeed make bad law.<sup>4</sup> Sometimes sympathetic appellate judges do more harm than unsympathetic ones. Someone who wants to become an appellate judge should think about that. And someone who is already an appellate judge should never forget it.

## *B. In the Trenches*

### *1. Reading*

Appellate work is usually intensely oriented to paper and reading, and produces much less oral interaction than does trial work. That is especially true of those appeal courts which deny oral argument for most cases, those which impose extremely short time limits for oral argument, and those which draw panels from judges who live in different cities. However it comes about, the orientation to paper shapes the judges' task several ways.

The first effect is vital, to the surprise of a new appellate judge. Any appellate judge must be good at decisionmaking, paper handling, and time management. Even the onrush of paper (or emails) is considerable. If it backs up, it will flood the judge and his or her colleagues. What if an appellate judge cannot immediately take at least one useful step with each piece of paper or electronic communication reaching the desk or computer? He or she will soon drown in the in-basket, whether it is made of wood or of electrons. The judge's life will be a

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4. See, e.g., *Winterbottom v. Wright* (1842) 10 M. & W. 109 (1842) ("Hard cases, it has been frequently observed, are apt to introduce bad law.").

misery, and judgments from that judge will be poor tardy stragglers.

Lawyers often lead a very different life. Some active litigation lawyers take many cases to trial. They settle fewer suits, instead delegating decisionmaking to judges and juries. They usually insist on all their rights at every interlocutory step. And some trial judges are happy to have a jury to make the serious decisions. Some very good trial lawyers like a personal duel such as cross-examination, but do not like long written briefs full of numbers and small details. All such people will need to change gears to succeed as appellate judges, or even to tolerate that life.<sup>5</sup> Conversely, a good lawyer who did little courtroom work, and was more at home with commercial transactions, will sometimes make a fine appellate judge.

A general knowledge of the law and its principles and goals, and of how the social, commercial, and legal worlds really function, is very valuable. But more important than any knowledge are ability and attitude. A truly bad judge is not one who is ignorant of the law; it is one who is not even curious.

They say that it's sometimes better to fill an important job with someone who thinks that he or she does not really deserve the position. That appointee will work hard every day to learn the work, to measure up to its demands, and to be worthy. If you become an appellate judge, try to fit into that mould; do not think that you can relax and be the big man or woman on campus simply because you have passed the entrance exam. Many modern legal systems put enormous powers and responsibilities into judges' hands. The public deserves their best efforts. Indeed many oaths of office expressly pledge those efforts.

Much of an appellate judge's job is triage of one sort or another. That is so whether the court is richly endowed with law clerks and staff lawyers, or it is not, and whatever that court's tradition of just what work those clerks and lawyers do and do not do. Here are four examples of such triage.

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5. Maybe some of them exemplify the Peter Principle, which says that people who do well in their jobs keep getting promoted to different higher positions, until they finally get one which they are not good at. There they stay. See LAURENCE J. PETER, *THE PETER PRINCIPLE: WHY THINGS ALWAYS GO WRONG* (1969).

### a. Scaling the Paper Mountain

Many appeals unload on the judges a Matterhorn of paper or potential reading, including transcripts and trial exhibits. Usually one judge cannot day in and day out keep reading all that and still stay healthy (and have a personal life). Reading some of it carefully is vital, but reading most or all of it (beyond maybe some judicious skimming) is often highly counterproductive. One would think that good experienced lawyers would be quick to flag for the judges just what to read, indicating what is merely semi-relevant background or completely extraneous. But lawyers rarely do. This problem is especially acute when an appeal is supposed to be confined, one way or another, to questions of law, jurisdiction, or principle. Here even a court's law clerks or staff lawyers often have limited use, especially if they are the first people at the court to look at the material. Law clerks and staff lawyers are of more use when given specific tasks and directions by the judge. So the judge has to develop experience and initial methods to analyze lawyers' arguments, so as to locate which papers are important and more or less discard those which are not. Only then can the careful reading commence. But usually then the careful reading need not be unduly lengthy.

### b. Assessing the Necessary Investment of Time

Next, the judge should have some idea of what types of appeals deserve the Cadillac wedding with lots of bridesmaids, an army of ushers, a consultant, a videographer, several acolytes, and a bishop, and for what types the standard chapel wedding suffices. (That distinction refers to any of a number of procedural streams or differences, including whether the case would benefit from oral argument, whether law clerks or staff lawyers help, or even whether the case should be directed to a different court.) The judge should be quick to spot cases likely to be sent by default down an inappropriate track—either permanently, or long enough to waste significant time and money—which could cause a risk of injustice.

### c. Assigning Responsibility for the Opinion

Once the case is set on the right course, someone (possibly each judge assigned to the appeal) should develop some ideas about who should write the judgment, what form it should take, and at what stage it should first be drafted. For example, should any type of judgment or disposition be discussed before oral argument, or without any oral argument? Who should do the drafting? One judge? All three judges? One judge's law clerk? A staff lawyer? Sometimes the answer is determined by the procedural track chosen for the appeal, but not always. And frequently it is possible—though not routine—to treat an appeal differently than the track initially assigned would suggest.

### d. Developing a Sense of the Case

Sometimes it is important to try to have some real feeling for a case even before oral argument commences. The judge may find that he or she should raise some aspect of a pending appeal before oral argument with the two (or more) colleagues assigned to decide it. And fairly often a judge should do more than merely read the briefs and the trial reasons under appeal. That way oral argument can make the judge's views jell.

In conference right after the oral argument, it is very unhelpful for one judge merely to tell his or her colleagues that the case needs more thought, and that he or she cannot suggest even a tentative answer. At the very least, that conference after oral argument is supposed to assign responsibility for producing a first draft of a judgment. Until that is done, nothing much can happen. If indecision happens fairly often, the court will become gridlocked.

Furthermore, by the end of oral argument (at the very latest), a judge should have a good idea about what issues or entire appeals he or she feels firmly about. And he or she should know enough, and have thought enough, to be able to see immediately when a colleague's differing views either are persuasive, suggest need for more research, or open up a different possible route to unanimity of the three judges. That does not mean that an appellate judge always has to be able to think on his or her feet about every issue and reach a snap

decision. But on a busy court with a heavy load, at least a tentative conclusion should surface by the end of oral argument. And even when occasionally that is not possible, the judge's tentative decision should come within a day or two after oral argument, in the great majority of the remaining instances. All this said, the lawyer wanting to become an appellate judge should ponder whether past job and life experience has accustomed him or her to such triage-style decisionmaking processes.

## 2. *Writing*

Although reading is central to the work of an appellate judge, it may be just as important for a would-be appellate judge to grasp the central importance of writing.<sup>6</sup> Being such a judge means having to become a prompt and prolific published author.

Some judges make sound decisions, and know how to support them with good reasoning. But even so, they have serious trouble writing a judgment. Other judges can write competently, but do not really enjoy writing, even shy away from it somewhat. Both are definitely true of most lawyers. And some lawyers would rather go to the dentist than write an important paper about anything. Some just cannot do it. In a successful law firm, there are always junior lawyers who can do such writing work, thus enabling a senior lawyer to perform effectively. Such a senior lawyer transported to an appellate bench will have serious problems, however many law clerks and staff lawyers the court has. Thus, someone wanting to become an appellate judge should ponder long and hard whether past job and life experience has accustomed him or her to writing deeply, quickly, and frequently.

### III. WHO DOES THE WORK: THE PROPER ROLE FOR LAW CLERKS AND STAFF ATTORNEYS

The reader may object that writing is no problem for appellate judges because busy ones may have law clerks (or, as we call them in Canada, articling students) and staff lawyers to

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6. I return to other aspects of writing in Parts III and V below.

draft opinions and judgments for them. Such professional employees do aid many appeal courts; other courts are more starved for resources. But, bright as the law clerks may be, and as experienced as an occasional staff lawyer may be, having them write judgments is not a very good solution. True, some appeals are so simple that the judgment need say little. And many of the staff lawyers and law clerks are wonderful. But no law clerk is experienced. None of those employees is a clone of any particular judge.

In my considered view, after long experience, a judgment more than a page or two long written by someone other than the judge is likely not very good. There are doubtless many different reasons for that, but it is the usual result.

Any conscientious judge who is not submerged by a tsunami of appeals, has but two choices when expected to produce any judgment beyond a very routine one. The first choice is personally to make a rough draft of at least the important parts. That certainly includes analysis of the important issues. Possibly other people can then add more routine text at the beginning and end, and run down doubtful points and loose ends. Certainly they can add the detailed citations to law and evidence.

The judge's second and only other choice is delegation of the whole draft. The judge would give detailed instructions to some non-judge to write a first draft of the judgment, and then give back a host of numerous constructive critical comments on that person's first draft, suggesting in detail how to rewrite big parts of it. And then the judge would do much the same with the second, third, fourth, fifth, sixth, and seventh drafts. (There will be at least that many drafts; no one can anticipate all someone else's wishes on the first half-dozen attempts.)

I have known a few judges who managed the latter puppet process and turned out good judgments. But that process was usually much more work for the judge than writing a first draft himself or herself would have been. (Not to mention how much extra work it was for the ghostwriter.) Sometimes a huge number of drafts proved necessary. Playing puppet master always yields slow results, so there are dozens of gaps during which the master's memory fades.



Fairly often I have carefully read (and tried to follow or to distinguish) mediocre judgments from other courts, which I suspect were ghostwritten. Such judgments often look acceptable on a quick read, or in the abstract. But careful examination often shows statements of routine settled law which are only approximately correct, not exact. Worse, a specific later lawsuit on the same main topic will often reveal hidden ambiguities and subtle internal contradictions on the main topic in the earlier precedent. As a result, some courts constantly build new law upon shaky foundations.

A judge who is the nominal author of a judgment which wrestles with the important issues, but who has merely read someone's draft instead of writing its central parts, has not tested it. Such a judge can never be sure that he or she has really grasped the issues, let alone tried to work with the contrary view. And working with the contrary view is important: Sometimes the best proof of a conclusion is that attempts to prove the opposite do not work.

Delegation only makes sense if the delegate is somehow a more suitable person to do the job. And the law clerk is rarely better suited to writing the opinion than is the judge, in part because a judge is not an umpire calling "Out!" or "Safe!" He or she does far more. An appeal court's judgments make law, which the single word "Affirmed" rarely does, and the single word "Reversed" never does. And even these words might be wrong unless the foundation under them is well built.

Consider that in many a new building under construction, extra samples of each concrete pour are taken and saved. Once they have set, the samples are subjected to destructive strength testing in a hydraulic press. If one sample is found too weak, the corresponding concrete pour is torn out of the building, re-poured, and retested. Nothing more is built until the weak part is replaced. The same principle should apply to judgments on appeal.

Testing the strength of written legal reasoning is even more delicate and relies even more heavily on the assayer's experience and judgment than does testing concrete samples. It is no job for apprentices. Judgments speak to a wider audience than legal scholars alone; they also speak to the parties and to the public at large. The reasons for decision must answer all the

arguments from the losing party. It takes experience to know what those are and which of them deserve a detailed refutation.

Some appellate judgments appear to be the product of a committee. Typically, the ostensible author and some law clerk were running a sort of three-legged race, tied together but not really working as one entity. The result is often much poorer than a draft by either person alone: worse in substance, and harder to read.

Delegation of judgment drafting to a law clerk or staff lawyer yields another problem. Often all judges on the panel do not immediately agree totally with a new draft judgment, so discussion is needed. Such debates among those three judges then turn out to be more or less negotiations among middlemen if the draft's true author with the detailed knowledge is a law clerk who is of course unable to attend the judges' discussions, not a judge.<sup>7</sup>

I counsel neither perfection nor superhuman authorial effort, especially for overworked appeal courts, or for any court deciding minor routine matters. But too much delegated writing breeds more evils than just mediocre work. In the long run, it consumes many people's labor, saves no time, and creates future problems.

An appellate judge tempted to delegate judgment writing should frankly analyze his or her problem. Is writing itself repugnant? Or is other earlier inefficiency or delay stealing time needed to write?

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7. Maybe that is why some justices have characterized the Supreme Court of the United States as "nine small, independent law firms," Lewis F. Powell, Jr., *What the Justices are Saying . . .*, 62 A.B.A. J. 1454, 1454 (Nov. 1976), and as "nine firms, sometimes practicing law against each other," DAVID H. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 122 (1986) (footnote omitted). Indeed, on some American appeal courts, the physical layout of appellate judges' offices even looks like separate little law firms. See, e.g., O'Brien, *supra*, at 122 (referring to the "secluded chambers" assigned to the justices of the Supreme Court of the United States, who engage in little of the "direct daily outreach" common among the judges of the federal courts of appeals). Not so in Canada. Churchill once said that institutions are shaped by the physical premises which they occupy. Winston S. Churchill, Prime Minister of England, *Speech*, House of Commons (meeting in the House of Lords) (Oct. 28, 1943) (expressing his wish for reconstruction of the Commons Chamber, which had been destroyed by German bombs in 1941: "We shape our buildings, and afterwards our buildings shape us"). Is it a coincidence that the Supreme Court of the United States had no real premises until the mid-1930s? Or that the Supreme Court of Canada did, the House of Lords scarcely did, and the High Court of Australia for a long time was peripatetic?

## IV. WHO CONTROLS

*A. Coalition and Compromise*

A senior or successful lawyer probably makes his or her own decisions on files. The other lawyers in the firm usually do not second-guess the professional decisions on a partner's files. It is similar in trial courts. A trial judge runs the show, subject only to appeal; and even then, appeal courts usually owe him or her considerable appellate deference. Judges on some trial courts even administer those cases assigned to them, deciding all the interlocutory applications before trial.

Appeal courts are different. The law and the system allow one judge to do very little on his or her own. On a court that sits in panels, it usually takes a majority of two or three judges to decide anything; and on some courts, it may be seven or nine, or occasionally even more. So a lawyer who liked his or her colleagues in the law firm, but did not like the endless back and forth of partnership meetings, may find these aspects of appellate work confining, or worse. They say, after all, that without enough friends to make up a majority, anything a judge writes is just literature.

Many writers have suggested that dissents yield several benefits.<sup>8</sup> Few of those writers have sat on appeal courts. Lighting a path for future generations is theoretically a benefit, though largely confined to ultimate appeal courts. But a dissent which successfully lights a new path is statistically pretty rare. A dissent may have a little more effect if it is likely to influence a higher court to accept an appeal from that very decision. And of course a judge has a duty not to concur in a judgment which he or she is firmly convinced is wrong. There are a few other problems with an absolute prohibition of dissents.<sup>9</sup> Otherwise, the benefits of dissents are slim. Their drawbacks are not fully appreciated until one becomes a trial judge or an appellate judge.

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8. See, e.g., Hunter Smith, *Personal and Official Authority: Turn-of-the-Century Lawyers and the Dissenting Opinion*, 24 *YALE J.L. & HUMAN.* 507, 531–34 (2012) (collecting and discussing scholarship about dissenting opinions).

9. But that prohibition is now almost unknown in the English-speaking world.

A good appellate judge must be decisive, prompt, and well organized. But after a few years, those mental habits can make him or her somewhat opinionated. Therefore, it can be frustrating or daunting for that judge to wait for colleagues to get up to speed or to make up their minds. It is still worse for the judge to learn that he or she disagrees on what another judge sees as received truth and wisdom. An appellate judge spends part of his or her time trying to persuade colleagues, listening to them, and getting surprises. It is disconcerting for anyone to find that no one (including your most respected friends) agrees with you about some aspect of a particular case, creating the dawning realization that *maybe I am wrong*.

Why are appellate judges repeatedly surprised by the large variety of ways in which their colleagues can reason? Without getting into controversial psychological theories, it is safe to say that different able learned people in all walks of life often reach decisions in different ways, emphasizing different things. Different people have different training and life experiences. It takes a great deal of patience, experience, and humility to work successfully with colleagues whose working style or decisionmaking process is noticeably different. Or just opaque.

Various courts use different traditions and unwritten rules or practices to handle such interactions. Those include preparing in some depth for oral argument; conferences held at various stages of the process; circulating draft judgments; encouraging or discouraging private caucuses; and various approaches to rehearing procedures. A new appellate judge must be quick to learn those used on his or her court.

Unless a new appellate judge wants to multiply everyone's work by producing a split panel and two or three separate judgments in many appeals, he or she will have to compromise and persuade, and to be willing to reach unanimity where that is reasonable and ethical. There is often more than one way to reach the right and sound result in a given appeal. So the judge must be sensitive to others, diplomatic, and creative. Above all, the judge has to be willing and able to suppress ego, pride of authorship, rigid dogmatism, laziness, and suspicion. So anyone who is not a team player and is unable or unwilling to negotiate will have some difficulties on an appeal court. And he or she

will multiply the work for all three judges on the panels hearing most appeals.

### *B. The Risk of Reversal . . . and the Court of Public Opinion*

If a trial judge dislikes being overruled on appeal, moving to the appeal court is likely no solution. First, colleagues can overrule an appellate judge without even an appeal from him or her: They simply will not concur in some of that judge's judgments. And second, there is usually a higher court of appeal above the first appeal court.<sup>10</sup> Furthermore, when an appellate judge is overruled, he or she cannot take comfort in the fact that the final decision was by a jury.

That problem can be magnified when the judge's decision is criticized by the media, or by that ultimate court of appeals, student law reviews. Someone who aspires to glory should transfer to the stage, the arts, sports, or the military, not to an appellate bench.

Presumably most lawyers or trial judges can at least imagine the human elements of appellate judging. But their full implications, and their combined effects, sometimes do not sink in until the new appellate judge personally experiences them.

## V. WORKLOAD AND HOW TO SURMOUNT IT

### *A. Preparing to Hear and Decide the Case*

The workload of appeal courts tends to be heavy. What can one judge do about it? Here are some suggestions for first steps:

- Get all of the materials for each appeal on which he or she will sit, as soon as they are on file and available.
- At that stage, it is best to read the reasons for decision which are under appeal, then the appellant's brief, and then the appellee's. (If time

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10. Even if the judge in question is now on the state's supreme court, the jurisdiction of some federal court may be invoked on a constitutional ground.

presses at first, the judge should at least skim those materials at an early date.)

- When reading briefs,<sup>11</sup> a judge should note things which deserve following up. Such needy topics can take many forms, but here are two of the most important:
  - a statement about facts or evidence which could be very important, even pivotal, if correct, but which is disputed, improbable, or not backed by any evidence citation;
  - a proposition of law which could be important, even pivotal, if correct, but which sounds dubious, or is disputed, or is backed by either poor authority or none at all.<sup>12</sup>
- No matter how obvious or memorable the case seems at the time of reading, the judge should make at least a brief note of his or her views and puzzles at that early stage.<sup>13</sup>

All these early steps let the judge see whether more material should be obtained from somewhere, whether more

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11. It is interesting to note that at one time briefs were unknown in the U.S., even in the Supreme Court of the United States. See, e.g., Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on Their History, Function, and Future*, 10 J. APP. PRAC. & PROCESS 247, 251 (2009) (noting that the rules of the Supreme Court of the United States first referred to a brief “containing the substance of all the material pleadings, facts and documents . . . and the points of law and facts intended to be presented” in 1821). In Canada, the origins of the brief—known as a *factum*—are older. See, e.g., J.E. Côté, *History of Factums*, 52 ALTA. L. REV. 71, 74 (2014) (tracing the *factum*'s roots to Quebec, where court rules dating from 1809 refer to each party's filing of a written “case”).

12. Conversely, extensive further reading or checking before oral argument is often of little value, if it audits points which are neither contested nor improbable.

13. I am not the first to make this important point:

“The horror of that moment,” the King went on, “I shall never, *never* forget!”

“You will, though,” the Queen said, “if you don't make a memorandum of it.”

LEWIS CARROLL, *THROUGH THE LOOKING-GLASS, AND WHAT ALICE FOUND THERE* 19 (1872).

research should be done, or whether a law clerk or staff lawyer should be asked to check or read carefully some part of the materials filed. Discovering that need too late may bar effective steps, or lead to long delays. Early reading also exposes issues overlooked or superficially treated by the trial court or counsel. Whether and how to do something about either or both will commonly require some lead time. Sometimes the assistance of staff or that of the lawyers for the parties must be called upon.

At some point before oral argument, the judge absolutely must personally read carefully the reasons for decision of the lower courts, the briefs, and anything else which the judge or those helping the judge prepare for the argument think important. But should the judge do that careful reading early, or wait until just before the oral argument (or the day on which the panel is to decide a non-argument case)? It is hard to say; there are pros and cons. It may depend on the particular judge's memory or note-taking habits. One solution may be to do both: Read early, and then review again at a late stage. That sounds like duplicated work, but proper notes (and marginal marks) made the first time will minimize the duplication, allowing the judge to focus on the most important or difficult parts of the case.

An appeal court's law clerks or staff lawyers often prepare prehearing memoranda for upcoming appeals. Those memos are more useful if tailored to the needs and habits of individual judges. One general cookie-cutter memo for three judges is much less helpful. A good memo helps greatly by revealing any submerged problems, such as incomplete materials, hidden issues, or apparent gaps in research. But whatever the system of preparation, it is dangerous for a judge to rely heavily on such summaries by non-judges. It is risky even to rely on them temporarily, until the judge personally gets up to speed a day or two before oral argument. Well before the day set for argument, the judge has to know whether the case is ready for oral argument and decision. A judge has more experience than a law clerk (or staff lawyer) and can detect important points half hidden, and suspect red herrings and dead ends. A non-judge working for the court should try not to advocate one position at this early stage. So often he or she cannot fairly say whether the

case is important, will need a lot more work, or has strong merits.

*B. Making the Decision and Issuing the Judgment:  
Begin at Once*

In many areas of life, long lineups or long waiting lists get longer, and short ones get shorter. That is true of many accumulated undone tasks. It is trebly true of unwritten judgments backed up in a judge's chambers. The hardest judgment to write—worse even than the appeal which the judge dislikes—is the one which the judge has trouble remembering.

When to write a draft judgment is the vital point in appellate work. Canada's National Judicial Institute has done considerable consultation on this topic, and once published suggestions on it. The title of their compilation sums it all up by announcing that the most important thing is to begin.<sup>14</sup> That is the first Commandment, and from it flows all the law. The judge must take a snapshot before the scene fades, is disturbed, or is overwritten. And early writing helps psychologically: The hearing day's emotions and momentum propel the drafting process.

By the end of argument, usually the judge should know what conclusion and possible paths to it he or she prefers. Attempting a draft judgment is the acid test for a judge's tentative conclusions. So the judge who is to do the first draft must at once prepare a draft judgment.<sup>15</sup> By sunrise the next day, the judge will have forgotten important parts of his or her thinking, let alone the arguments. In three weeks, almost all the judge's reasoning will evaporate; some good parts of it can never be recreated or rediscovered. And the mental momentum will drop dramatically even one day after argument.

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14. NATIONAL JUDICIAL INSTITUTE, *THE MOST IMPORTANT THING IS TO BEGIN: THE ART AND CRAFT OF TIMELY JUDGMENT WRITING* (2003).

15. An oral judgment the same day is a possibility. See J.E. Côté, *The Oral Judgment Practice in the Canadian Appellate Courts*, 5 J APP. PRAC. & PROCESS 435 (2003). But that is uncommon in the U.S. and I will not discuss it here. Readers interested in the topic might, however, consider the tentative-opinion practice of the few U.S. courts that use them. See, e.g., Joshua Stein, *Tentative Oral Opinions: Improving Oral Argument without Spending a Dime*, 14 J. APP. PRAC. & PROCESS 158 (2013) (discussing tentative-oral-opinion practice of a California appeal court).



The judge always thinks that tomorrow, or the weekend, or next week, would be a better time to start writing. Unless the judge has a fever of 104°F today, that is false. Writing will not happen tomorrow; other responsibilities will intervene, and work postponed will not start for at least two weeks. Even a simple appeal will involve at least eight basic ideas, interconnected like a cat's cradle of string. After a few days the judge will probably forget some of the ideas, and will certainly forget most of their interconnections. To think otherwise steers far too close to vanity. No one's brain can hold, let alone retain, that many things for several weeks.

So after oral argument, as soon as a particular judge has definitely been assigned to see that the first draft of a certain appeal judgment is written, that judge must personally act at once. What must be done? Capturing immediately all of the judge's basic ideas. Details can come later. How to capture the ideas? By writing something useful before going to bed that same night, and usually that something should be a draft of a judgment.

On that first day, it is enough for the judge to write a very rough draft which links the important ideas or pieces of information, saves them overnight, and flags remaining queries or loose ends. If the ultimate judgment is likely to be very long, a detailed outline, plus a rough draft of the key portions, may have to suffice for the first day. In either case, the draft will have gaps, blanks and reminders to check things. But making it immediately ensures that nothing important will be lost.

Rarely, the appeal is so complex and difficult that it requires some more legal or factual reading before any sort of draft is possible. But usually by the end of oral argument, such additional steps are not necessary. And for even such an exceptional appeal, one which is a true puzzle, the responsible judge should immediately write or dictate a very specific internal memo. That memo should describe precisely what research or checking must be done, and what specific results and conclusions will flow from alternative possible answers generated by that research or checking. And the judge should draft at once parts of the judgment not affected by the additional research or checking.

Unless the judge has spare time on the first day, he or she need not turn out anything like a respectable full draft. Indeed, there is danger in trying to do so. Without staying up very late, the judge probably does not have enough time to turn out a product with ends tied down, queries answered, and important authorities checked. And what is written after real fatigue sets in may not be dependable.

But if the judge begins the process on argument day, he or she can then wake up the next morning happily recalling that the judgment's foundation is already laid, and its framing completed; so now the judge or others are ready to nail the siding onto the outside of the building.

## VI. COLLEGIALITY

Any court has two functions. One is to apply the law fairly. The other is to demonstrate to the public and to the losing party that the decision was reached fairly, and with an informed but reasonably open mind. England's Vice-Chancellor Megarry once said that the most important person in a courtroom is the party who is going to lose, because the hearing must leave him or her with the conviction that the court proceedings were fair.<sup>16</sup> An appellate judge must remember, then, that appellate judges are not at war with anyone: neither parties to appeals, nor trial judges, nor colleagues on the court of appeal. Even parties who are very wrong are usually sincere.

For all those reasons, an appellate judge needs a good deal of diplomacy. It is not necessary to be rude; usually one gains more by being polite.<sup>17</sup> No exhaustive catalogue of ways to be

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16. See, e.g., Robert Megarry, *Temptations of the Bench*, 16 ALTA. L. REV. 406, 410 (1978) (noting his conviction that "the most important person in the court room. . . is the litigant who is going to lose," and urging courts to consider whether, "when the end comes, will he go away feeling that he has had a fair run and a full hearing?").

17. As Winston Churchill commented about the moderately phrased declaration of war that he sent to the Japanese Ambassador on December 8, 1941, "when you have to kill a man it costs nothing to be polite." See, e.g., Book-of-the-Month-Club Advertisement, LIFE, Sept. 27, 1954, at 3 (using Churchill's statement to introduce an offering of his six-volume history, *THE SECOND WORLD WAR*). In its entirety, Churchill's letter read as follows:

polite and diplomatic is possible. But here are some hints for appellate judges:

- Once in a while, it really is necessary to write something firm and stern in a judgment, criticizing the trial judge or one party's lawyer. On these occasions,
  - Use old-fashioned language, not modern turns of phrase: Ask yourself how your grandmother would have phrased it.
  - Avoid extreme language. Say nothing more offensive or violent than "very incomplete," "not accurate," "lamentable," "curious," or "ill-conceived."
  - Do not say that a lawyer or a colleague suppressed or concealed something. Say that

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Sir,

On the evening of December 7th His Majesty's Government in the United Kingdom learned that Japanese forces without previous warning either in the form of a declaration of war or of an ultimatum with a conditional declaration of war had attempted a landing on the coast of Malaya and bombed Singapore and Hong Kong.

In view of these wanton acts of unprovoked aggression committed in flagrant violation of International Law and particularly of Article I of the Third Hague Convention relative to the opening of hostilities, to which both Japan and the United Kingdom are parties, His Majesty's Ambassador at Tokyo has been instructed to inform the Imperial Japanese Government in the name of His Majesty's Government in the United Kingdom that a state of war exists between our two countries.

I have the honour to be, with high consideration,

Sir,  
Your obedient servant,  
Winston S. Churchill

376 Parl Deb HC (ser. 5) (1941) cols.1358–59 (UK) (accessed Oct. 14, 2015; copy on file with Journal of Appellate Practice and Process). An electronic copy of the declaration is available at [http://hansard.millbanksystems.com/commons/1941/dec/08/prime-ministers-declaration#column\\_1358](http://hansard.millbanksystems.com/commons/1941/dec/08/prime-ministers-declaration#column_1358).

it has been “forgotten” or “overlooked,” or that the point was “insufficiently researched.”

- More frequently, it may be necessary to write a judgment disagreeing with a proposition being adopted by a colleague. In this situation, do not mention the colleague at all.
  - Instead (where possible) disagree with the view of the party whose submission the colleague accepts.
  - And if no party so argued, simply begin with “One might wonder whether [proposition being adopted by colleague], but no party so argued on this appeal.”
- Remember that we all err occasionally, and that it is usually more tactful to criticize a piece of work, rather than its author.
  - Do not say that the judge under appeal overlooked or left out vital points.
  - Do not say even that he or she erred.
    - Instead, say that the reasons for decision (or jury instructions) of the trial court did so.
  - When writing an internal memo to judicial colleagues, it is better to say that a draft judgment does not go deeply enough into a question than to say that the judge who wrote it does not.<sup>18</sup>

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18. The latter could be read as implying that he or she cannot—or cannot be bothered to—do the research, either of which is unnecessarily harsh. Indeed, I remember that a very able and experienced state supreme court judge used to chair an annual seminar for appellate judges at which he would always ask a Canadian judge in the audience if he or

- Sign no reasons for judgment beyond the routine, until someone who was not on the panel has read and commented on the draft.
  - Such comments should touch on readability, ease of understanding, tone, and phrasing, which is likely also to detect unfortunate terms that might produce misinterpretations, misunderstandings, or offence.
  - Sometimes the best person to undertake this reading is one totally unacquainted with the appeal in question, but well accustomed to modern speech and social attitudes.
- And remember that there is one comment which is never safe to ignore: that a draft judgment is hard to understand, ambiguous, or could be read as suggesting something unintended.

## VII. CONCLUSION

To the receptive reader, I close with an explanation. This article is not intended to deter lawyers from becoming appellate judges. Being an appellate judge is a wonderful, fascinating, and stimulating stage in one's legal career. The work is varied and mind-expanding, letting one cooperate with interesting colleagues to solve problems, make law, and answer real-life questions. On many levels that satisfies deeply. But one should know beforehand what the job entails.



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she saw in Canada sharp comments of the sort exchanged between some American justices. Because the Canadian judges always replied that they had never seen anything like it in Canada, the event's chairman would then suggest that such sharp language is not necessary.

