

REFLECTIONS ON APPELLATE COURTS: AN APPELLATE ADVOCATE'S THOUGHTS FOR JUDGES*

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I. INTRODUCTION

When writing an article to an audience of appellate judges, appellate advocate Moses Lasky spoke of the delicate nature of the task:

Unlike the teacher of law, the poor lawyer occupies no Olympian coign of vantage outside the fray. Nor is he clothed in the armor of the black judicial robe to protect him from the consequences of being in the fray.¹

Lasky explained that “only an enormous respect for the function of the courts and, by and large, for their efforts” allowed him to turn a critical eye on them.² He also acknowledged that “if there are deficiencies in the bench and its opinions, they may well stem from bad briefs and poor advocacy.”³ As was Lasky, here am I, ready to engage in a candid conversation about what advocates seek from the bench. I hope that the conversation will prove thought-provoking,

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1. Moses Lasky, *A Return To The Observatory Below The Bench*, 19 Sw. L.J. 679, 679 (1965) [hereinafter Lasky, *Below the Bench II*].

2. *Id.*

3. *Id.* at 680.

perhaps enlightening, and that we will all leave with a renewed commitment to the collaboration necessary to make the appellate process function better.

As an appellate advocate, what I seek on behalf of my clients is nothing more and nothing less than principled decisionmaking that leads to a just result. Judge Posner offered a definition of a principled decision that is worth quoting: “A decision is principled if the ground of the decision can be stated truthfully in a form the judge could publicly avow without inviting strong condemnation by professional opinion.”⁴ He illustrated his statement by observing that

[i]f the only “principle” that explained a judge’s decisions in tax cases was that he thought tax collection communistic or satanic, his tax decisions would be unprincipled, because he would never admit publicly—not in this society, not today—what his ground of decision was.⁵

Judge Posner elaborated on his notion of principled decisions, explaining that “[t]o be a principled adjudicator involves more than just acknowledging the true ground of decision; it also requires being consistent within and across cases.”⁶

If appellate judges do not engage in principled decisionmaking, then the appellate advocate’s presentation of an appeal becomes meaningless, for the issues selected and the arguments presented by the advocate are, or should be, grounded on a respect for the law. The advocate seeks to persuade the appellate court that professional principles of decisionmaking that are accepted in the jurisdiction support the advocate’s position. When a decision is actually based on some other ground, unknowable in advance and inconsistent from case to case, the entire process takes on an Alice-in-Wonderland quality. No appellate advocate wants to participate in such a process—and I am sure that judges would also disavow it.

Like any experienced advocate, however, I have seen appellate decisions that do not satisfy this standard. I have read opinions in which the court omitted discussion of a significant issue, overlooked critical facts, or distorted the discussion of

4. Richard A. Posner, *The Federal Courts: Challenge and Reform*, 312 (2d prtg., Harv. U. Press 1999).

5. *Id.* at 312.

6. *Id.*

past precedent. But I have seen many more in which the appellate court carefully and thoughtfully considered the issues presented and decided the outcome on the basis of the facts and law. I regularly read opinions that are lucid, logical, and occasionally, even elegant. And I have had clients say to me, "I had almost lost faith in the system until I received this decision." For advocates and judges alike, this is something to strive for and something that, in my optimistic fashion, I believe is possible.

In any event, I thought it might be useful to catalogue more concretely some aspects of what I seek from the appellate judges before whom I appear.

- First, and most basic, I hope to receive a decision that reflects a careful and accurate understanding of the facts in the record.
- Second, I read the opinion to see whether it discusses the issues raised by the parties.
- Third, I hope the opinion analyzes the existing law on the subject, and then sets forth the court's reasoning in a logical, principled, and persuasive way.
- Fourth, I look for an opinion that announces the court's holding in careful language so that it is clear rather than ambiguous, and so that the scope of the holding is appropriate for the case. I prefer to win but if I don't win, I look for an opinion that demonstrates, to me and my clients, that the court heard the case, considered the issues raised by the parties, refrained from deciding issues not raised or briefed by the parties, and reached an outcome that was consistent with a principled approach to decisionmaking.
- Fifth, I want the process to be fair and one that facilitates, rather than impedes, my ability to present my best arguments to the court, both in the briefs and at oral argument.

- Sixth, I would like to receive a decision in a timely manner, if this is possible without compromising the quality of the opinion.

Let me elaborate on these points.

II. APPELLATE ADVOCATES SEEK AN OPINION FROM THE COURT THAT SETS FORTH THE FACTS ESSENTIAL TO THE OUTCOME IN A MANNER DEMONSTRATING THAT THE COURT CORRECTLY UNDERSTOOD THE RECORD.

The factual discussion in an opinion is critical to its acceptance by the parties. Unless the opinion completely, accurately, and evenhandedly sets forth the facts, it has, in some senses, failed to accomplish the essential functions of an appellate decision. To the extent that the opinion is intended to⁷ and does effectuate the court's law-making function,⁸ the breadth of the rule of law the court announces is limited by the factual circumstances that gave rise to the court's holding.⁹ To the extent that the opinion reflects the court's error-correction function, the factual recitation is necessary to demonstrate that the court has read the record with care, is aware of the relevant facts, and has applied the law to those facts. Justice Jackson long ago recognized that "most contentions of law are won or lost on facts."¹⁰ This is particularly true at the intermediate level, where

7. I will leave for another day the ongoing debate about unpublished opinions and their wisdom and compatibility with the fulfillment of the appellate court's obligations. Compare *Anastosoff v. U.S.*, 223 F.3d 898 (8th Cir. 2000), *vacating as moot Anastosoff v. U.S.*, 235 F.3d 1054 (8th Cir. 2000), with *Hart v. Massanari*, 266 F.2d 1155 (9th Cir. 2001); see generally Stephen R. Barnett, *From Anastosoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. App. Prac. & Process 1 (2002); Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 Hastings L.J. 1235 (2004); see also Fed. R. App. P. 32 (LEXIS 2006). Regardless of how you come out on this debate, the opinion will have some impact on lawmaking because it will be used for its persuasive value in most jurisdictions. The opinion must also accomplish the other appellate function, resolving the case presented between the parties.

8. It is well recognized that appellate courts have both a law-making function and an error-correction function. See, for example, Judge Arnold's discussion of these matters in *Anastosoff* and Judge Kozinski's discussion in *Hart*.

9. See Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571, 579-589 (1987).

10. Robert H. Jackson, *Advocacy before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 803 (Nov. 1951).

the appellate court is generally required simply to apply the facts to the law.¹¹

These principles may seem so basic that you wonder why I address them at all. I do so because the time constraints on many appellate courts, particularly at the intermediate level, coupled with a necessary reliance on appellate court staff or law clerks, has led to abbreviated opinions or orders in many jurisdictions. Most appellate advocates would, I think, join me in urging appellate judges to resist the temptation to shorten the factual recitation too much. But how much is too much? I suggest this rule: If an advocate cannot be sure that the court correctly understood all salient facts, then the factual discussion was insufficient.

I have heard more than one appellate judge suggest that setting forth too many facts renders the decision more readily subject to attack on appeal. They fear that minor mistakes about facts not material to their holdings will prompt further appellate review, and they conclude that omitting the discussion avoids this possibility. Perhaps. But at what cost? Judge Abrahamson noted that the “judge is constrained by the facts,” because the “facts set the boundaries for decisions.”¹² Discussing those facts in the written opinion serves as a check on the court; it is intended to and does help to ensure that the court has done its job correctly. To the extent that written opinions dispense with this essential aspect of appellate decisionmaking, a critical tool for ensuring a just result is lost. In this time of scarce judicial resources and ever-increasing time pressures on appellate courts, the need to accurately set forth facts in the opinion provides the counter-balance necessary to ensure that the time spent was adequate to the task.

Appellate advocates understand that a minor error does not necessarily undercut the court's decision and reasoning, but they also believe that a failure to accurately set forth the facts suggests that the court may not have labored long or with much care over their case. This is always a disappointment. It is also problematic because it lessens the losing party's respect for the

11. See e.g. Robert P. Young, Jr., *Advocacy in Intermediate State Appellate & Supreme Courts* (speech, App. J. Ed. Inst.) (San Francisco Oct. 1, 2005) (copy on file with author).

12. Shirley S. Abrahamson, *Judging in the Quiet of the Storm*, 24 St. Mary's L.J. 965, 983 (1993) (citing Sol Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. Rev. 1, 20-21 (1990)).

process. The absence of a well-written, accurate, and complete factual recitation may cause the losing party to conclude that the case was not fully considered by the court. Litigants sometimes question whether the court understood the facts, particularly in a hard-fought case. If critical facts are omitted from the opinion, the parties cannot be sure that the court adequately reviewed the record and grasped them correctly. Moses Lasky, with whose wisdom I began, may have said it best:

An opinion writer is entitled to the greatest leeway in his law as in his reasoning, for they are his. But honesty allows no leeway in his statement of the facts, for they are not his. There is no substitute whatever for adherence to the exact and precise record in the case. No "result-orientation" can justify omission of a single relevant fact or the inclusion of a single factual statement that is false. This should go without saying. Unfortunately it needs saying.¹³

Development of the facts in our system of justice is done through the adversary process, a point with significant implications for this aspect of the decision. To the extent that a litigant misstates facts in a brief, the litigant on the other side will be looking to be sure that the court took the time to analyze the discrepancies. Appeals in which one side or another obfuscates, dissembles, or tells outright lies are not as rare as they should be. Appellate advocates who adhere to the record facts with care rely on appellate judges to sort through the arguments and separate the "wheat from the chaff."¹⁴ Only a complete factual recitation offers evidence that the appellate tribunal has taken the time to check inaccurate factual assertions against the record.

III. APPELLATE ADVOCATES SEEK AN OPINION IN WHICH THE COURT DECIDES THE ISSUES RAISED BY THE PARTIES (AND NO OTHERS).

Our appellate system is adversarial, not inquisitorial. In our system, courts of limited power address only those issues

13. Lasky, *Below the Bench II*, *supra* n. 1, at 689.

14. Robert L. Stern, Eugene Grossman & Stephen M. Shapiro, *Supreme Court Practice* 578 (6th ed. 1986) (quoting Charles Evans Hughes, *The Supreme Court of the United States* 62-63 (Columbia U. Press 1966) (reprint of 1928 edition)).

brought to them by the parties and on the record created by the parties. Judge Coffin, when discussing the quintessential aspects of an appellate system, explained: "Deciding an appeal is not a matter of approaching the problem as if for the first time. It is determining whether another, earlier, carefully structured decision should be upheld."¹⁵

Judge Coffin saw this limitation as a "source of strength" because the "raw materials for appellate deliberation are already fixed, assembled, and focused."¹⁶ To him, a critical aspect of our system is its "reliance on structured advocacy by adversaries,"¹⁷ and in his view, the system is premised on the notion that "out of the hammer-and-anvil confrontation of opposing advocates, each of whom seeks only victory, both a true view of facts and an informed view of law will emerge."¹⁸ Karl Llewellyn likewise emphasized the benefits of a frozen record: It offers the appellate court issues that have been "limited, sharpened, and phrased in advance," that are then presented by the adversary argument of counsel.¹⁹ In Professor Llewellyn's view, "when counsel are skillful and reasonably in balance," the argument by the adversaries increases predictability because the advocates point out the significant issues, make the "fact-picture clear and vivid," and illuminate the consequences of different potential decisions.²⁰ In an adversarial system, it is not the court's function to raise issues that the parties have not raised. As Judge Coffin observed, "the parties, through their trained counsel, participate in shaping the issues, in collecting all relevant information, and in organizing its presentation."²¹

Given this premise, appellate courts should rarely reach out to inject new issues into a case on appeal.²² On those occasions

15. Frank M. Coffin, *The Ways of a Judge: Reflections from the Federal Appellate Bench* 52 (Houghton Mifflin 1980).

16. *Id.* at 53-54.

17. *Id.* at 54.

18. *Id.*

19. Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* 29-30 (Little, Brown & Co. 1960).

20. *Id.* at 30.

21. Coffin, *supra* n. 15, at 55.

22. In the civil context, this is particularly true in a case before an intermediate court primarily concerned with error correction. In the criminal context, however, an appellate court at any level may have reasons relating to a just result that militate in favor of taking a more active stance on occasion. A criminal appellate court might, for example, raise a

on which an appellate court feels compelled to raise new issues, appellate advocates seek notice of that intention, and of course they also seek an opportunity to research the issues and present their arguments to the court, preferably in writing. Oral argument is difficult enough without fielding questions about an issue that was never raised or decided below and has not been briefed or argued by the opposing counsel. At a minimum, appellate advocates would like the opportunity to file supplemental briefs, even after argument, so that both sides have the opportunity to present the court with a reasoned discussion of any court-raised issue in light of the facts and law.

Appellate advocates hope that the appellate court will address, somewhere in the opinion, all issues that the parties have raised. The failure to do so suggests that the court reviewed the matter so quickly that it missed an issue or saw the issue but then forgot to address it in the written opinion. This apparent lack of care undermines confidence in the outcome. It does so for both sides, although it is particularly difficult for the losing side to accept a decision when the court failed to discuss all issues.

To be sure, some appellate advocates fail in their job of winnowing the case down to the critical issues, and present the court with lengthy lists of supposedly erroneous rulings instead. This failure increases the likelihood that the court will omit an issue or address it in a conclusory fashion. Although I have no empirical proof of this, I suspect that when too many issues are raised, appellate courts render decisions that are less likely to satisfy their own standards for a well-written, cogent, legally defensible opinion. In those instances in which multiple weak issues have been raised, a full discussion of the key issues may be coupled with a short account of why the others were rejected. But unless they are all mentioned, the advocates (and their clients) may conclude that the court simply forgot to decide those that were omitted from the discussion. This undermines confidence in the process and has a corrosive effect over time.

guidelines-scoring mistake that was overlooked by both sides but, if uncorrected, will result in a significantly longer sentence for the criminal defendant than would be the case if the guidelines were correctly scored.

IV. APPELLATE ADVOCATES SEEK AN OPINION IN WHICH THE COURT ANALYZES THE LEGAL ISSUES WITH CARE AND ELABORATES ON ITS REASONING.

The heart of the appellate decisionmaking process is the opinion's analysis and reasoning. While litigants want most to know whether they have won or lost, appellate judges and lawyers know that the reasoning in support of that result is at least as important. Like my clients, I want to win too, and that desire goes a long way toward reconciling me to an opinion that contains little or no reasoning, that is inconsistent with existing precedent, or that reaches an outcome by a series of logical leaps rather than logical reasoning. But I am also concerned about the quality of decisionmaking and the justice of the outcome; winning on the basis of an unsatisfying opinion is ultimately unsatisfying as well.

Aspects of the court's reasoning that are important to most advocates include the discussion of precedent, the effort to harmonize the decision with related areas of law, the application of the facts to the law, and the elaboration of the reasoning. Volumes have been written on the craft, theory, and logic of judicial opinion writing.²³ And I do not propose to offer my own approach or to try to perform the impossible task of summarizing this great body of literature. But some points about the reasoning are important to an appellate advocate regardless of the judicial methodology embraced by the judges on a particular panel.

An opinion should analyze key precedents. Lasky points to a case he argued before the United States Supreme Court in which the opinion, when it came down, merely said, "We put those cases to one side."²⁴ Advocates want more than this. They

23. See e.g. Benjamin N. Cardozo, *The Nature of the Judicial Process* (Yale U. Press 1991) (reprint of 1921 edition); Llewellyn, *supra* n. 19; Abrahamson, *supra* n. 12; Aharon Barak, *A Judge on Judging: The Role of the Supreme Court in a Democracy*, 116 Harv. L. Rev. 16 (2002); Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 Colum. L. Rev. 359 (1975); Patricia M. Wald, *Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 Harv. L. Rev. 887 (1987).

24. Moses Lasky, *Observing Appellate Opinions from Below the Bench*, 49 Cal. L. Rev. 831, 834 (1961) (quoting *Cal. St. Auto. Assn. v. Maloney*, 341 U.S. 105, 108 (1951)) [hereinafter Lasky, *Below the Bench I*].

are interested in knowing why the court chose one line of authority over another, how the court distinguished existing precedent that one side may have argued was controlling, or why the court thinks a holding should be expanded because precedent's rationale applies or contracted because it does not.²⁵ Lasky described the use of conflicting lines of authority by result-oriented judges:

“Result-oriented” opinions are often put together by a two-platoon system. The judge has two platoons of cases for a variety of propositions. One platoon says that the law is A. The other says that it is non-A. Depending on which goal he wishes to push the ball across, the coach—pardon me, the opinion writer—trots out Platoon A or Platoon non-A. More than once I have been amused to see Judge Smith trot out Judge Jones' Platoon non-A in dissent from Judge Jones' opinion, while a little later Judge Jones will trot out that same platoon in dissent from Judge Smith.²⁶

When appellate courts allow such conflicting lines of authority to be used for result-oriented and inconsistent decisionmaking, appellate lawyers must tell their clients that the result will be unpredictable and that it depends on the panel they draw. This undermines public confidence in the process.

Advocates are also interested in the judicial methodology employed by the court. It is well beyond the scope of this paper to discuss the many schools of thought about textualism, intentionalism, pragmatism, and all the other “isms” that are being debated today in academia, in our courts, and in the world of politics. But appellate advocates study these aspects of decisions for the guidance they offer concerning the tools that judges use when making their decisions. If a court has embraced a consistent methodology for the analysis of certain kinds of issues, an explanation of that methodology is exceedingly helpful. It offers guidance to advocates about the types of arguments that they should advance in a particular forum.²⁷

25. *Id.* at 834-35.

26. Lasky, *Below the Bench II*, *supra* n. 1, at 689.

27. Mary Massaron Ross, *Better Advocacy through Jurisprudential Analysis*, 77 Mich. B.J. 28 (Jan. 1988); Mary Massaron Ross, *Reflections on the Craft of Judging and the Art of Advocacy*, 40 For Def. 8 (1998).

The court's explanation is also helpful in responding to the questions of clients (and occasionally the press) about whether the court issued a "result-oriented" decision. Lasky points out that "[i]t is a poor judge indeed who cannot write an opinion persuasive on its face; he need merely stand mute about principles that lead to an undesired conclusion and invoke a body of law that logically leads to a different one."²⁸ Because appellate judges have little or no opportunity to speak to the ultimate consumers of their work, they may forget that a key function of the judicial opinion is "to mollify the litigants."²⁹ Because appellate advocates do not work at that remove, however, they know that being able to point to a methodology that is consistently applied and that justifies the outcome can, and usually does, satisfy the parties in a way that mere *ipse dixit* never can. On the other hand, appellate advocates are appalled when, "[l]ike Procrustes and his iron bed, the opinion lops off some of the facts or some of the law if they are too much for the desired conclusion or stretches them if they fall somewhat short."³⁰ Justice Traynor explained that the process of articulating the reasoning in written form offers the best test for the solution to the legal question presented.³¹ It is then that the judge "often discovers that his tentative views will not jell in the writing."³² As Lasky explained:

Where a judge need write no opinion, his judgment may be faulty. Forced to reason his way step by step and set down these steps in black and white, he is compelled to put salt on the tail of his reasoning to keep it from fluttering away.³³

A conclusory opinion lacks these safeguards.

Appellate advocates seek an opinion that applies the law to the facts, reaches a conclusion, and then stops. When the appellate court goes on to discuss a series of further propositions that are unnecessary to the outcome, it may undermine the

28. Lasky, *Below the Bench I*, supra n. 24, at 834.

29. *Id.* at 835.

30. *Id.* at 839.

31. Roger J. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. Chi. L. Rev. 211, 218 (1957).

32. *Id.*

33. Lasky, *Below the Bench I*, supra n. 24, at 838.

opinion's authority as precedent and inject confusion into the case. And it often leads to conclusions that are not well grounded, because they are not based on answering questions presented in a concrete context after a decision below, full appellate briefing, and oral argument. Better to write narrowly than to close off future options that the court has not, and cannot fully anticipate.

Of course, the length, style, and approach to an opinion will differ enormously depending on whether it is from an intermediate appellate court or a court of last resort. But even an opinion from an intermediate appellate court in a routine case should have sufficient analysis to reveal the reasoning process employed to reach the result. Frederick Schauer calls reasoned elaboration "both the norm and the ideal" for appellate decisionmaking.³⁴ Without it, the opinion fails in performing an essential aspect of its job, which is to communicate to the parties the reasons for the court's decision and to demonstrate that the parties' arguments were carefully considered and that the appropriate legal principles have been neutrally applied to the facts of the case. Professor Schauer explained the importance of reason by emphasizing that the reasons ensure that included within each decision is "a principle of greater generality than the decision itself."³⁵ This constrains the decisionmaker and prevents an overly flexible case-by-case approach to decisionmaking.³⁶ It also "drive[s] out illegitimate reasons when they are the only plausible explanation for particular outcomes."³⁷

Professor Llewellyn identified the obligation to provide a written opinion with reasons as one of the "steadying facts" in the law.³⁸ Justice Abrahamson agreed, noting that this "writing process imposes a profound constraint on judicial discretion."³⁹ She explained that "[t]he act of stating reasons that can be judged and evaluated, combined with the doctrine of stare

34. Frederick Schauer, *Giving Reasons*, 47 *Stan. L. Rev.* 633, 633 (1995).

35. *Id.* at 641 (emphasis omitted).

36. *Id.* at 654-659.

37. *Id.* at 658.

38. Llewellyn, *supra* n. 19, at 26-27.

39. Abrahamson, *supra* n. 12, at 987.

decisis, can control judicial arbitrariness.”⁴⁰ Justice Abrahamson qualified this assertion by pointing out that “[o]pinion writing can be a constraining influence as long as the opinion reflects the court’s true thinking and is not simply a cover-up for the judicially-mandated result.”⁴¹ Thus, she urges something that appellate advocates seek above all, that judges “produce a reasoned, forthright, written opinion in all cases.”⁴²

Appellate advocates also dislike the overly frequent use of decision-avoidance techniques, such as waiver based on the failure to preserve or adequately raise an issue. These techniques have a proper place, such as when an appellate court declines to decide an issue that was never raised in the trial court, or refuses to address an issue that has not been raised on appeal or perhaps was raised only belatedly in a reply brief. But they ought not be used to avoid a decision on the merits when the issue has been raised and argued on appeal simply because the argument is relatively weak. If the issue is so weak as to lack any need for discussion, and the court has absolutely decided not to discuss it, a better approach would be to say, as some courts do, “the remaining arguments are so weak that we decline to address them.”

Telling the advocate (and the clients) that the advocate failed to “adequately brief” an issue is a statement that should be used only in egregious circumstances, such as when the brief contained only a sentence or two of discussion about the issue and offered no authority or reasoning at all. A statement that an issue will not be addressed on the merits because it was inadequately briefed tends to inflame the losing party and may generate a malpractice claim, thus creating additional litigation. It drives a wedge between the client and the attorney, creating a lack of confidence in the entire litigation process. And over-use of these techniques creates other less obvious problems. They may too readily become a crutch for those writing opinions under time pressure, for they save the time needed to discuss the facts, law, and reasoning on those issues. Finally, the use of such techniques undermines the parties’ confidence in the process. When the appellate court declines to decide a case on

40. *Id.* at 987-88.

41. *Id.* at 988.

42. *Id.* at 989.

the merits, the litigants do not feel heard; they rarely walk away satisfied that, although they have not prevailed, their case was heard. On the other hand, if the appellate court decides the issue with a discussion of its reasoning, the litigants are far more likely to believe that they have had their day in court. They walk away knowing that their arguments were presented to the court, considered, but decided adversely on the basis of the rule of law. This may not be a happy outcome, but the litigants can be satisfied that their case has been heard.

V. APPELLATE ADVOCATES SEEK AN OPINION IN WHICH THE COURT ANNOUNCES ITS HOLDING IN PRECISE LANGUAGE THAT GIVES ADEQUATE GUIDANCE TO THE PARTIES AND TO THE BENCH AND BAR IF THE OPINION IS TO BE PUBLISHED.

Precision in the holding is critical to the parties. It tells them their legal rights as a result of the appeal. This may be to remand the case for entry of summary judgment in their favor. Or it may be to impose injunctive relief in some fashion. Opinions that remand a case for further proceedings should tell the lower court precisely what it must or might do on remand. Appellate advocates seek an articulation of the holding that makes clear whether the remand is general or limited and that offers sufficient guidance to the parties and lower court concerning the appellate court's mandate. One writer even urged appellate courts not to engage in what amounts to "judicial shortchange" by which the "court's opinion slithers out through some pinhole, and back the case goes for further anguished and expensive litigation."⁴³

Precision in the holding of a published opinion is also critical to its later use as authority for other cases. Henry Hart's test for the "quality of an opinion" is

the light it casts, outside the four corners of the particular lawsuit, in guiding the judgment of the hundreds of thousands of lawyers and government officials who have to deal at first hand with the problems of everyday life and of

43. Lasky, *Below the Bench I*, *supra* n. 24, at 837.

the thousands of judges who have to handle the great mass of the litigation which ultimately develops.⁴⁴

Appellate advocates (and the trial bench) seek opinions that offer such clarity and guidance that the holding can readily be applied to other cases.

If the opinion restates the holding three or four different ways, each time with slightly different language that offers subtle or not-so-subtle differences in its potential application, then it will cause confusion and more litigation. Far better to offer an opinion with a single carefully worded holding. This is true regardless of whether the court is embracing a bright-line rule or adopting a balancing test. Appellate advocates have an obligation to help the court do this by offering what Professor Llewellyn calls the "opinion-Kernel," which "puts into clean words the soundly guiding rule to serve the future."⁴⁵ He urged appellate advocates to "put a proper opinion Kernel into your brief, to invite lifting."⁴⁶

VI. APPELLATE ADVOCATES SEEK A REVIEW PROCESS THAT IS FAIR AND THAT FACILITATES, RATHER THAN IMPEDES, THEIR EFFORTS TO PRESENT THEIR CASES.

Appellate advocates seek a fair review process, in which the rules (and internal policies or procedures of the court) are known in advance, offer adequate time and opportunity to present the best arguments to the court (and to answer the opposing side's arguments), and that foster a collegial and even-handed review by the court.

The American Bar Association standards offer guidance on what is required for a fair process. The ABA sets forth overarching principles based upon the function of an appeal:

An appeal is intended to subject a decision of a lower court to collective and deliberative review. An appellate court's internal procedures for deciding an appeal should therefore

44. Henry M. Hart, Jr., *The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 96 (1958).

45. Llewellyn, *supra* n. 19, at 241.

46. *Id.* at 243.

ensure that the parties' contentions are carefully considered by all the judges participating in the decision.⁴⁷

In its commentary, the ABA adds that

[f]airness and persuasiveness in appellate adjudication require that the parties have adequate opportunity to present their contentions, that they have confidence that their contentions have been considered, that all the judges responsible for a decision have participated in reaching it, and that the court's decision rests on well-reasoned grounds.⁴⁸

Thus, the ABA cautions against draft decisions written by a judge before conferencing with other members of the panel because the decision may not be a product of collegiality. This risk exists in any court that assigns opinion writing before the conference at which the judges decide the case. This caution is worth keeping in mind, even when an appellate court, such as the Michigan Court of Appeals, embraces a heavily staff-centered and front-loaded approach to decisionmaking.

In addition, a fair process is one in which appellate advocates may learn the rules and internal operating procedures that affect the handling of their case. Many appellate courts offer guidance by publishing their internal operating procedures or by preparing publications of various kinds offering tips to practitioners. For example, the Michigan Court of Appeals and the Michigan Supreme Court have both published internal operating procedures, which offer practitioners helpful information about the court's policies for handling extensions of time and numerous other significant procedural issues. And many appellate courts, both state and federal, now post their rules and internal operating procedures on their websites.

VII. APPELLATE ADVOCATES SEEK A DECISION THAT IS ISSUED IN AS TIMELY A MANNER AS IS CONSISTENT WITH HIGH QUALITY AND THE AVAILABLE JUDICIAL RESOURCES.

I rarely hear appellate advocates complain about delay in the appellate courts. But given the budget constraints of many

47. ABA, *Standards Relating to Appellate Courts* § 3.30 (ABA 1977).

48. *Id.*

appellate courts and what has been called the “crisis of volume,” the time between briefing and oral argument has expanded in many jurisdictions.⁴⁹ Judge Posner recognizes that many think these changes “are bad,” and certainly some of the things that I address in this article suggest a concern among appellate advocates with this shift to a more bureaucratic form of appellate judging. To the extent possible, appellate advocates would prefer less delay—as would their clients. But they generally oppose steps that reduce the quality of the decisionmaking process in order to speed the result.

When I hear a concern about delay, it is most often that appellate advocates worry about a lengthy time between oral argument and the issuance of a decision. They fear that, by the time the judges sit down to write an opinion, they will have forgotten much of what they once understood. But most appellate advocates seek a timely opinion (and a timely oral argument after briefing). Lengthy delays—such as that experienced in the Sixth Circuit when its complement of judges was severely reduced due to the Senate’s failure to confirm numerous nominees to the court—are troublesome to advocates and litigants alike.

VIII. APPELLATE ADVOCATES SEEK THE OPPORTUNITY TO PARTICIPATE IN THE APPELLATE PROCESS AND TO CONTRIBUTE TO THE IMPLEMENTATION OF THE RULE OF LAW.

The role of appellate courts (and the advocates who appear before them) is central to the American concepts of justice and the rule of law. Appellate advocates may bring a routine property dispute or misdemeanor conviction to the intermediate appellate court for review. Or they may pursue a cutting edge legal dispute in a court of last resort. In either case, they are participating along with the court in the daily process by which

49. Judge Posner used the term “crisis of volume” in *The Federal Courts: Crisis and Reform* (Harv. U. Press 1985). He argued in the second edition of that book, however, that the anticipated crisis was averted by “measures that may portend the gradual transformation of the federal judiciary from the Anglo-American . . . to the Continental European model.” Richard A. Posner, *The Federal Courts: Challenge and Reform* xiii (Harv. U. Press 1996).

the rule of law is effectuated. Most of us are too busy with the volume of work before us, and the daily tasks of life, to think about the connection between how we do our job on one appeal and the greater question of whether the judicial process in this country functions properly. But on the rare occasions when we can step away from those tasks to reflect on our responsibilities and learn from each other, such a perspective can help appellate advocates and appellate judges to see what it is they seek from each other. Only when each of us does his or her job will the promise of American justice and the rule of law have any chance of being fulfilled. And that, I think, is what we all seek.

