WHAT TRIAL JUDGES WANT (AND DON'T WANT) IN APPELLATE OPINIONS

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The bodies of many a cherished opinion lie strewn along the ravine of appellate review. With little time to grieve their losses, trial judges dutifully continue to author their judicial creations, hoping that the packs of appellate judges eyeing them from above will let them pass, injured but still alive. Appellate judges are wont to suggest ways that trial judges can armor their opinions to reduce appellate predations.[1] And trial judges are always grateful for these lessons in avoiding reversal. But few nisi prius judges have commented on what they want to see in appellate opinions.

This restraint is surprising, given trial judges' intrinsic preoccupation with appellate opinions. Surpassing even their peers of the bar, trial judges represent the primary consumers of appellate writing. From these decisions they will discern the state of the law. To grasp the rationale behind each rule, trial judges must understand the facts at issue. Beyond the demands of any particular case, their appellate records affect their professional reputations.

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1. *See, e.g.*, Marshall L. Davidson III, *Attracting Undue Scrutiny on Appeal: An Appellate Judge's Perspective*, 17 J. APP. PRAC. & PROCESS 177, 188–90 (2016), https://tinyurl.com/mrnux5f7. Judge Davidson warned trial judges against deviating from the law, misrepresenting crucial facts, and considering information outside the record. *Id.* at 180–83. He also stressed the importance of maintaining a professional, qualified tone in the face of far-fetched arguments and of deciding cases on dispositive threshold issues—even if the merits present compelling questions. *Id.* at 183–90.

Statistical analyses show that appellate courts are affirmance-prone.[2] But it is sometimes hard for trial judges to see this reality. In any event, the threat of reversal has been thought to instill in trial judges a necessary sense of caution and deference.[3] An excessive fear of reversal, though, can enervate opinion writers. Trial judges so motivated commit to few conclusions. They seek to minimize their exposure, although they might privately believe that the margin favoring the prevailing party is much greater. Every trial judge must steer between recklessness and paralysis.

Judges of courts of original jurisdiction find themselves in a precarious position on appeal: The four corners of their opinions are the extent of their involvement. They cannot telephone an appellate court to resolve misunderstandings. They are at the mercy of the parties' lawyers; if the lawyers argue the case poorly, the trial judge can only observe the resulting confusion. Sometimes the trial judge cannot even read the papers filed with the appellate court; papers are not always posted to the court's website.

The trial bench often turns to humor to cope with the perceived vagaries of appellate review. In one favored jest, an appellate judge tells a trial colleague, "I'm sorry, but I reversed you today." The trial judge responds: "That's okay. I reverse you every day." In another, a judge looks at two reversals, saying of the first, "What

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2. Barry C. Edwards, *Why Appeals Courts Rarely Reverse Lower Courts: An Experimental Study to Explore Affirmation Bias*, 68 EMORY L.J. ONLINE 1035, 1035 (2019) (finding that roughly 90 percent of appeals across state and federal courts yield affirmances), https://tinyurl.com/46ec2sy6. From July 2017 to June 2018, the U.S. Courts of Appeals reversed 7.8 percent of the time. *Id.* at 1037. Data from 2001 and 2010 show reversal rates in state civil and criminal cases ranging from 6.7 percent to 17 percent. *Id.* at 1039–40.

3. Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 86 (1985), https://tinyurl.com/wadjhkfk. Professor Dalton noted that trial judges may be inclined to carelessness when they might believe that an appellate court will correct their errors. In any case, Professor Dalton argued, the threat of reversal is less effective at promoting just outcomes than commonly believed. *Id.* at 92. Some judges regard reversals as inevitable. Others slavishly follow appellate court precedent (which may itself be unjust). Still others distort the merits of cases in working to shield them from review. *Id.*

was I *thinking*?"—but of the second, "What were *they* thinking?"

The best appellate opinions address these questions. The dismay that springs anew each time a trial judge is reversed cannot be extinguished, except with time and grace. But it can be eased when appellate opinions consider trial judges' needs and wants.

Below are some likes and dislikes about the substance and style of appellate opinions—particularly those of state courts of intermediate appellate jurisdiction—from the perspective of a judge of first instance. These preferences arise from the author's own experiences, alongside conversations with judicial friends over the years. The intention is not to engage in fist-shaking toward any particular jurisdiction, judge, court, or decision. Rather, the goal is to advance some thoughts to improve the accessibility and utility of appellate opinions for trial judges.

Other readers, especially counsel and the litigants themselves, stand to benefit from these recommendations. Though trial judges are the principal readers of appellate opinions, audiences beyond the bench include law students, lawyers, legislators, and the public at large.[4] Their faith in the fairness and accuracy of the judicial system undergirds its stability. Lawyers and laypersons who submit their disputes for review, not the judges from whom higher courts wrest decisions, must ultimately be satisfied. And appellate courts may do themselves a service, too. Trial judges may feel less inclined to strain against precedent, knowing, whatever the outcome on appeal, that the reviewing court read their reasoning.

4. *See* Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 813–14 (1961), https://tinyurl.com/3v9ytfj5.

I. SUBSTANTIVE LIKES

A. Explaining the Rationale Behind the Holding

An opinion should reveal why the court ruled as it did—an obvious point, but one that is the earnest cry of every trial judge. Trial judges perform their work best when they understand which portions of their reasoning were endorsed or rejected, to what extent, and why.

Though they sympathize with the pressures of high appellate caseloads, declaring that "the trial judge erred" in a few sentences of terse analysis and citations does little to enlighten the reader. Much more helpful is a decision containing a non-conclusory analysis section that restates the lower court's ruling and rationale—along with each party's key arguments—and then pinpoints how the trial judge stumbled (or strode on firm ground).

Trial judges who can avail themselves of explanations for appellate holdings can more confidently tackle the task of recalibrating their approach to the law. They need not guess which sorts of arguments are foreclosed and which remain viable. They can better match precedents with cases before them.[5] And they can more easily tell when novel or unusual circumstances should give rise to exceptions from the ordinary rule.[6]

By showing their work, appellate judges also offer an important gauge of whether they have treated the parties and their arguments fairly and squarely. Procedural fairness, marked in part by thorough and balanced consideration of each party's arguments, is an essential complement of a just outcome.[7] Endorsing or

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5. Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, 59 HOUS. L. REV. 103, 119 (2021), https://tinyurl.com/bda4a9y.

6. *See* Richard B. Cappalli, *Improving Appellate Opinions*, 83 JUDICATURE 286, 318 (2000), https://tinyurl.com/ms9cchc9.

7. Roy W. McLeese III, *Trying to Write Fair Opinions*, 97 N.Y.U. L. REV. 1353, 1355 (2022), https://tinyurl.com/bdf6asmb. Judge McLeese identifies three key pillars of procedural fairness: (1) neutrality in the decision-making process, (2) respect for the parties, and (3) trust that judges care about the litigants' interests. He observes that procedural fairness bolsters the legitimacy of the

rebutting a party's key arguments, particularly those of the losing party, serves the dual functions of making the party feel heard and inspiring confidence in the evenhandedness of the judicial process among the broader public.[8]

Appellate judges can elude criticism for their analysis by not explaining it.[9] But appellate judges—like all judges—are accountable to their peers, to other courts, and ultimately to the public.

B. The Virtue of Brevity

Brevity keeps readers alert and engaged by lifting them above the mire of minutiae, complex sentences, and disorganized repetitiveness.[10] This is not to say that length is inherently bad. Brevity need not war with the aim of explaining the factual and legal basis for a holding. The goal, instead, is to say only what needs to be said to explain and justify the outcome, making every word count.

While judges may be eager to showcase their breadth of scholarship, the tedium of long opinions can alienate audiences.[11] Concise (and succinct) writing forces judges to reach the essential issues quickly and, by extension, affords readers more time to think deeply on them.[12] As New York Chief Judge Judith S. Kaye has stressed, a judge must know why every point put down on paper matters to the analysis or the result.[13] Given

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judicial system and that the methods used to achieve it increases the fairness of the outcome. *Id.*

8. *See id.* at 1372.

9. *Cf.* Varsava, *supra* note 5, at 118 ("[B]y showcasing the kind of reasoning that the judiciary and legal system deems appropriate, judicial opinions enable people to evaluate and critique the system.").

10. *See, e.g.*, Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, 252 (2008), https://tinyurl.com/y34w8prb.

11. *Id.*

12. *Id.* at 253.

13. *See* Judith S. Kaye, *Effective Brief Writing*, *in* NEW YORK APPELLATE PRACTICE 625, 629 (N.Y. State Bar Ass'n 2013), https://tinyurl.com/2tnutm78 (advising appellate brief writers that their points of law should start with their

the dwindling amount of time courts can dedicate to each case, a panel's efforts to give an issue exhaustive treatment in a decision can cause the decision to be less rigorous than one with narrower ambitions.[14] An appellate panel's protracted opinion may repel the very recognition the panel seeks. Professional readers will find the panel's distracted argument less worthy of citation.

Brevity is a virtue of both substance and style. Many of the (dis)likes below, while (un)desirable in their own right, also advance or frustrate the project of achieving brevity.

C. Clearly Delineating Changes and Continuity in the Law

Alongside its case-specific resolution, the appellate opinion establishes the rules of law that govern future cases concerning similar issues. The consistent administration of justice at which this precedential function is aimed demands that the contours of these rules be defined clearly, precisely, and consistently.[15] Appellate opinions should make plain the degree to which precedents are being modified—whether they are being overturned, affirmed, or merely questioned.[16] The leading cases promulgating the principle in question, not just those the parties and the trial court invoked, should be cited to signal that its application in a range of

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strongest argument, should "build toward your objectives,[] be forthrightly presented and well documented.").

14. *See* Lebovits et al., *supra* note 10, at 253.

15. *See* S.I. Strong, *Writing Reasoned Decisions and Opinions: A Guide for Novice, Experienced, and Foreign Judges*, 2015 J. DISP. RESOL. 93, 102, 108 (2015), https://tinyurl.com/39dzyn67.

16. D. Brock Hornby, *Appellate Judges: Think Before You Publish*, LITIGATION, Winter 1996, at 3, 62, https://tinyurl.com/y4ud4b68. U.S. District Judge Hornby, previously a Maine Supreme Court Justice, presents for appellate opinions a "punchlist" guided by the imperatives of "simplicity, clarity, economy, and general fairness." *Id.* at 3. Distinguishing cases on their facts without providing additional guidance comes in for special criticism. Indecisiveness about the state of precedent is too costly a luxury for appellate judges to indulge. *Id.* at 62–63.

circumstances has been considered and to deter attempts to revive or abandon it. And an opinion's articulation of the governing legal standard should be phrased as similarly as possible each time the standard is given—particularly when the standard is complex. Originality and textual variation here is less important than clarity. And varying or shuffling words, even if only a little bit, might lead parties and judges to infer a change or ambiguity in the standard when none is intended.[17]

D. Addressing the Discretion Afforded by New Rules

Where a balancing test or other open-ended rule is set forth, appellate opinions should specify the degree of discretion the trial judge enjoys in assessing various factors. If a certain factor is present, does it presumptively neutralize the effects of others, or is that merely the appellate court's preference? What kinds of evidence may trial judges consider as shaping a given factor? Although exhaustiveness is not expected, it is better that trial judges grasp the limits of their power while they still control their cases than be chided on appeal for exceeding boundaries they could not see.

E. Tracing and Reconciling Disparate Lines of Precedent

From time to time, trial judges discover that an appellate court has made conflicting pronouncements on the same issue. That oversight invites additional rounds of court orders that—despite the judge's best efforts—may be overturned based on some tacit understanding of the appellate court not evident in its opinions. Inconsistencies in precedent should be resolved as soon as the opportunity presents itself when the clash bears on the ultimate outcome. And instead of just stating the rule going forward, appellate opinions should trace the development of each line of precedent. Doing so clarifies

17. *Id.* at 62.

where and how the lower court's thinking went amiss or reveals the underlying principle on which the lines converge.[18] It also presents a handy reference for the trial judge whenever a future party argues that the rule is arbitrary or murky as applied to the facts of its case.

F. Keeping Dicta to a Minimum

Comments on matters not necessary to deciding the case or setting precedent do not belong in opinions. It may be tempting to exploit the platform for other ends. Nonetheless, the legitimacy of the judicial system rests on the perceived exercise of judicial power with neutrality and restraint.[19] Debates over the efficacy of lawful public policies fall to the political branches.[20] Relatedly, ruminations about the philosophy of the law and its future evolution are necessary only when the sweeping nature of the case demands these statements. Otherwise, they are best confined to chambers or lunches with colleagues. Doing so may save trial judges from zealous advocates who barrage them with cherry-picked dicta, while enabling the parties themselves to see more clearly the arguments from precedent on which to focus. And both will enjoy shorter opinions.

G. Attaching Clear Instructions to a Remand

To prevent cases from shuttling between appellate and trial courts, issue-specific remands should specify exactly what actions the trial judge must take.[21] Where applicable, these instructions should discuss:

- Whether additional arguments and evidence may be considered and, if so, their appropriate scope.

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18. *See* Patrick Emery Longan, *Professionalism on the Appellate Bench: The Life and Example of Justice George Rose Smith of the Arkansas Supreme Court*, 54 ARK. L. REV. 523, 538 (2001), https://tinyurl.com/zhykm7y5.

19. *See* McLeese, *supra* note 7, at 1355–56.

20. *See id.* at 1369.

21. *See* Dalton, *supra* note 3, at 89–90.

- What portions of reasoning in the trial court's opinion should be supplemented or revised.
- What legal standard(s) should be applied.
- What processes for additional discovery may be undertaken.
- What evidence and agreements from the first trial may carry over to the second.
- Who will be responsible for attorney fees.

H. Including Only Those Facts Central to the Questions at Hand

The air of authority pervading appellate opinions disposes readers to view every detail as significant. Excluding facts irrelevant to the issues to be decided will lessen the risk that the case is improperly distinguished in the future. The facts should be "rigidly pared down . . . to those that are truly essential as opposed to those that are decorative and adventitious."[22] This culling has the added benefit of enabling the opinion-writer to prod readers toward the opinion's conclusion from its outset.[23]

II. SUBSTANTIVE DISLIKES

A. Substituting Citations for Explanation

Cobbling together quotations and string citations does not an opinion make.[24] Brusque declarations like,

22. Benjamin N. Cardozo, *Law and Literature*, 39 COLUM. L. REV. 119, 134, 52 HARV. L. REV. 471, 486, 48 YALE L.J. 489, 504 (1939) (simultaneously published), reprinted from 14 YALE REV. 699 (1925), https://tinyurl.com/2vuep6ma. In this seminal work on judicial writing, Justice Cardozo rejected the notion that attractive prose saps opinions of their authority. Form and substance are intertwined, and the greatest legal writers are those who so tightly control their prose that they seem to channel the "voice of the law" through themselves. 39 COLUM. L. REV. at 121, 123, 52 HARV. L. REV. at 473, 475, 48 YALE L.J. at 491, 493.

23. Longan, *supra* note 18, at 550–51. Professor Longan explores other persuasive techniques, including vivid word usage and short, forceful sentences. *Id.* at 551–52.

24. *See id.* at 541.

"We have rejected the appellee's arguments elsewhere," followed by a litany of cases, reveals little about the nature of these arguments, their resemblance to their predecessors, or what makes them unpersuasive under the facts at hand. Without these details, trial judges and parties alike will find it difficult to tell whether and when those arguments might be more successful under other factual scenarios. Nor does the factual narrative, sitting in isolation, suffice to form connections that should be stated explicitly. "Blend[ing] the law and the facts" to avoid being too conclusory requires that the appellate court explain how the precedents cited relate to the case under consideration.[25]

String citations equally offend in suggesting a "mechanical" treatment of the case.[26] They clutter the page and accomplish little beyond conveying an overwhelming sense of authority. Absent discussion of a split in the caselaw, one or two cases should suffice to establish the proposition at hand. And those statements for which an abundance of citations may be offered tend to be well-settled and thus least in need of support.[27] A brief explanation of the rationale behind the principle makes better use of the space occupied by extra citations. If the reasoning is obvious, a few lines can be saved by more sparing citation. Either way, the trial judge—knowing the sleight that can be worked with

25. Davidson, *supra* note 1, at 189. Judge Davidson claims that being too conclusory is a common problem among trial judges. *Id.* The same holds true of their appellate counterparts.

26. George Rose Smith, *The Current Opinions of the Supreme Court of Arkansas: A Study in Craftsmanship*, 1 ARK. L. REV. 89, 95–96 (1947), https://tinyurl.com/muvbhjeb. Judge Smith framed his analysis around six defects in appellate opinions identified by Dean Wigmore—among them, "undiscriminating citation of authority," "unfamiliarity with controlling precedents," and "mechanical treatment of judicial questions." *Id.* at 90–104 (reviewing JOHN H. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 8b (3d ed. 1940)).

27. *Id.* at 96.

citations[28]—will be more persuaded that the principle fits the case.

B. Relying on Hidden Reasons

An opinion should make explicit every basis on which the court relies for its holding. The function of transparency is defeated if the court shields from view some of its true reasons.[29] Suppose that an appellate court is reviewing a question of law decided by a trial judge known to be careless and dismissive of precedent. If these qualities are an appropriate consideration and incline the court toward reversal, the court should discuss the judge's spotted history. If these qualities are an inappropriate consideration (and they will typically be inappropriate), the appellate judges should ignore them entirely. What the court thinks, it should say. What the court does not say, it should not think.[30]

Similarly, if a reviewing court faces a choice on appeal about how broadly (or strictly) to apply existing precedent, or which of several potentially relevant lines of precedent to apply, the court should candidly explain how it is employing its precedents to resolve the appeal and why—not pretend that the court's resolution of the appeal was obvious or inevitable.

Appellate candor enables the reviewing court to argue for and justify its decision-making and provides more guidance to trial judges and later appellate panels. It may also allay a reader's suspicion that ideological (or otherwise objectionable) motives played a role in the outcome. The trial judge, though perhaps more willing to believe that the hidden justifications are good ones, will still hesitate to rely on a decision that handles precedent in a way that is neither self-evident nor explained.

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28. *See* Andrew Jensen Kerr, *The Perfect Opinion*, 12 WASH. U. JURIS. REV. 221, 227 (2020), https://tinyurl.com/56wafnx8 (arguing that some judges regard excessive citation as a tactic for masking the real reasons for a decision).

29. McLeese, *supra* note 7, at 1364.

30. *Cf. id.* This example is adapted from one given by Judge McLeese.

C. Overdetermining the Holding

On the other extreme, some appellate opinions may explain *too much*, giving every reason imaginable for the holding. This impulse belongs to the lawyer, not the judge; lawyers must argue in the alternative because they do not know which arguments the court will prefer.[31] As with factual details, including more factors increases ambiguity over which factors are necessary or sufficient for the outcome and which are superfluous. That diminishes the clarity of the decision's guidance for future courts.[32] And it creates additional openings for lawyers to resist precedent at the trial level[33] and greater uncertainty for trial judges. For the same reasons, if an appellate court believes it helpful in a particular case to include multiple grounds for the same result, the court should clearly indicate which justification is an independent alternative holding, and which is merely dictum. And any alternative holding, like the primary analysis, should fully draw out the connections between law and fact.

III. STYLISTIC LIKES

A. Citing the Trial Opinion and Record

The trial court's opinion deserves the same treatment as references to case law. If the opinion is published, the appellate court should supply the citation. When discussing a particular line of reasoning by the trial judge, the appellate court should pinpoint its location in the lower-court's opinion. This reassures the trial court that its analysis has been assessed, even if

31. *See* Hornby, *supra* note 16, at 63.

32. *Id.* One solution is to identify which factors are dispositive or more weighty.

33. Cappalli, *supra* note 6, at 318. Professor Cappalli stressed that trial judges must operate under the assumption that lawyers will pull any stray word from an opinion if it benefits their case. Whole lines of superfluous reasoning give lawyers too much material with which to distort the law.

rejected, and encourages appellate judges to reproduce that analysis faithfully. Trial judges should also be rewarded for stylistic excellence through direct quotations of phrases that cleanly capture intricate ideas.

For similar reasons, appellate opinions should cite relevant facts from the filing system containing the motion or trial record. Law belongs to the courts, but fact belongs to the litigants. A fair evaluation of the case requires that appellate judges consider the losing party's factual pleadings, not just its legal arguments, to justify their application of the given rule(s). Citing the motion or trial record is especially important in a memorandum opinion featuring an abbreviated factual background, since this points readers toward context that might be necessary to render the decision intelligible.

Points on which the trial court ruled correctly should be cited, regardless of whether they save the court from reversal. Many cases require balancing numerous factors rather than applying a single, clear-cut rule. Ignoring those aspects favorable to the holding below cheapens the effort applied to reach the decision.[34] Opinions should not adopt a scorched-earth approach.[35] Nor does it hurt briefly to credit extraordinary labors evident in trial judges' opinions. If they have pressed forward against a deluge of evidentiary submissions to deliver a compact, accessible statement of the facts, some recognition might prove a relief.

B. Compacting Key Information into the Introduction

Given the vast number of cases through which they must sift, trial judges welcome any expedient to lifting the relevant from the extraneous. An appellate opinion's introductory paragraph(s) should prefigure the

34. *See* McLeese, *supra* note 7, at 1361.
35. *See id.*

framework of the rest of the opinion to allow readers to determine quickly whether to continue reading.[36]

The two types of opinion styles identified by former Seventh Circuit Chief Judge Richard A. Posner—pure and impure—approach this task differently.[37] Because the pure opinion adopts a formal, elevated tone accompanied by an abundance of detail, it touches on all the crucial points of the case—the who, what, when, where, why, and how—in its introduction. Who are the parties, and which prevailed in the trial court? What is the nature of the parties' claims, and what are the issues on appeal? From where did the appeal originate? Why did the appellant appeal (if there is more to be said about its motives beyond the issues already mentioned)? How did the case reach the court—was it an appeal of right or by leave? What is the court's holding?[38]

By contrast, the impure opinion's relaxed, conversational tone lends itself to a carefully culled factual or procedural background that signals the victor and the winning arguments without directly disclosing them.[39] Since this style is closer to narrative, it better captures the attention of the novice reader, though the trial judge might also find it more intelligible and interesting to read.

Each style carries its own dangers. The pure opinion sometimes buries a clear precedent under legalisms, maxims, footnotes, and appeals to authority.[40] The impure opinion swaps out sweeping statements for peculiarities like humor, current events, and poetry, as well as sloppy citations.[41] Whichever style the court adopts, the reader should depart from the first

36. Strong, *supra* note 15, at 118–20.

37. Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1421 (1995), https://tinyurl.com/2pk2p6c3.

38. Strong, *supra* note 15, at 118–20.

39. Lebovits et al., *supra* note 10, at 251, 295 n.404 (citing Justice Black's first paragraph in *Gideon v. Wainwright*, 372 U.S. 335, 337 (1963)).

40. *Id.* at 252.

41. *See id.* at 269–77.

paragraph with a clear idea where the opinion is heading.

C. Thoughtful Organization

For those judges who do select an opinion for further examination, signposting between topics helps guide their eyes throughout the body. Roman numerals or ordinal numbers can do this job well, but section headings grouping issues by type or summarizing an intermediate conclusion may be necessary in more involved cases.[42] Within each section, it should be clear which portions of analysis are new and which run directly from prior sections.

Consistency in the order of sections allows readers familiar with the author's style to locate easily the information they seek.[43] But differences in the relative importance of sections across cases may warrant rearranging them. For instance, if the issue is whether a party has met its burden of proof, it may be helpful to articulate the standard before the factual statement so that the reader first processes the facts in light of the standard.[44] Similarly, issues with the potential to foreclose further inquiry—like those concerning subject matter jurisdiction or the statute of limitations—should be prioritized.[45] Above all, appellate courts should bear in mind that the process by which they arrived at their decision, while perhaps more interesting from a cognitive perspective, might not represent the most efficient route.

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42. *See* Davidson, *supra* note 1, at 190.

43. Longan, *supra* note 18, at 556.

44. *See* George Rose Smith, *A Primer of Opinion Writing, for Four New Judges*, 21 ARK. L. REV. 197, 200 (1967). https://tinyurl.com/cu4ayedt. Judge Smith wrote this piece for four newly elected judges of the Arkansas Supreme Court. Its advice on the drafting process, including the importance of a precise opening paragraph and simple sentence structure, has become foundational to instruction on the subject across the United States.

45. *See id.* at 206.

Trial judges prize lucid guidance above entertaining narratives.[46]

IV. STYLISTIC DISLIKES

A. Ignoring the Possibility of Error

Although trial judges must do as their appellate courts tell them, they might nevertheless remain unpersuaded. In complex cases in which the trial judge has scrutinized the facts and law at length, an appellate tone of measured rather than absolute certainty may be more appropriate.[47] Tact bolsters the credibility of the court and shows respect to the trial judge (and the defeated litigant) by acknowledging that reasonable minds might differ on the matter.[48] Descriptors like "meritless" or "contrary to the law" should be reserved for arguments that are baseless or closed beyond question; otherwise, phrases like "we conclude" or "in our view" should be used.[49] By the same token, it is often unwise to adjudicate that the evidence "clearly" or "obviously" yields the conclusion.[50] This claim typically accompanies analysis that is neither of these things.[51]

Unqualified language is suitable where nothing reasonable may be said in defense of a position. This occurs less frequently than the fondness for absolutes in case law would suggest. The tone of appellate discourse is more persuasive when understated. At the same time,

46. Varsava, *supra* note 5, at 121, 132. Professor Varsava contends that by inserting dramatic stories or evocative images, judges risk oversimplifying their cases and imputing an inexorability to conclusions that are really more contingent. Narratives tend to omit details that run counter to neat character archetypes; a sound argument by a party that is losing on every other point may thus be overlooked to create a complete victor. In the process, the traces of alternative lines of reasoning that may prove useful in similar but distinguishable cases disappear. *Id.* at 133–34.

47. McLeese, *supra* note 7, at 1358.

48. *Id.*

49. *Id.*

50. Davidson, *supra* note 1, at 186.

51. *Id.*

courts should avoid so "overload[ing]" an opinion's language "with all its possible qualifications that it will tumble down of its own weight."[52]

The effect of logic on the force of the holding should not be overstated. Some opinions seem to imply that the conclusion follows inevitably from precedents and doctrines they cite, and that their purpose is merely to elucidate the intervening syllogisms. But logic cannot transcend the reliability of the premises on which it operates. Thus, "the same court may start a seemingly similar case from a different premise and with equal inevitability by pure logic arrive at a different result."[53]

B. Demeaning the Trial Judge

Sniping at the trial judge for reaching a contrary result is an ill-advised urge. Cases usually admit of multiple reasonable decisions. Condescending remarks handed down by the appellate bench are especially unfair because of the power imbalance with trial judges.[54] Trial judges cannot defend their character before the court; they must live with the remarks, however inaccurate, immortalized in publication. And the losing party on appeal may grow indignant at the impression that their reversal of fortune stemmed purely from one judge disliking another.

Below are some ways that appellate opinions can maintain a respectful tone toward trial judges:

- Refrain from claiming that the judge "forgot" or "overlooked" key information.[55]

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52. Cardozo, *supra* note 22, at 122, 52 HARV. L. REV. at 474, 48 YALE L.J. at 492.

53. Leflar, *supra* note 4, at 816.

54. McLeese, *supra* note 7, at 1363.

55. J.E. Côté, *A Practical Guide to Appellate Judging*, 16 J. APP. PRAC. & PROCESS 15, 34 (2015), https://tinyurl.com/ycysn3hy. Côté, a retired appellate judge, observed the value of collegiality both among appellate judges deciding a case where their beliefs clash, and between appellate and trial judges under review. *Id.* at 32–35. Most participants in a case are sincere in their views, however mistaken these may be. Charged language betrays a closed mind. *Id.* at 32.

- Attribute error to the judge's reasoning or a party's argument the opinion endorsed, not to the judge directly.[56]
- Say that the judge "exceeded the scope" of discretion, rather than "abused" it.[57]
- Avoid repeatedly naming the judge. Opinions that name and shame risk making their objections seem personal.

C. Injecting Humor, Sarcasm, or Other Improper Devices and Forms

Appellate courts disappoint no one by excising humor. Jokes, however well-intentioned, may give the impression that the court treated the case flippantly.[58] Parties take the relief they seek seriously, as do trial judges their appellate record. It is unlikely, after months or years of wrangling over the case, that they will share the appellate court's sense of humor.

Sarcasm, too, has no place. It is merely a method of veiled insult that will be read by many for the first time with a straight face. Nor do references to popular culture have the reliable impact judges might expect. The professionals among their audience may be less attuned to recent trends than the authors might think, and cultural touchstones once looked upon affectionately can quickly become objects of disapproval.

Experimenting with poetry, novelistic narratives, and other literary forms should occur on a judge's free time.[59] It is difficult for parties to applaud an opinion's

56. *Id.* at 34.

57. McLeese, *supra* note 7, at 1363.

58. Davidson, *supra* note 1, at 179.

59. Elaine Craig, *Judicial Audiences: A Case Study of Justice David Watt's Literary Judgments*, 64 MCGILL L.J. 309, 345 (2018), https://tinyurl.com/268yn82z. Professor Craig suggests that judges may write literary judgments to seize the attention of readers in the legal profession who have tired of the regular colorless fare or because they themselves are bored. In the first instance, she argues, the effect terminates whenever judges attempt serious legal discussion. In the second, judges impermissibly subordinate the pursuit of justice to their own self-interest. *Id.* at 342–45.

meter as the court affirms a sentence of incarceration. And it is disrespectful to exploit shocking or repugnant details in a case to mimic the atmosphere of crime fiction or thrillers.[60] For the trial judge, forays into literary judgments may be welcome in service of a legal function—such as by crystallizing through metaphor an idea that has taken multiple paragraphs to develop.[61] But attempts at cleverness tend to introduce irrelevant facts and obscure the legal issues.[62] An elaborate style should never command content.[63] Content, not style, should prevail.

V. CONCLUSION

There is no guaranteed path to affirmance. Nor should there be. But by knowing why appellate courts have ruled as they did and what the law is now, trial judges can more readily deliver justice to litigants at an earlier stage. If first achieved on appeal, justice will be a long time coming.

As one appellate justice noted more than 30 years ago, "appellate judges watch from on high the legal battle fought below, and when the dust and smoke of the battle clears they come down out of the hills and shoot the wounded."[64] Trial judges cannot avoid this fate. They ask merely for more direction (or judicious words of warning) from on high before the next battle. Some preamble, perhaps, and a guide to the next world.

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60. *Id.* at 315–18.
61. *Id.* at 341–42.
62. *Id.* at 341.
63. *Id.*
64. Black v. State, 723 S.W.2d 674, 677 n.1 (Tex. Crim. App. 1986) (Onion, P.J., dissenting).