

CONTENTS

Dedication	v
Preface to the Third Edition	xv
Preface to the Second Edition	xix
Preface to the First Edition	xxiii
About the Author	xxv
Introduction	xxvii
The Book: How to Use It	xxix
Experienced Trial and Appellate Judges	xxix
Trial Judges: New or Veteran	xxx
Administrative Law Judges: New or Veteran	xxx
Arbitrators: New or Veteran	xxx
All New Judges	xxx
Law Clerks	xxx

PART ONE

THEORETICAL CONCEPTS UNDERLYING AN OPINION

Chapter One • Writing Judicial Opinions	3
§ 1.1 Overview: The Increasing Importance of Writing a Good Opinion	3
§ 1.2 Criticisms of Opinions	9
§ 1.3 The Purpose of an Opinion	11
Chapter Two • To Write or Not to Write	15
§ 2.1 Overview	15
§ 2.2 To Publish or Not to Publish: That Is the Question	15
§ 2.3 Per Curiam Opinions	17
§ 2.4 Alternatives to Published Opinions	19
§ 2.4.1 The Judgment Order	19
§ 2.4.2 The Nonprecedential Opinion	20

§ 2.5 Opinion Writing Guidelines	21
§ 2.6 Readership	22
§ 2.6.1 Primary Consumers	22
§ 2.6.2 Secondary Markets	24
Chapter Three · Reaching and Justifying the Decision: A Distinction with a Difference	27
§ 3.1 Overview	27
§ 3.2 Rules, Principles and Doctrines	27
§ 3.2.1 Rules	29
§ 3.2.2 Principles	30
§ 3.2.3 Doctrine	31
§ 3.3 Two Processes: Decision Making and Decision Justifying	31
§ 3.3.1 The Difference between “Hot” and “Cold”	32
§ 3.3.2 Where Decisions Are Made	33
§ 3.4 Idiosyncrasies of Appellate Courts: The Pre-Decision Opinion Assignment	34
§ 3.5 Five Recurring Questions	35
Chapter Four · Judicial Declaration of Public Policy	39
§ 4.1 Overview	39
§ 4.2 Where There Is No Consensus for Public Policy	48
§ 4.3 Four Concerns to Be Addressed	49
§ 4.4 Weighing of Interests	50
PART TWO	
THE ANATOMY OF AN OPINION	
Chapter Five · The Outline of Your Opinion	57
§ 5.1 Overview	57
§ 5.2 Five Parts Necessary for an Appellate Opinion	57
§ 5.3 The Orientation Paragraph(s)	59
§ 5.4 Statement of Jurisdiction	59
§ 5.5 Summary of Issues to Be Discussed	59
§ 5.6 Standards of Review	60
§ 5.7 Write the Facts	60
§ 5.8 Stating Reasons for the Decision	61
§ 5.9 Disposition	61

Chapter Six • Jurisdiction and Standards of Review	63
§ 6.1 Overview	63
§ 6.2 Subject Matter Jurisdiction Checklist	63
§ 6.3 Issue Preservation for Review	64
§ 6.4 Standard of Review	65
§ 6.5 The Fact Finder	66
§ 6.6 Three Categories of Facts	67
§ 6.6.1 Basic and Inferred Facts	67
§ 6.6.2 Ultimate Facts (Mixed Questions of Fact and Law)	68
§ 6.7 Fact Finding: Who Does It, and Under What Conditions?	68
§ 6.8 Who Found the Facts?	69
§ 6.8.1 Fact Finding: Jury or Judge?	71
§ 6.8.2 Fact Finding: Administrative Agencies	72
§ 6.9 A Comparison: Common Law and Civil Law Traditions	73
§ 6.10 Excerpts from Court Opinions	74
§ 6.11 Review of the Exercise of Discretion	75
§ 6.12 Excerpts from Court Opinions	76
§ 6.13 Review of Questions of Law	77
§ 6.14 Excerpts from Court Opinions	78
§ 6.15 Summary	79
 Chapter Seven • Orientation Paragraph	 81
§ 7.1 Overview	81
§ 7.2 Drafting the Opening Paragraph	81
§ 7.3 The Bottom Line: Five Questions	83
§ 7.4 Preview of the Opinion	84
§ 7.5 Previews: A Personal Preference	85
§ 7.6 Excerpts from Court Opinions	86
§ 7.6.1 Effective Opening Paragraphs	86
§ 7.6.2 Less Effective Openings	88
§ 7.6.3 Mystery Stories	89
 Chapter Eight • Summary of Issues	 93
§ 8.1 What Issues Do We Address?	93
§ 8.2 Appeal as of Right or by Writ of Certiorari	93
§ 8.3 Courts of General Jurisdiction	94
§ 8.4 Clean-Up Phrases	95
§ 8.5 Excerpts from Court Opinions	96
§ 8.6 Judicial Reaction to Advocacy	97

§ 8.7 Summary of Issues	98
§ 8.8 Excerpts from Court Opinions	99
§ 8.8.1 Statements of Issues	99
§ 8.8.2 Phrasing the Issue	100
§ 8.8.3 Neutral Issue Summaries	100
§ 8.8.4 Issues Summarized in Opening Paragraphs	102
Chapter Nine • Statement of Facts	107
§ 9.1 The Importance of the Statement of Facts	107
§ 9.2 What Facts Should Be Set Forth?	107
§ 9.3 Where Do You Place the Facts?	109
§ 9.4 The Polestar Is Accuracy	109
§ 9.5 Narration Should Be Limited to Material Facts	110
§ 9.6 Guidelines to Determine Material Facts	112
§ 9.7 Materiality: One Man's Meat	113
Chapter Ten • Writing the Reasons for the Decision	117
§ 10.1 Overview	117
§ 10.2 The Rationale Must Offer Clarity	119
§ 10.2.1 Let the Reader Recognize an Outline	121
§ 10.2.1.1 Simple Opinion Outline	122
§ 10.2.1.2 More Sophisticated Opinion Outline	122
§ 10.2.2 Identify the Precise Jurisprudential Conflict	124
§ 10.2.2.1 Excerpts from Court Opinions	125
§ 10.3 The Required Logical Structure of Each Issue: Overview	130
§ 10.3.1 Introduction to Deductive and Inductive Reasoning	131
§ 10.3.2 Deductive Reasoning	131
§ 10.3.3 The Deductive Categorical Syllogism Must Appear in Every Issue You Discuss	134
§ 10.3.4 Deductive Reasoning in the Discussion of an Issue	135
§ 10.3.5 Inductive Reasoning	136
§ 10.3.6 Testing the Conclusion of Each Issue	137
§ 10.3.7 Determine Whether Your Premises Are Free from Material Fallacies	138
§ 10.4 Consider the Consequences of Your Analysis	139
§ 10.4.1 Guidelines in Considering Consequences	140
§ 10.4.2 The Requirement of Consistency in Considering Consequences	141
§ 10.4.3 The Tenet of Coherence in Considering Consequences	142

§ 10.5 Cut Down on Citations	143
§ 10.5.1 How to Cut Down on Citations	144
§ 10.5.2 Use a Parenthetical if You Can	145
§ 10.6 Issue Discussion: A Recapitulation	145
§ 10.7 The Disposition	148
 Chapter Eleven • Concurring and Dissenting Opinions	 149
§ 11.1 Overview	149
§ 11.2 Concurring Opinions	150
§ 11.2.1 Proper Concurring Opinions	150
§ 11.2.2 Whether to Respond to a Dissenting Opinion	151
§ 11.2.3 Improper Concurring Opinions	152
§ 11.2.4 Concurring Opinions: In Sum	154
§ 11.3 Dissenting Opinions	155
§ 11.3.1 Some Open Questions on the Work of State Appellate Courts	156
§ 11.4 Final Thoughts	157
§ 11.5 Excerpts from Dissenting Opinions	158
 Chapter Twelve • The Important Role of Law Clerks	 165
§ 12.1 Overview	165
§ 12.2 Writing Tasks: General Considerations	166
§ 12.3 Suggestions for Good Writing and Editing	166
§ 12.4 Clerking Responsibilities	167
§ 12.4.1 Preparing Bench Memoranda	167
§ 12.4.2 Research	169
§ 12.4.3 Ordering the Record or Supplemental Briefing	169
§ 12.4.4 Components of a Bench Memo	170
§ 12.5 Writing an Opinion	172
§ 12.6 Special Instructions for Trial Court Clerks	173
§ 12.6.1 Resolution of Motions in Trial Courts	173
§ 12.6.2 Findings of Fact and Conclusions of Law	174
§ 12.6.3 Federal Trial Court Orders	175
§ 12.6.4 Understanding Summary Judgment	176
§ 12.6.5 Common Law Demurrer and Rule 12(b)(6)	178
§ 12.7 Denouement	179
 Chapter Thirteen • Opinions of Trial Courts	 183
§ 13.1 Overview	183
§ 13.2 Necessary Parts of a Trial Court Opinion	184

§ 13.3 Opening Paragraph	185
§ 13.4 Excerpts from Trial Court Opinions: Opening Paragraphs	185
§ 13.5 Statement of Facts: Motions to Dismiss	187
§ 13.6 Statement of Facts: Summary Judgment	187
§ 13.7 The Trial Judge as Fact Finder	188
§ 13.8 Fact? Or Disguised Conclusion of Law?	190
§ 13.9 Be Careful of the Proposed Findings of Fact	192
§ 13.10 Discussion of the Law	192
§ 13.11 Conclusions of Law	193
§ 13.12 The Disposition	194
 Chapter Fourteen • Administrative Law Judge Opinions	 197
§ 14.1 Overview	197
§ 14.1.1 Federal Agencies with Administrative Law Judges	197
§ 14.1.2 State Departments and Agencies with Administrative Law Judges	198
§ 14.2 Why Write? The Rationale for an ALJ's Written Opinion	200
§ 14.3 The Substance of the Opinion	202
§ 14.4 Idiosyncratic Problems of Immigration Judges	207
§ 14.5 ALJ Review Boards	209
§ 14.5.1 Other State and Federal Review Tribunals	212
§ 14.6 The ALJ Opinion on Review	213
§ 14.6.1 An Example of How Appellate Courts Review ALJ Opinions	214
§ 14.7 Conclusion	216
 Chapter Fifteen • Arbitration Procedures and Opinion Writing	 219
§ 15.1 Overview	219
§ 15.2 Arbitration Awards	220
§ 15.2.1 The Conflict between Federal and State Arbitration Acts	221
§ 15.3 Crafting a Binding Award	222
§ 15.4 Parts Necessary for an Arbitration Award	225
§ 15.5 Excerpts from Arbitration Awards	227
§ 15.5.1 Effective Statements of Reasons	227
§ 15.5.2 Effective Statement of the Governing Arbitration Law	228

**PART THREE
WRITING STYLE**

Chapter Sixteen • Writing Style	231
§ 16.1 Footnotes	231
§ 16.2 Guidelines to “Middle Ground” Footnoting	231
§ 16.2.1 Proper Footnote Use	232
§ 16.2.2 Improper Footnote Use	232
§ 16.2.3 Goodbye to Footnotes	232
§ 16.2.4 A Letter to a Law Review Editor	237
§ 16.3 Writing Style	238
§ 16.4 Literature and Poetry	240
§ 16.5 Favorite Opinion Writers	242
 Chapter Seventeen • Writing Style: A Reprise, or, “Watch Your Language!”	 273
§ 17.1 Citations and Authorities	273
§ 17.2 Writing to Be Clear and Interesting	274
§ 17.3 My Pet Peeves	276
§ 17.4 If You Only Knew	277
§ 17.5 Word Selection	278

**PART FOUR
CHECKLISTS**

Chapter Eighteen • Appellate Opinion Writing Checklist	285
§ 18	285
 Chapter Nineteen • Appellate Opinion Testing Checklist	 291
§ 19	291
 Chapter Twenty • Shorten-Your-Appellate-Opinion Checklist	 295
§ 20	295
 Chapter Twenty-One • Trial Court and Hearing Tribunal Checklists	 301
§ 21.1 Opinion Writing Checklist	301
§ 21.2 Opinion Testing Checklist	305
§ 21.3 Shorten-Your-Opinion Checklist	307

Chapter Twenty-Two • Administrative Law Judge Checklists	311
§ 22.1 Opinion Writing Checklist	311
§ 22.2 Opinion Testing Checklist	315
§ 22.3 Shorten-Your-Opinion Checklist	317
 Chapter Twenty-Three • Arbitrator Checklists	 321
§ 23.1 Opinion Writing Checklist	321
§ 23.2 Opinion Testing Checklist	325
§ 23.3 Shorten-Your-Opinion Checklist	327