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The Architecture of Argument

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The question of how best to structure judgments is an ongoing one. This article is based on the premise that judges should convey their reasoning in a form that reflects the simple and repetitive logic of the law. It provides a seven-step recipe for writing clearly structured judgments that convey logical reasoning and contain context before details, clearly partitioned issues and succinct arguments.

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

> "1 had trouble figuring out what's going on in this case until I got to page 15," I said. "This is where you get around to mentioning the issues."
>
> "Yes, professor, I can see that."
>
> "And now that I know what the issues are, it seems to me that probably twelve of the first fifteen pages could be omitted, since they have nothing to do with any of the issues."
>
> "Yes, professor, I agree."
>
> "Just out of curiosity, why did you wait until page 15 to enunciate the issues?"
>
> "Well professor, to tell the truth, I didn't know what the issues were myself until I got to page 15."

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

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

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I. The universal logic of the law

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

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

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

In jurisprudence, only four arguments can occur:

1. The litigants may contest factual allegations.
2. Or they may claim that the other side has cited the wrong law.
3. Or they may argue that although the other side has cited the right law, they have misinterpreted it.
4. Or they can agree about the facts and the law, but disagree about how one applies to the other.

Every case boils down to some combination of these four basic disputes. There are no others. Litigants may argue about things outside the law: technicalities in accounting procedures, similarities among patented products, or the reliability of laboratory tests. But these arguments involve other disciplines. They are not legal arguments.

Even when some procedural issue is argued (venue, for example, or timeliness), the argument will always be the same. One side will allege certain facts in the context of a controlling law, principle or standard, and the other side will either dispute the facts, or argue that the wrong law has been cited, or that the right law has been misinterpreted or misapplied.

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

The logic of jurisprudence is the same in trial courts and courts of appeal. The only difference is that at trial, litigants are likely to argue about both facts and law, whereas in courts of appeal arguments tend to focus on the law - the appellant arguing that the court below has applied the wrong law, or misinterpreted or misapplied the right one. Appellate courts are not equipped to examine the evidence itself. They

cannot call witnesses, examine exhibits or indulge litigants in the sort of lengthy, unpredictable, and often disorderly proceedings that characterise a trial. Courts of appeal may hear arguments about the admissibility or sufficiency of certain evidence, but except in rare circumstances they will not second-guess trial courts on the inferences of fact drawn from whatever evidence they deem admissible.

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

II. A universal outline for judgments

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

Because despite the appearance of logic, litigation is always messy and uncertain. It relies on "facts" inferred from observations that cannot be replicated, reported by witnesses who may or may not be telling the truth or by experts who are generally contradicted by opposing experts. Inferences made from events described by witnesses rarely achieve the reliability of science. Even evidence that claims to be "scientific" can be contested by other data or other interpretations of the same data or by arguing that the data has been contaminated.

Nor do issues arise from the facts with a logical inevitability. Good lawyers can find many issues in any set of allegations, some more likely than others to benefit their clients. Unanticipated issues and surprising facts may arise during the trial, and sometimes on appeal.

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

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

Jurisprudence requires lawyers and judges to control the chaos by conveying their reasoning in a form that seems logical. Instead of controlling the chaos, however, they often reproduce it, failing to identify or to partition the issues, rambling through facts and allegations without distinguishing the credible from the implausible, switching from one party's version to the other's as if judges were court reporters, reproducing the testimony instead of analysing it. Their
arguments meander, just as their thoughts must have meandered. They produce a stream of consciousness instead of an orderly sequence, a diary of dawning awareness instead of an engine of logic in which a result emerges from an application of law to fact. They forget that the goal of jurisprudence is to pluck the essential issues, the relevant facts and controlling laws from the maelstrom of arguments, allegations, precedents, principles and pretensions that rage about during a trial. It is not an easy task. But it would be easier if judges would remember the simple logical structure that they must identify in the resolution of every issue in every case.

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

Paradoxically, judges sometimes forget that their readers want precisely the same things: context before details, clearly partitioned issues and succinct arguments. Rules for appellate procedure generally work just as well on both sides of the bench, and at every level, all the way to Supreme Court.

III. A seven-step recipe for organisation

Here is a recipe for organising a judgment in even the most complex case.

1. Identify and partition the issues.
2. Prepare an LOPP/FLOPP analysis for each issue.
3. Arrange the analysis of issues like rooms in a shotgun house.
4. Prepare an outline with case-specific headings.
5. Write a beginning.
6. Write an ending.
7. Review your draft with a checklist and a friend.

1. Identify and partition the issues

Plan the body of the judgment before settling on an introduction.

Use a stack of note cards, or half sheets of paper, or the equivalent space on a computer screen. On each card write the word "Issue", followed by a *brief* statement of any question you will have to decide.

At trial, the issues may be either questions of fact or questions of law. At the end of the trial you will have to present your findings and support them with reasons enough to satisfy the court of appeal, if not the losing party. During the trial you may have to provide written responses to preliminary or interlocutory motions - again, with reasons that will survive on appeal.

At trial, the issues are any reasonable and relevant question raised by either party. To these, some judges add questions that either they or the court of appeal might think *ought* to have been raised, even if only to mention them as a way of anticipating what might be raised at a different level.

When judges are responsible for finding facts, they have to support their findings with credible reasons. (Paradoxically, juries do not have this obligation: they find facts without revealing their reasons.) When a jury is responsible for finding facts, you are relieved of your responsibility to provide reasons for these findings; but at the same time you become responsible to guide the jury's deliberations by composing directions that they can understand and that will also satisfy a court of appeal's demand for legal accuracy. Either task alone would be difficult enough; achieving both at once is just short of miraculous.

On appeal, you should have the assistance of counsel in identifying and articulating the issues. At either level, judges in some jurisdictions use case management procedures to have counsel clarify the issues among themselves before addressing the court.

Determining the issues early is essential to efficiency in writing and economy in the result. You cannot distinguish relevant facts and arguments from pointless digressions until you have determined precisely what questions the court is being asked to settle. If the issues change as the case proceeds, prepare cards for the new ones and discard those that become irrelevant.

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

2. Prepare a LOPP/FLOPP analysis for each issue

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

- LOPP (Losing Party's Position)
- FLOPP (Flaw in Losing Party's Position)
- CONCLUSION.

> *For example:*
>
> LOPP: Respondent contends that he had not been informed of the penalty clause in the contract.
>
> FLOPP: The evidence shows that both the respondent and his attorney received the contract thirty days before signing it.
>
> CONCLUSION: Therefore respondent's contention that he was unaware of the penalty clause has no merit.

When the conclusion is obvious, it may be effective to leave it unstated, allowing your readers to make the inevitable inference on their own. These inferences will, of course, become explicit in the form of findings or orders at the end of the ruling as a whole. Sometimes it is effective to refer to an unstated conclusion as if it were so obvious that it can be safely tucked away in a subordinate clause (for example, "Because the respondent had ample time to examine the contract before signing it. . ."). Understatement of this sort can be more powerful than rhetorical excess. It implies that any reasonable reader would agree.

Be careful about using highly charged language to characterise the losing party's position. Charged language is a rhetorical weapon that often backfires. It pleases readers who agree with you in advance, but it alienates impartial readers, and infuriates the losing party and anyone who may be sympathetic to the losing party's point of view. There are, of course, exceptions, when judicial indignation is perfectly appropriate and effective. But charged language is often a sign that an argument is based on passion rather than law. Normally, a civil society wants judges to rise above emotion and blatant political preferences. People who pay attention to the courts want reasons, not feelings nor even ideals - reasons that seem firmly grounded in law. Express the losing party's position as effectively as you can - as if you were representing that party yourself - and then identify the flaw in that position with surgical detachment. If you cannot find the flaw in your best statement of the losing party's position, you may need to reconsider your conclusion.

Although the final logic in a judgment always resembles a categorical syllogism (controlling law/relevant facts/conclusion), actual courtroom argument is dialectical: one party argues X, the other argues Y. Lawyers are always responding to the opposing party's position. This dialectic should be easy to find in the analysis of each issue:

> One party says X.
> The other party says Y.
> The court says X (or Y, or possibly Z).

The LOPP/FLOPP pattern suggested earlier captures this dialectic. But because the court's position is essentially identical with the prevailing party's position, it is often possible to skip one of these steps.

> LOPP: One party says X.
> FLOPP: But the court says Y because...

There is no reason to say what the winning party has argued, since the court has adopted that position as its own.

Although the LOPP/FLOPP pattern generally works, there are a few exceptions.

One exception occurs when the controlling law is a principle of equity or a matter of judicial discretion that must be exercised without clear and definitive standards. In determining custody, for example, or visitation rights, family court judges can help calm raging emotions by downplaying the notion of a "losing" party. Divide the judgment into factors (for example, "Proximity to schools", “Access to extended family" or "The child's safety"). Under each heading, simply compare and contrast conditions at mom's house with conditions at dad's house. A simple objective description will suffice; often the inferences will be obvious.

An adverse ruling in family court is never easy to accept; but disappointed parents will find it easier to respect a decision that focuses on the child's best interest rather than on a finding that either party has been found a less competent parent. Even when the decision is actually based on the unsuitability of one parent, it does no harm for the record to acknowledge whatever parental strengths can be attributed to that parent along with the weaknesses that are critical to the decision.

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

> Plaintiff argues that the respondent's equity in the condominium at the time of the divorce was $250,000.

> Respondent, however, presented evidence that the equity was roughly half that amount.
>
> After carefully weighing the evidence presented by each side, I find that... because...

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

This is trickier than it seems. Many trial judges believe that by expressing reasons for findings, particularly for findings based on credibility of witnesses, they invite the court of appeal to second guess them and to reach different conclusions. On the other hand, failure to give reasons can tempt the court of appeal to remand on grounds that the findings were not supported by sufficient evidence. Balance is the key. Trial judges should support their findings with sufficient reasons to show that they are not arbitrary and capricious. Whenever possible, they should cite specifics - for example, evidence from documents, consistencies or inconsistencies in testimony, conformity to or deviation from normal human behaviour, awareness of motives for telling the truth or for concealing it, etc. In other words, judges can and should reveal exactly the sort of thought processes that they tell jurors to follow in reaching a verdict.

In general, the LOPP/FLOPP pattern will help you think clearly about the application of fact to law. It can also protect you from your own biases. Nothing is more frustrating to the bar and to the public than a decision that is not supported by a clear and logical application of law to facts. And nothing can be more damaging to public trust in the integrity of the judiciary.

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

The most frequent cause of obscurity in jurisprudence on both sides of the bench is not technical language or complex issues or arcane subjects. It is haphazard organisation.

The easiest way to organise a judgment is to imitate the structure of what in some parts of the United States is called a shotgun house - a house in which each room follows the other in a straight line leading from a front porch to a back porch. The front porch is the introduction, the back porch the conclusion. Each room between contains the analysis of a particular issue.

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

Sometimes there will be threshold issues (standing, for example, or jurisdiction or timeliness); normally these are dealt with first.

Sometimes issues can be grouped in categories (for example, three dealing with the admissibility of evidence, two dealing with jury instructions, five dealing with sentencing). Sometimes the issues can be arranged in a logical chain, each issue dependent on the other for its viability. Sometimes each issue is completely independent of the others. In this situation, consider arranging the issues chronologically, if the material allows it.

After reaching a decision on a dispositive issue, the others generally become moot. On occasion, however, judges will analyse these moot issues anyway, on the theory that if they are reversed on the dispositive issue, ruling on the others will save the litigants the trouble and expense of further litigation. If you do this, be sure to announce your intention in advance. Do not surprise your readers by having them read your analysis of a dozen issues only to discover at the end that the moving party had no standing in court.

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

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

Although a "foyer" for an extended facts, background or procedural history may be necessary at times, more often than not it can be avoided by writing a beginning that provides an essential overview (see step 5, below), saving necessary details for the analysis of the issue to which they are most relevant. Narrating the detailed facts twice - in the beginning and in the analysis of the issues - creates unnecessary work for yourself and your readers.

4. Prepare an outline with generic and case-specific headings

If a judgment is very short - two or three pages - it may need no headings. In longer texts, headings are extremely helpful, particularly to readers who want to read your argument as quickly as possible.

In judgments that include a table of contents, headings provide a road map, foreshadowing the journey you want your reader to take. Within the document, headings serve as signposts marking the boundaries between various stages of the journey. They show where the analysis of each issue ends and another begins. To serve these functions effectively, headings mus. be as brief as possible. They should not be entire arguments (though it is often effective to put a brief summary of an argument immediately after each heading).

There are two kinds of headings: generic and case specific. Words and phrases like "Introduction", "Background", "Order", "Cases cited", "Issues" and "Findings of fact" are generic headings. Generic headings can be transferred from case to case, regardless of the facts and issues.

Although generic headings are useful, even more useful are case-specific headings - headings like "Was the warrant valid?" or "What is the meaning of 'obscenity' in section 905?" These headings differ from generic headings in that they are tied to the facts of a specific case. They mark boundaries between the analysis of separate issues. Case-specific headings enable future readers (such as lawyers and law students) to go directly to those sections they suspect might be helpful to other cases.

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

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

You can phrase it as a question:

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

Or you can phrase it as a topic:

> State Agency.

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

Even though you should write every judgment as if you expect your readers to follow it from beginning to end, chances are they will not. Effective headings will aid those readers who raid your text like marauding pirates, looking for what interests them and ignoring the rest. Make it easy for them to find whatever they are looking for.

No matter how you phrase them, however, headings should be clearly foreshadowed by the end of the introductory section (see step 5 below). And they should be phrased in such a way that they are intelligible to an educated non-lawyer who knows nothing about the case in advance.

Here, for example, is a heading that requires far too much knowledge of local law:

> **Issue One**
> The holder of a perfected security interest is not entitled to negate the State's rights under the statutory "warrant hold" provision of the VIP Government Code, section 403.055 (a).

The same issue could have been stated much more clearly in plain English:

> **Issue One**
>
> Can the state withhold Medicare funds from creditors of a bankrupt nursing home that has failed to pay its taxes?

5. Write a beginning

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

Avoid beginning with technical, dry or uncontested assertions. Imagine, for example, the reaction of weary readers with busy schedules when they see an opening paragraph like this:

> Pursuant to Local Patent Rule 4-5(b), Defendant National Compuchip Corporation ("Compuchip") challenges the Claim Construction Brief filed on February 27, 2003 by Plaintiff Laserop, Inc ("Laserop"), on issues of claim construction for US Patent Nos 5,944,807 ("the '807 patent") and 6,098,141 ("the '141 patent"). Exhs A and B, The Laserop patents. Compuchip's proposed interpretation of the terms and phrases in the claims of the '807 and '141 patents are set forth in Compuchip's Interpretation Chart for the Claim Terms! Phrase Recited in the Asserted Claims of US Patent No 5,944,807 ("the '807 patent") and US Patent No 6,098,141, which is attached hereto as Exh C.

lf you are a typical reader, you probably did not read this example in its entirety. You skipped over it as soon as your eyes glazed over. Yet some judges are convinced that they are bound by tradition, rules or logic to begin their judgments with a reference to the rule that gets one party or the other into court. There is something logical about this convention; after all, how can we decide a case if the litigants have not established standing and jurisdiction? But then again, if there is no contest about standing or jurisdiction, why waste the opening lines establishing something that can be safely presumed?

Then, too, once they have mastered the numerical references in a particular case or a particular statute or a particular set of rules, some judges forget that shorthand references are meaningless to readers who are not already intimately familiar with the same material. References like "Local Patent Rule 4-5(b)" and "the '807 patent" do not actually communicate information; they merely remind a small set of readers in the know. Granted, this beginning would make sense to the parties

involved in the case, but it wouldn't tell them anything new. So to whom is it useful?

When jurisdiction and standing are uncontested, starting with "Pursuant to" is like putting a hotdog stand on prime real estate. The first paragraph and the last are possibly the only places where you can count on the reader's attention. Why waste this space by filling it with uncontested assertions or with information the reader can be presumed to know?

Similarly, imagine the reaction of their readers who encounter opening lines like these:

> **Declaratory judgment (article 453 cpc)**
>
> This Court, having examined the proceedings and the exhibits, considered the arguments of counsel, and duly deliberated, doth now render the following Declaratory judgment:

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

An effective introduction provides two things: a synopsis of the facts and a brief statement of the issues. Begin with what you would tell your next door neighbours if they were curious about the case. Use ordinary, neighbourly language. Avoid jargon. Tell a brief story indicating the human conflict, "who did what to whom" or "who's arguing about what". Then state the issues - the questions of fact or law that you need to settle.

In cases destined for the highest courts, often the fate of the particular litigants is less important than what the decision will mean for other litigants in similar situations. If the issues have far-reaching implications - if, for example the suit is intended to establish or to challenge an important public policy - you might start with the issues and then summarise the facts.

The combination of facts and issues provides the context that gives meaning to everything that follows. In addition, by delineating the issues in a few lines, you can foreshadow the structure of the argument to follow. Here is an example:

> Harry Saunders was convicted of assault, battery, rape and murder, each in the first degree. According to the evidence, Saunders wore gloves and a mask when he committed these crimes, concealing his identity from his victim and from witnesses on the scene.
>
> In this appeal, Saunders argues that the lineup in which he was identified was suggestive, that articles of clothing used in his identification were illegally seized from his apartment, and that he had no access to counsel at key points during the investigation

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

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

This beginning provides the necessary context for understanding the analysis that follows. You can even predict the headings: "Lineup identification"; "Search and seizure"; *'~ccess* to counsel". And in predicting the headings, you are predicting the structure of the rest of the document. You are, in effect, promised an easy and interesting read. Although judges are not obliged to make their writing interesting, doing so does have the effect of helping the reader pay attention to the argument.

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

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

> [1] This is an application supported by an affidavit in which the applicant is seeking to be admitted to bail pending her trial. The affidavit discloses that the applicant who has been in custody since October, 1985 was on 3rd December, 1985 committed to the High Court for trial for the offence of Infanticide. On 18th December, 1985 she applied to the High Court at Kitwe to be admitted to bail pending her trial.

This is an adequate beginning, but it reads like an abstract problem in the law instead of what it really is, a case about a young woman who has been improperly held in jail without bail. Starting with the story would have given the case the sense of urgency and human significance it deserved:

> [1] Rosemary Chilufya has been in jail for nearly five months, awaiting trial on a charge of infanticide. The High Court has refused to set bail, on the ground that infanticide is a form of murder, and murder is not a bailable offense. A threshold issue in this case, however, is whether the Supreme Court has the authority to...

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

> 1. The issues in this appeal in respect of the Appellant's 1994 taxation year are:
>
> a) Whether the Appellant, in determining LCT liability under Part 1.3 of the Act, is entitled to deduct the amounts of the Estimates from its "capital", or whether such amounts are to be included in its "capital" :
>
> i) as "reserves" pursuant to ss 181(1) and 181.2(3)(b), or
>
> ii) as "other surpluses" pursuant to s 181.2(3)(a);
>
> b) Alternatively, if the Estimates are "reserves" or "other surpluses", whether the Appellant, in computing its income under Part I of the Act, is entitled to deduct the amounts of the Estimates from its revenue;
>
> c) Whether the Appellant, in determining LCT liability under Part 1.3 of the Act, is entitled to deduct the $37,481/776 amount" as a "deferred tax debit balance" within the meaning of s 181.2(3)(h).

The other extreme is to provide too little detail:

> The issue is whether the tax returns filed by the appellant in 1994 were accurate.

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

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

> The issue is whether the appellant is entitled to deductions pursuant to ss 181(1), 181.2(3)(a), 181.2(3)(b), and 181.2(3)(h) of Part 1.3 of the Income Tax Act.

A good statement of issues foreshadows the structure of what follows and provides the reader with a glimpse of the grounds of the

argument. It does not cite laws, precedents or records that can be more usefully cited in the analysis section. In this particular case, after a brief description of what the appellant claimed in his tax returns, the issues might have been effectively stated like this:

> The issues are:
> - Whether the appellant is entitled to deduct the amounts of the estimates from its "capital".
> - Whether the appellant is entitled to deduct the amounts of the estimates from its revenue.
> - Whether the appellant is entitled to deduct the $37,481,776 as a "deferred tax debit balance".

A good beginning makes the reader want to read more. A notable example is this introduction in a per curiam by the Ontario Court of Appeal:[1]

> "[1] Professor Starson is an exceptionally intelligent man. His field of expertise is physics. Although he has no formal qualifications in that field, he is in regular contact with some of the leading physicists in the world. In 1991 he co-authored an article entitled 'Discrete Anti-Gravity' with Professor H Pierre Noyes, who teaches physics at Stanford University and is the Director of the Stanford Linear Accelerator Center. Professor Noyes has described Professor Starson's thinking in the field of physics as being ten ahead of its time.
>
> [2] Unfortunately, Professor Starson has a history of mental illness, dating back to 1985. Unfortunately, Professor Starson has a history of mental illness, dating back to 1985. He has been diagnosed as suffering from a bipolar affective disorder. On several occasions during the last 15 years he has spent time in mental institutions. In November 1998 Professor Starson was found not criminally responsible on account of mental disorder on two counts of uttering death threats. In January 1999 the Ontario Review Board ordered that he be detained at the Centre of Addiction and Mental Health (the Centre)".

Notice that this passage does not call attention to itself *as writing*. The words are transparent, invisible, like lenses through which we see characters and events. The writer doesn't seem to be *trying* to write. The art conceals the artifice. It's *as if* the story wrote itself. But of course it did not. A beginning like this is carefully crafted, a combination of talent and craft.

In this case, the plot thickens when we find out that the unusual Professor Starson "has a history of mental illness." And it thickens further when we discover a few sentences later that he does not want the medication the Ontario Review Board wants to give him, because it would cloud his mind and hinder his ability to conduct his theoretical research.

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

[1] *Starson v Swayze* (unrep. 14 June 2001, Ontario CA).

6. Write an ending

Your concluding section may include only an order. However, if you think the court above yours, or the press, or the losing party might miss the essence of your analysis, use your conclusion as a summation. Repeat your analysis, but in different words, and succinctly. Brevity is essential.

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

In a very short judgment, where repeating the reasons would be tedious, a conclusion that includes an order without repeating the reasons may be adequate:

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

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

> **Conclusion**
>
> Defendant, Tarwater Tobacco Co., has succeeded in having this case removed from state to federal court on the ground that Tarwater's local agents were named as co-defendants by plaintiff as a ruse ("fraudulent joinder") to obtain a favorable local venue.
>
> The standards for removal on the basis fraudulent of joinder are quite high. In this case, Tarwater would have had to prove either that there is no possibility of a verdict against the local defendants, or that the complaint against them was based on false information.
>
> Tarwater has met neither standard. There is no evidence of fraudulent information in the joinder. Nor is there any question that a jury would find against Tarwater's local agents if the facts alleged are proved at trial.

> For these reasons, the case is remanded to the Circuit Court for Barbour County, Alabama, Clayton Division, from which it was removed.
>
> Costs and attorney's fees are assigned to Tarwater. Their failure to provide credible evidence for their claim amounts to a frivolous delaying tactic, taxing the plaintiff with unnecessary costs and taxing the resources of this court.

It may seem paradoxical that a good ending resembles a good beginning (which, in turn, often resembles a good head note). The resemblance is not accidental. Your audience does not necessarily read from top to bottom. If they get lost in an argument, they may flip to the end, hoping to find a synopsis there. They will not be helped by a conclusion that says merely "For the foregoing reasons . . . ," sending them right back to the thicket they had just abandoned. An effective conclusion summarises those foregoing reasons in a nutshell, in plain English, without repeating citations and references that are already included in the body. Here is how the Ontario court concluded the case about Professor Starson:

> "[14] Putting aside any paternalistic instincts – and we think that neither the Board nor the appellants have done so – we conclude that Professor Starson understood, through the screen of his mental illness, all aspects of the decision whether to be treated. He understands the information relevant to that decision and its reasonably foreseeable consequences. He has made a decision that may cost him his freedom and accelerate his illness. Many would agree with the Board that it is a decision that is against his best interests. But for Professor Starson, it is a rational decision, and not one that reflects a lack of capacity. And therefore it is a decision that the statute and s. 7 of the *Canadian Charter of Rights and Freedoms* permit him to make.
>
> [15] The appeal is dismissed."

Enough said.

7. Review your draft with a checklist and a friend.

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

Ask your friend to tell you, after reading only the first page, who did what to whom and what issues need to be settled.

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

If your friend doesn't answer any of these questions to your satisfaction don't explain. Revise.

A well-written judgment is as smooth as a grape. There is nothing extra. Once you reduce it to essentials and organise it coherently, you are ready to revise and polish for style.

IV. Recommended Reading

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

Raymond, James C, "Legal Writing: An Obstruction to Justice" (1978) 30 *Alabama Law Review 1-17.*

Raymond, James C, "Writing to Be Read: or, Why Can't Lawyers Write Like Katherine Mansfield?", *New Zealand Law Conference: The Law and Politics, Conference Pap* . 1993, vol 2, pp 210-216. Reprinted in (1997) 3 *The Judicial Review 153-161.*

Raymond, James C and Goldfarb, Ronald L, *Clear Understandings: A Guide to Legal Writing,* 1983, Random House, New York.

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