

Law

How not to write a judicial opinion

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In writing this article, I have decided, for reasons I may regret, not to follow the sage advice of a person who has infinitely more wisdom, intelligence, and judgment than I possess. After informing my wife of the article's proposed title and subject, she suggested that I should perhaps use a disclaimer stating that I am away on vacation and that, in my absence, the article has been written by an individual who prefers to remain anonymous.

As tempting as that suggestion is, I have chosen to embrace the views of another family member — my 12-year-old son, Sam. Sam's background and credentials may be more questionable than those of my spouse, but his damn-the-torpedoes philosophy of life has emboldened me to follow his lead and act on my impulses.

Like others his age, Sam has much to learn, but he definitely has something to offer judges whose legal prose well exceed the page limits that we mere mortal lawyers must labor under when submitting our appellate briefs.

The Maryland Rules of Appellate Procedure restrict the length of briefs to 35 pages when they are filed in the Court of Special Appeals, and 50 in the state's highest court. It is not at all uncommon, however, for a judicial opinion to well exceed those page limits combined.

One of my colleagues was recently the beneficiary of a 111-page tome, which was issued in the same week that bore witness to a decision that was several pages longer. I was involved in a case a few years ago that resulted in a massive 140-page opus. Although opinions of these lengths are far from the norm, it is not unusual for our appellate judges to crank out 70, 80, and 90-page decisions.

As a former government lawyer who is now a member of a private firm, I can personally attest to the adverse societal and economic impact of reading an opinion whose length makes *The Odyssey* seem like a short story.

Shocking as it may seem, the vast majority of government attorneys actually work for a living, and the time it takes to pore through one of these abbreviated versions of the Bible is often one more hour at the office. To some, this may produce an unsympathetic shrug because the publicly employed lawyer's salary remains the same no matter how hard he or she works, which means that the extra hour at work costs the taxpayers nothing — other than the proverbial cost of burning the midnight oil (and printing the decision).

The consequences are not so easy to ignore in private practice. Somebody's got to pay the freight for each six-minute increment spent reading *War v. Peace*, and if the decision is reported — and after all, why would a judge spend all this time writing something that will be read by only two parties — we're talking about a big shipping and handling expense. Westlaw does not have one of those boxes that keeps track of the number of visitors preceding you when you download a case, so I can only guess how many times one of these mammoth opinions is read. But if it's anywhere near the number of hits displayed by even one of those obscure little Web sites, the opinion whose pages number in the three-figures could cost, collectively, six figures to read.

In my view, unabridged judicial opinions are not worth the money. Although decisions are reported to give guidance, getting lost is the more likely result of wading through one of these mothers. It is also a little unrealistic, as my office neighbor points out, to expect a trial judge with an exploding court docket to find the time to read and be guided by an opinion 10 to 15 times the length of your average Chinese menu.

Sure, some cases are complicated and require more discussion than do others, but many of these decisions, to be perfectly candid, are unnecessarily long, painfully repetitive, and unduly bogged down with legal minutiae that contribute only marginally to the development of the law.

If anyone at this point is wondering why I did not listen to my wife, you are not alone.

I have written scores of briefs and edited many times more, but I have never written a judicial opinion, and so it may seem somewhat presumptuous for me to be critical of those who have. But this is still the United States of America, and, besides, it's my column (although perhaps not for much longer), so I'd like to address the judges personally and give them the following piece of advice: When you sit down to write your next decision, it may not be a bad thing to at least consider the minimalist philosophy that my son applies both to his writing and in answering questions concerning how his day went.

Sam's response to such queries — "good" — is succinct, pointed, and, when not contradicted by his teachers, accurate. A judicial opinion should strive to be all of these.

Of course, a judicial opinion should be a little bit more informative than my child's description of his day. The balance lies somewhere in between its judicial equivalent — the generic one-line order granting a party's summary judgment motion — and its polar opposite, i.e., the decision that begins with a description of the Magna Carta. Just keep the masses in mind when striking that balance.