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ESSAYS

ATTRACTING UNDUE SCRUTINY ON APPEAL: AN APPELLATE JUDGE'S PERSPECTIVE

Marshall L. Davidson, III*

Trial judges have difficult jobs. They must often make on-the-spot decisions, such as ruling on an objection at trial, with little or no time for reflection. They must grapple with zealous lawyers while navigating a fine line between ensuring due process and fairness to self-represented litigants and maintaining neutrality and fairness to the opposing side. As first-line decision makers, they must sometimes resolve difficult issues in a legal vacuum, as with an issue of first impression. Little about the trial judge's role in the administration of justice is easy.

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And, of course, nearly every decision a trial judge makes is subject to challenge on appeal by any party who believes the decision is wrong. After twenty-five years of reviewing thousands of trial and intermediate appellate court decisions for error in all types of cases, it is apparent to me there are some common ways trial judges attract greater scrutiny on appeal than they otherwise might. This essay addresses some of the more common ones.

A. USING HUMOR IMPROPERLY

“Humor in the judicial system is not funny.”¹ After attending national conferences at which judicial writing is featured as a prominent topic, I am always struck by the division among judges, both state and federal, over whether humor has an appropriate place in a court’s written decision. Some judges believe, and strenuously assert, that judicial writing is unnecessarily dull, uninspiring, and unimaginative. Consequently, some judges see nothing wrong with injecting a bit of levity into an otherwise cold, impersonal, and technical way of conducting business. For example, in a case involving the issue of whether the defendant, a married man, should be placed on probation for attempting to convince a minor to check into a hotel with him, the court observed:

This defendant has in the eyes of the law done wrong, but not enough in this instance to be jailed, and the least the trial judge can do is to relieve him of his temporary sentence, and remember that he is forever and eternally on probation to his wife, who will be his wife, his warden and parole officer all wrapped up in one. What a sad fate for any poor mortal to face.²

While it is difficult to know what, if any, reaction the defendant, his wife, the prosecutor, or anyone else associated with this case had upon reading the court’s decision, it is not far-fetched to imagine that such commentary in the opinion may have been viewed as offensive or even hurtful. Perhaps worse, it

1. Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, 271 (2008).

2. *State v. Silva*, 477 S.W.2d 517, 521 (Tenn. 1972).

may have been viewed as diminishing the seriousness of the crime of which the defendant was convicted.

But some judges are skilled enough to inject humor in such a way to avoid giving offense. For instance, in a case about fertilizer and tax deductions, a federal court of appeals wrote that

“[t]o every thing there is a season, and a time to every purpose under the heaven: A time to be born, and a time to die; a time to plant, and a time to pluck up that which is planted; a time to purchase fertilizer, and a time to take a deduction for that which is purchased.”³

In another case involving the tort principle of attractive nuisance, the court declared that

[w]hile we acknowledge the picturesque beauty of the rolling hills and majestic mountains of Tennessee and agree that they are attractive, the fortunate fact that God has strewn His splendor with such a lavish hand and blessed our state with great beauty, and has made it a veritable playground, hardly affords a reason to classify any normal topographical feature as an attractive nuisance.⁴

It is difficult to imagine a reasonable reader taking offense at either of these cleverly written observations.

There is, of course, a self-evident danger in attempting to weave humor into judicial writing—the parties, and perhaps a reviewing court, may feel that the judge did not take the case seriously. Consequently, some legal scholars counsel against using humor in judicial writing, given that “[t]he litigant has vital interests at stake . . . and the robed buffoon who makes merry at his expense should be choked with his own wig.”⁵ Other commentators assert that “[I]itigants consciously place the court in a position of power to resolve controversies; they expect to be treated fairly and with dignity,” and then point out that “[h]umor can defy both expectations.”⁶

My own view is that attempts at being cute or humorous in a written decision should be avoided for fear of being perceived

3. *Schenk v. Comm’r*, 686 F.2d 315, 316 (5th Cir. 1982).

4. *McIntyre v. McIntyre*, 558 S.W.2d 836, 837 (Tenn. 1977).

5. WILLIAM L. PROSSER, *THE JUDICIAL HUMORIST: A COLLECTION OF JUDICIAL OPINIONS AND OTHER FRIVOLITIES* vii (1952).

6. Lebovits, Curtin & Solomon, *supra* note 1, at 272.

as flippant, uncaring, or unprofessional by the parties, other courts (in particular, an appellate court charged with reviewing the decision), or the public in general. As stated by the Kansas Supreme Court, “[j]udges simply should not ‘wisecrack’ at the expense of anyone connected with a judicial proceeding,” for “[w]hen judges do this . . . respect for the administration of justice suffers.”⁷ The risk of giving the parties the impression that the judge is making light of their situation is just not worth it.

B. DISCOUNTING THE LAW

Public confidence in the performance and impartiality of the courts is maintained only when judges rigorously follow the law. The basic idea, of course, is that judges should interpret statutes and other laws as they find them and apply those laws faithfully according to their plain meaning. The discretion to establish public policy is generally committed to legislative bodies, not to the courts. Thus, to avoid reading their own beliefs and values into the law, judges are expected to apply the law as written. Put another way, it is not the province of the judge to second-guess the wisdom of legislation and decide cases based on what the judge believes the law should be.⁸ No reasonable jurist would seriously contend otherwise.

Similarly, most judges would readily agree that decisional inconsistency and unpredictability represent the antithesis of an efficient and effective system of resolving disputes. Yet, court decisions that fail to faithfully follow the law can create just the sort of inconsistency and unpredictability that can undermine the

7. *In re Rome*, 542 P.2d 676, 685 (Kan. 1975).

8. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194–95 (1978) (“Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.”). On the other hand, a statute’s meaning can sometimes be less clear than the judge would hope, *see, e.g.*, Steven Wisotsky, *How to Interpret Statutes—Or Not: Plain Meaning and Other Phantoms*, 10 J. APP. PRAC. & PROCESS 321, 324 (2009) (asserting that “superficially clear statutory language may upon concentrated analysis prove ambiguous” and that “there is no plain meaning without context”), but judges are nonetheless charged with determining plain meaning and then applying the law.

efficiency and effectiveness of our judicial system. The result is diminished public confidence in the integrity of the courts.

Accordingly, few things attract the attention of a reviewing court more quickly than a lower court's failure to correctly identify and apply settled legal principles. Reviewing courts will not fully trust the work of a court with a demonstrated pattern of failing to follow the law. Or to put it differently, trial judges undermine their credibility with appellate courts by repeatedly misstating the law—albeit inadvertently—or by not adhering to relevant legal standards. Once a judicial reputation is diminished in this regard, it is not easily rehabilitated.

C. MISSTATING KEY FACTS

Trial courts are, of course, primarily fact-finding courts.⁹ Thus, it is no small matter when a trial court misapprehends or misconstrues crucial facts. Appellate judges can readily identify trial courts in their jurisdictions that are careful when making factual determinations and those that are not. Naturally, decisions by judges in the latter category tend to be reviewed, consciously or unconsciously, more closely on appeal.

Cases are not decided in a factual vacuum and, generally speaking, the law has little meaning outside the factual context in which it has been applied. Accordingly, the difficulty attendant to a judge's misapprehension of even one key fact is that it can skew the resulting legal analysis. Indeed, such a mistake can be outcome determinative. Thus, to state the obvious, factual assertions in a court's decision must be completely accurate. Courts, both trial and appellate, take a dim view of lawyers who incorrectly present the facts, cite cases that have little to do with the proposition for which they are cited, take testimony out of context, or exaggerate the proof. The same applies to judges.

In short, carelessness with the facts will attract the attention of a higher court. A judge's credibility and reputation are hard-

9. *See, e.g.*, *DeMarco v. United States*, 415 U.S. 449, 450 (1974) (acknowledging that when a "factual issue was dispositive of the case . . . , it would have been better practice not to resolve it in the Court of Appeals based only on the materials then before the court" and that "[t]he issue should have been remanded for initial disposition in the District Court after an evidentiary hearing").

earned assets, and misstating the essential facts of the case or the law, even if unintentional, undermines both. To avoid this pitfall, judges, regardless of court, must be meticulously accurate in describing the factual record. As one trial judge observed when considering the lapses in professional conduct of an attorney appearing before him, a reputation “for intellectual and ethical integrity” is either the “greatest asset” or “worst enemy” of anyone working in the law, so the judge recommended “treat[ing] . . . every daily task as if your career will be judged on it.”¹⁰ That standard rings as true for the members of the trial and appellate benches as for the members of the bar.

D. STRAYING BEYOND THE RECORD

From the perspective of an appellate court, evaluating a trial court’s decision necessarily entails taking into account information the trial court had before it at the time the issues were decided, as opposed to the potentially open-ended universe of information that parties may seek to present on appeal. The same principle applies to the work of a trial judge. That is, trial judges should base their decisions on evidence adduced by the parties, as opposed to formulating a decision based, in whole or in part, on information that they obtain independently. As noted by one court,

appellate courts are put in an awkward position . . . [when] evidence obtained through private inquiry or observation, as well as its probative value, is not shown in the record, making an evaluation of the information on appeal difficult, if not impossible.¹¹

Moreover, aside from practical problems associated with appellate review, trial judges unnecessarily create problems for the parties when they consider extrajudicial observations or the perspectives of outside individuals. For example, by observing a party outside of the proceeding and then considering those observations in the decisionmaking process, the judge essentially becomes a source of evidence. Although judges can

10. *In re Moncier*, 550 F. Supp. 2d 768, 774 (E.D. Tenn. 2008) (citation omitted).

11. *Vaughn v. Shelby Williams of Tenn., Inc.*, 813 S.W.2d 132, 134 (Tenn. 1991).

generally take judicial notice of the law and certain types of facts, a judge presiding over a trial cannot serve as a witness—and for good reason. The most “obvious one is that the system of justice does not appear to be impartial if the judge charged with the duty of adjudicating the litigation also acts as a source of evidence.”¹²

To be sure, straying beyond the record will attract attention on appeal.

E. USING TONE IMPROPERLY

Just as the tone of the judge’s voice creates an impression with the listener, so the tone of the judge’s writing creates an impression with the reader. Tone is an important element of judicial writing, and a variety of tones are possible in a written decision, such as casual, matter-of-fact, angry, annoyed, authoritative, impersonal, argumentative, and lecturing. Judicial writing is, of course, formal writing, and the tone of the decision should reflect the serious responsibility the judge has assumed as the adjudicator. Generally, the shorter the sentence the more formal the tone, as shorter sentences have a more blunt, business-like effect. Longer sentences tend to convey a less formal tone.

Along these same lines, condescending, sarcastic, insulting, or angry words should be avoided in orders and opinions. Temper tantrums on paper come across as unprofessional and petty. It is one thing to reject a party’s argument as “unpersuasive” or “lacking merit,” but another to characterize a party’s position as “utterly unconvincing, if not absurd.” Words can and do sting. And if they are written words, they can endure for the ages and be seen by untold numbers of people, without regard to jurisdiction or geography.

The same cautionary note applies to a judge’s oral comments. The United States Supreme Court has observed that

judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that

12. *Id.*

derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.¹³

Generally, a measured tone is easier to achieve, both orally and in writing, when the judge remains focused on the facts and the law rather than the judge's feelings about the parties or their conduct, a task sometimes made difficult by the egregious nature of certain types of conduct.

Similarly, nothing good comes from taking cheap shots at the parties or their lawyers, as these reflect poorly on the writer and demean the courts. For example, a federal district court judge wrote about

two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever . . . , an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact—complete with hats, handshakes and cryptic words—to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed.¹⁴

The judge further observed that one of the lawyers “has been writing crisply in ink since the second grade,” and suggested that the “lovable” attorney on the other side “upgrade to a nice shiny No. 2 pencil or at least sharpen what’s left of the stubs of his crayons for what remains of this heart-stopping, spine-tingling action.”¹⁵ However, the latter attorney was cautioned by the judge “not to run with a sharpened writing utensil in hand.”¹⁶ While the judge in this case may have had ample reason to be unimpressed with counsels’ efforts, an alternative approach to the problem would, I believe, have reflected more favorably on the individual judge and the judicial system as a whole.

A simple way of avoiding the perception of bias or disparagement is to use objective language whenever possible. For example, do not write “Mr. Smith is a deadbeat dad because

13. *Liteky v. United States*, 510 U.S. 540, 555 (1994) (emphasis in original).

14. *Bradshaw v. Unity Marine Corp.*, 147 F. Supp. 2d 668, 670 (S.D. Tex. 2001).

15. *Id.* at 672.

16. *Id.* at 672 n.4.

he has not paid child support in five years.” Instead, write “Mr. Smith has not paid child support in five years.” Do not write “Ms. Jones is a terrible driver because she has had three accidents in three years.” Instead, write “Ms. Jones has been in three accidents in the past three years.” If the objective statement is true, the same message will be conveyed without resorting to what might be viewed as inflammatory language. Admittedly, this type of restraint is not always easy to muster, but judges are expected to act with restraint nonetheless.

F. LOSING JUDICIAL BEARING OR Demeanor

Judges are human and, like anyone else, can be prone to impatience, annoyance, dissatisfaction, and anger. But unlike other people, judges are legally and ethically required to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”¹⁷ As stated by the Wisconsin Supreme Court,

[i]nvariably, members of the public will, from time to time, disagree with decisions of our courts, but that disagreement should never rest upon lack of confidence in the court’s integrity. Public confidence in the integrity of the judicial system is essential. It is our responsibility, and the responsibility of every judge, to merit and maintain that confidence.¹⁸

This too is often easier said than done.

Even the United States Supreme Court has recognized that some litigants are “thoroughly reprehensible” individuals toward whom the trial judge might understandably “be exceedingly ill disposed.”¹⁹ And, although the overwhelming majority of attorneys conduct themselves with civility and strive to adhere to the highest of ethical standards, some have difficulty maintaining the appropriate decorum, making it harder for the judge to remain dispassionate. One lawyer, for example, refused to stop talking after being warned by the judge that he would be jailed if he continued to speak. He refused to be silent, went to

17. *In re Bell*, 344 S.W.3d 304, 319 (Tenn. 2011) (citation omitted).

18. *In re Judicial Disciplinary Proceedings against Aulik*, 429 N.W.2d 759, 768 (Wis. 1988).

19. *Liteky*, 510 U.S. at 550–51.

jail, and saw his law license suspended.²⁰ Another lawyer sent an email to a judge telling the judge to “get down off your high horse and act like a man instead of a bully and clown.”²¹ Such behavior can try the patience of the most temperate of judges.

Judges do not expect to be treated like royalty, nor should they. However, they do expect to be treated with respect, and rightly so. But the reverse is true as well. When judges, either trial or appellate, treat parties or their lawyers with anything less than respect, it reflects poorly on both the individual judge and the judicial system as a whole.

G. USING EXTREME LANGUAGE

A less conspicuous way trial judges may draw attention on appeal is by frequently using extreme or exaggerated words, such as “obviously,” “clearly,” “always,” or “never.” I once reviewed a trial judge’s decision containing a lengthy description of the facts and, at the end of that discussion, the judge concluded that those facts “clearly and unmistakably” led to a particular result. The result, however, was anything but clear and unmistakable to me.

Perhaps there is a streak of contrariness in human nature that urges us to reject absolute assertions. Whether or not that is so, I have found that when a party or a judge writes that something is obvious or clear, the point is sometimes anything but obvious or clear. Indeed, such words often go hand in hand with weak or unreasonable arguments. While I am not suggesting that absolute language has no place in drafting a decision, I am suggesting that such words be used with care.

Absolute language naturally draws the reader’s attention, some of whom may be quick to question the accuracy of the

20. See *Moncier*, 550 F. Supp. 2d at 812–13 (suspending license); U.S. v. *Moncier*, 571 F.3d 593, 598 (11th Cir. 2009) (“The Court: ‘Mr. Moncier, one more word and you’re going to jail.’ Moncier: ‘May I speak to my—’ The Court: ‘Officers, take him into custody. We’ll be in recess.’”); see also *Moncier v. Bd. of Prof’l Responsibility*, 406 S.W.3d 139 (Tenn. 2013) (denying petition for relief from payment of costs imposed by disciplinary order).

21. *Hancock v. Bd. of Prof’l Responsibility of Sup. Ct. of Tenn.*, 447 S.W.3d 844, 848, 858 (Tenn. 2014) (reprinting screen shot of email message from lawyer to judge and affirming thirty-day suspension from practice).

assertion. How often can it realistically be said that something is always true or never the case?

H. LETTING DOWN YOUR GUARD WHILE ON THE RECORD

For most trial judges, being recorded either by a court reporter or by some other means is a routine matter. And therein lies the problem—forgetting there is a recorder, whether human or electronic, in the room.

While working as a staff attorney for the Tennessee Supreme Court, I once reviewed a trial transcript in a hotly contested appeal. Although subtleties like tone and mood can be difficult to gauge from a cold record, it was apparent in this instance that the trial judge was losing patience with an aggressive lawyer and vice versa. At one point, after the lawyer made an impertinent comment following the judge's overruling one of his many objections, the exasperated trial judge said, "I've ruled on your objection and, if you think I'm wrong, appeal to the Supreme Court and let those sons-of-b***** in Nashville tell me I'm wrong."²² The lawyer happily obliged.

Failing to exercise appropriate discretion while on the record will not go unnoticed on appeal, even if the appellate court does not mention the lapse in its opinion.

I. FAILING TO DECIDE A POTENTIALLY DISPOSITIVE ISSUE

Most judges prefer reaching the merits of a case to disposing of the dispute on a technicality or procedural point. The parties have, after all, turned to the legal system for help in resolving a problem that they cannot resolve themselves, and a decision short of the merits frustrates those expectations. Thus, so-called threshold issues may be viewed by some as obstacles to avoid. Indeed, in some jurisdictions, the law itself stresses the resolution of cases on the merits.²³

22. Because I no longer have ready access to the transcript, I am relying on my memory of the exchange. This may not be an exact rendering of the judge's statement, but it is close and conveys essentially what was in the transcript.

23. *See, e.g.,* *Henley v. Cobb*, 916 S.W.2d 915, 916 (Tenn.1996) (noting that "[i]t is well settled that Tennessee law strongly favors the resolution of all disputes on their merits" (citations omitted)).

However, many threshold issues, such as personal jurisdiction, subject-matter jurisdiction, notice, or the timeliness of a claim or defense, can be dispositive of the case. Thus, as well-intentioned as the trial judge may be in reaching the merits, the failure to address such threshold issues can make quick work of the matter on appeal. Indeed, appeals of this type can all but invite a remand.

J. MAKING THE SIMPLE DIFFICULT

Making the simple difficult is poor judging. The parties are already in a quandary regarding their dispute, and having the courts unnecessarily add another layer of difficulty serves to further frustrate and confuse matters.

Conversely, making the difficult simple is excellent judging. This can be no small task given the complexity of some areas of the law. The principles discussed above, such as avoiding flippancy or exaggerations and placing a premium on precision, brevity, and clarity, can help. So can maintaining a demeanor commensurate with the gravity of the proceeding and never losing one's temper. Here are some additional guidelines to consider:

- Dispatch weak or unreasonable arguments quickly and definitively. As one court has observed, “[i]t is not the role of the courts . . . to construct a litigant’s case.”²⁴ If a party’s evidence is—or arguments are—too weak to carry the day, unambiguously make that point.
- If the parties have filed a statement of the evidence in lieu of a transcript, make certain that it is both accurate and complete because the appellate judges will use it as the factual lens through which the decision below is evaluated.

24. *Sneed v. Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn.*, 301 S.W.3d 603, 615 (Tenn. 2010).

- Although of course it is not a brief, a trial court's written decision is meant to be persuasive, and the art of persuasion favors quality, not quantity. The longer the decision, the more unfocused and diluted it may become, and the less certain the case may seem to the appellate judges.
- There are two ways lawyers destroy their credibility in their briefs. The first is to cite a case for a proposition of law for which it does not stand. The second is to make a factual assertion unsupported by the record. The same goes for judges in their decisions.
- Fully develop the basis for the decision, leaving no gaps in the analysis for the appellate judges to fall through. Just as lawyers are expected to blend the law with the facts in their briefs, judges should do the same in their decisions. Being too conclusory is a common problem, placing the appellate judges in the difficult position of having to infer the rationale for the decision.
- Unlike oral arguments that can jump around from topic to topic in disjointed fashion, the trial court's written decision should lay out a comprehensive analysis of the issues so that the appellate judges can follow your thinking, especially in factually or legally complex or novel cases.
- Be sure the decision is anchored in the law or the appellate judges may send it back to you. Ask yourself whether your decision leaves any issues unresolved and explain why if so. Otherwise, the appellate judges may think you overlooked them and remand the case.
- Do not ignore adverse authority. Confront it. If the authority is not distinguishable and is otherwise

binding, follow it. If you don't, the case may come back to you.

- Be cautious when copying and pasting from prior decisions, making sure to update the research to reflect any new developments. Imagine learning from a higher court that a key case you relied upon was overruled before your decision was released.
- Make sure that your decision has a logical flow. If sentences and paragraphs are inserted where they interrupt a line of thought, or where they have no connection to what precedes or follows, coherence is lost. When this happens, the appellate judges may have trouble following your analysis. Transitional words at the beginnings of paragraphs help appellate judges string your thoughts together and frame their own analysis of the case.
- Use headings and subheadings to identify where treatment of one subject ends and another begins. Use long sentences and long paragraphs sparingly, as too much information may bog readers down and make it harder for them to follow your analysis.
- Edit carefully. Proofread, revise, and use great care in editing, checking citations, verifying quotations, and polishing your wording for maximum effectiveness. Readers may equate sloppy editing with sloppy research and analysis.

K. OVERREACTING TO REVERSALS, MODIFICATIONS, OR REMANDS

Do not take a reversal, a modification, or a remand personally. I have never met a judge or justice who served on the bench for any appreciable length of time who had never been

reversed.²⁵ Nearly every judge has a higher court looking over his or her shoulder, so a reversal should be expected from time to time.²⁶ Occasional disagreement is simply the nature of a tiered system of legal decisionmaking. Indeed, if appellate courts never reversed lower courts, something would be amiss.

Thick judicial skin comes with time on the bench. But new to the bench or not, trial judges would be well-advised to take the information before them, make the best decision possible, and then forget about it. If an appeal follows and the appellate court reverses or modifies the decision, taking it personally can become an unnecessary source of frustration and second-guessing. Be careful not to repeat the same mistake, but move on. A pattern of reversals is, of course, a different matter altogether—one beyond the scope of this essay.



25. The Fourth Circuit even reversed the decision in a case in which then-Associate Justice Rehnquist sat as the trial judge. *Heislup v. Town of Colonial Beach*, 813 F.2d 401 (4th Cir. 1986) (per curiam) (tbl.), cert. denied, 482 U.S. 909 (1987). Readers interested in learning a little more about Justice Rehnquist's appearance on the federal trial bench can consult David G. Leitch, *An Unwavering Man and Judge*, 10 TEX. J. L. & POLITICS 293, 293–94 (2005).

26. Cf. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (“[R]eversal by a higher court is not proof that justice is thereby better done. . . . We are not final because we are infallible, but we are infallible only because we are final.”).