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# Another Judge's Views on Writing Judicial Opinions

*Beverly B. Martin\**

The privilege of being a federal circuit judge allows, and indeed obliges, a judge to bring scrutiny and truth to the disputes she considers. Certainly, a judge's determination of what is truth is most clearly and effectively communicated by the judge's own telling of how she arrived at that truth. So Judge Posner's advocacy for judges writing their own opinions makes good sense.<sup>1</sup> Indeed, it is hard to imagine any judge taking the other side of that argument. I certainly will not do that here. But if I am obliged to tell the truth, I must confess that I do not write all of my opinions, not even a majority of them. I will write this, however, because opinion writing is an important part of the administration of justice by the courts. And I hope to add to the conversation by describing the work of the U.S. circuit court of which I became a part in 2010, and how this court has come to manage the enormous workload that has been entrusted to it. Doing so, I hope, will help put this subject in a meaningful, broader context.

## I. JUDGE'S ROLE IN ADMINISTERING AND COMMUNICATING JUSTICE

I came to my job as a circuit judge after having served as a U.S. district judge, and before that, a U.S. prosecutor. Judge Posner says this background is typical of a formalist judge.<sup>2</sup> He describes a formalist judge as one who most often comes to the court in middle age, and frequently from a hierarchical environment in which he relies upon junior members of his staff to draft briefs and other legal documents.<sup>3</sup> More generally, Judge Posner describes a formalist judge as being one who, among other things, is comfortable with legal jargon; knowledgeable about legal doctrines; has firm expectations about the style and tone of briefs; and expects the utmost deference from litigants.<sup>4</sup> The formalist judge's written

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\* Judge, United States Court of Appeals for the Eleventh Circuit.

1. See Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts - One Judge's Views*, 51 DUQ. L. REV. 3 (2013).

2. *Id.* at 5.

3. *Id.*

4. *Id.* at 5-6.

work invokes higher-level rules or principles rather than decision-making based on his "own notions of a sensible resolution of the case" that would not produce a "right answer" according to authoritative legal texts.<sup>5</sup>

Judge Posner contrasts with this formalist judge the realist judge, who cares more about judicial decisions "making sense" to lay people.<sup>6</sup> With this being the case, a realist judge is more likely to reject legal jargon in hopes of producing opinions that can be understood by nonlawyers.<sup>7</sup> Judge Posner further describes a realist judge as one who wants to understand the likely consequences of a decision; is acutely conscious of the weaknesses of the American judicial system; and wants to do what he can to improve it.<sup>8</sup> My experience tells me that the job of presiding in a trial court, with the direct and extensive contact with parties that accompany that job, may turn a formalist judge into a realist.

There are certainly cases filed in federal court with a lot at stake, and then there are those with not so much. But I have never been a part of a trial that was not of primary importance to at least one party to the dispute, and quite often, it is to both. That being the case, when the judge speaks in the courtroom as a representative of the courts and our government, what she says carries weight with the other people in the courtroom and impacts their sense of whether the proceeding was just. People who must bring their problems into our court system want to know that their part of the story has been heard and that an understanding of their story has been taken into account in the resolution of their case.

The opportunity for parties to see and hear the progress of their case comes with more ease in the trial court. At some point in more cases than not, the parties and the judge are together in the courtroom, and in the ritualized way permitted by our rules of evidence, they talk to one another. If the judge has questions about the facts or about the theory of someone's case, all she has to do is ask. As a lawyer appearing in court, I always appreciated having a judge share his or her impressions or leanings in a case with those gathered in the courtroom. This gives the parties a way to understand what has happened to them and why. Parties must

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5. *Id.* at 7.

6. *Id.* at 9, 11.

7. *Id.* at 9.

8. *Id.*

live the rest of their lives with what happens to them in court, and in an ideal world, they would be given a basis for understanding why their case came to be resolved as it was. From the trial judge's point of view, a physical proximity to the parties makes plain the parties' desire to be heard and understood, so those judges naturally want to give the parties some satisfaction about these things.

Years spent on a trial bench lead to less self-conscious exchanges between the judge and the parties appearing in her courtroom. Judge Posner identifies pragmatism as being a characteristic of the realist judge,<sup>9</sup> and surely this is a product of time spent in face-to-face contact with litigants in a courtroom. Legal jargon falls away. Judge Posner also describes a realist judge as one who does not have a "judicial philosophy" that generates the outcome of a given case.<sup>10</sup> This would seem to be the inevitable result of a judge who has experienced communicating a ruling for which she formalistically arrived at the outcome, together with an explanation justifying how she got there, only to be greeted by the knowing looks of the courtroom participants who realize none of it makes good sense.

Appeals court judges do not have the opportunity to communicate with parties to a dispute in such a direct same way. At least in my experience, appeals judges rarely ever see the parties. Even when parties do appear in court, the ability of an appeals judge to speak to them about how and why the court arrives at a decision is constrained during oral argument, because a panel opinion is the product of three judges who have not likely conferred about the case before the oral argument. To the extent that oral argument does serve as an aid to parties to understand why a court has come to a decision, it is not available to all parties because courts do not hear oral argument in all cases. While Judge Posner tells us that his court, the U.S. Court of Appeals for the Seventh Circuit, has the admirable rule of allowing arguments in any case in which both sides have counsel,<sup>11</sup> this is not a consistent practice for all courts of appeals. Indeed, the court of which I am a member holds an oral argument in only about fifteen percent of its cases.<sup>12</sup> So for the remaining eighty-five percent of our cases, the only

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9. *Id.*

10. *Id.*

11. *Id.* at 8.

12. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS 36 (2012) [hereinafter JUDICIAL BUSINESS OF THE U.S. COURTS].

communication we have with the parties is in writing. This would seem to underscore the need for authentic written communication with the parties—the more directly from the judge the better. But there is so much writing to do.

## II. WORKLOAD OF THE FEDERAL APPEALS COURT FOR THE ELEVENTH CIRCUIT

The Administrative Office of the U.S. Courts catalogs information about the number of cases handled by all federal courts. The most recent (although, as of yet, unpublished) numbers available to me at the time of my writing this article are for the twelve months ending on June 30, 2012. Those numbers show that during those twelve months, for the U.S. Court of Appeals for the Eleventh Circuit, where I sit as an active judge, each active judge was responsible for participating in 723 merits determinations.<sup>13</sup> Even assuming a seven-day workweek, and a 365-day annual work schedule, this means that I am responsible for writing or reviewing about two orders or opinions deciding a case on its merits every day. Although this number does take into account the orders and opinions written by my fellow panel members, it is important to me that those orders and opinions bear my name as a member of the panel. The three-judge panel system was designed to have the benefit of the thoughtful input and review by each panel member.

But this number does not account for all of the work that each active judge performs. Some cases are terminated on procedural grounds, such as the lack of appellate jurisdiction. And in the year ending on June 30, 2012, each active judge of the Eleventh Circuit was responsible for writing or reviewing orders terminating 249 of these cases.<sup>14</sup> Also not fully counted in this number of about two merits orders or opinions per day are the thousands of motions the members of this court consider. In the twelve months ending on June 30, 2012, approximately 5,300 miscellaneous motions were submitted to the active judges of this court, some rou-

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13. E-mail from Edward L. Scholl, Statistical Analyst, U.S. Court of Appeals for the Eleventh Circuit, to author (Sept. 6, 2012, 16:00 EST) (on file with author). Demonstrating how different these things can be from circuit to circuit, the U.S. Court of Appeals for the Seventh Circuit, during that same period, had 351 merits terminations per active judge. *Id.* I do not provide the Seventh Circuit numbers to imply that I could do what Judge Posner does. I surely could not.

14. *Id.* Again for context, each active judge on the Seventh Circuit participated in 81 procedural terminations. *Id.*

tine—some not.<sup>15</sup> And even this number does not include the 759 applications for a Certificate of Appealability required in habeas cases.<sup>16</sup> A Certificate of Appealability is required for prisoners seeking to appeal the denial of post-conviction relief.<sup>17</sup> It is certainly true that most of these applications are denied, but I am reminded every time I look at one that it is most often filed by someone who has been deprived of his liberty for a very long time. Our standard format for ruling on these cases begins with a recitation of the length of the sentence being served by the filer. It is not unusual at all for these orders to begin with a reference to the life sentence being served by the person seeking to have attention called to his case. I say hardly any of this is easy. It takes time and deserves our attention.

Neither does the estimate of roughly two merits opinions per day include the motions for rehearing that require our attention. During the twelve months ending on June 30, 2012, this court received a total of 863 petitions seeking a rehearing of the cases we decided.<sup>18</sup> These motions are also important because, if I have made a mistake in a case I decided, this may be the only way I can know about it. And when I learn that I have made a mistake in a case, I must take the time to work backward, go back to the other members of my panel, and try to get the mistake corrected. All of this is essential, because the only court superior to mine in the federal system is the Supreme Court of the United States, which takes roughly 85 cases per year,<sup>19</sup> and is not an error-correcting court.<sup>20</sup> We are responsible for correcting our own mistakes.

Perhaps these numbers describing our work load make it plain why some judges do not write all the rulings that are issued under their names.

Judge Posner is widely lauded as a prolific writer and thinker. His sustained ability to produce a large volume of high quality work that contributes to the development of the law is a source of wonder to many judges. And that he writes at least the first draft

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15. E-mail from Edward Scholl, Statistical Analyst, U.S. Court of Appeals for the Eleventh Circuit, to author (Sept. 6, 2012 15:57 EST) (on file with author).

16. *Id.*

17. 28 U.S.C. § 2253(b)-(c) (2006).

18. E-mail from Edward Scholl, Statistical Analyst, U.S. Court of Appeals for the Eleventh Circuit, to author (Sept. 7, 2012 08:46 EST) (on file with author).

19. See JUDICIAL BUSINESS OF THE U.S. COURTS, *supra* note 12, at 58.

20. EUGENE GRESSMAN, KENNETH S. GELLER, STEPHEN M. SHAPIRO, TIMOTHY S. BISHOP & EDWARD A. HARTNETT, SUPREME COURT PRACTICE § 5.12(c)(3) (9th ed. 2007) (“Error correction . . . is outside the mainstream of the Court’s functions.”).

of all of this compounds the awe other judges feel for the quantity and quality of his work product. His article gives some insight into how Judge Posner produces such a large volume of work so quickly. In advocating for new appellate judges to write their own opinions, Judge Posner responds to Justice Ginsburg, who is reported as saying that she would prefer to “write all my opinions myself, but there is just not enough time to do that.”<sup>21</sup> Judge Posner supposes that it would take Justice Ginsburg four hours to write the first draft of an opinion, on average.<sup>22</sup> While Judge Posner could no doubt meet this time limit, I cannot imagine writing a draft of a United States Supreme Court opinion in a mere four hours.

One of a number of impediments to my producing a four-hour opinion is the record in these cases. I simply do not know how to begin to craft an opinion before I feel sure that I understand what happened in the case, who was involved, and precisely what is the dispute we are being asked to resolve. The records in many of our cases are quite large. For example, cases that come to the appeals court after a trial regularly arrive with boxes containing the pleadings, the deposition transcripts, other discovery that preceded the trial, the transcript of the trial, and the evidence admitted during the trial. Perhaps the most extreme examples of the voluminous records we get are the cases our court considers in which a criminal defendant is facing a sentence of death. As of August 16, 2012, the ten active judges of the Eleventh Circuit have sixty death cases pending, with each of these cases assigned to three judges.<sup>23</sup> The records in many of these cases are large enough to fill a truck. The cases are often decades old, with lengthy and aging trial records, routinely combined with equally lengthy state habeas transcripts and records. Increasingly, appeals courts are receiving electronic versions of the record. But while this may reduce the amount of space a particular record requires, it does not reduce the number of pages to be read.

Consistent with the model of the realist judge, the fear of writing an opinion that will be read by parties who will recognize even the smallest misstatement of a fact, slows things down considerably. I say this is the way it should be. You can imagine that the worry about understanding the record is only heightened when

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21. Posner, *supra* note 1, at 27.

22. *Id.*

23. Scholl, *supra* note 18.

the stakes are so high as in a death case. In an attempt to make the best use of my time, I am rarely the first to wade through the records in these cases, and when I do, I take generous direction from my law clerks about what is most important for me to read. Also, I rely on my law clerks to check and recheck the record once I rely upon a fact from the record in reaching a decision in a case.

For these reasons as well as what surely must be my own lack of raw talent, I cannot imagine drafting opinions in the mere four-hour time period suggested by Judge Posner. But even if I were to assume that I could meet this four-hour rule, there still seems little possibility for writing the first draft of everything that goes out from this court under my name.

The enormous workload I have described requires judges to develop methods for addressing cases in ways other than personally writing every opinion and order that goes out under her name. These methods no doubt vary from judge to judge, but all judges must make quick assessments about which cases need and deserve more personal attention than others. I try to prioritize my work so that I spend more time on the more difficult cases, like those, for example, with close questions of law; those that present pressing issues of the day; or those that need attention because an injustice has been done. Again, however, the assessment about the relative importance of cases must be made very quickly, and without an in-depth review of the record. This rapid assessment surely means I make mistakes. Indeed, I am aware of mistakes I have made in evaluating how much attention one case deserves relative to others, and I shudder to think of the mistakes I never learn that I made.

For the cases that I identify as most needing my attention, I do write the first draft. Also, in those cases for which I alone write a separate opinion, I almost always write the first draft. This helps me clearly delineate my differences with my colleagues, and make a careful decision about whether the facts of a given case together with the law governing that case justify writing a separate opinion.

For the next tier of cases—cases which do not immediately strike me as requiring my own prose—I rely on my law clerks for writing a first draft. In these cases, I also rely upon these remarkable young lawyers to teach me what I need to know about the record for the case and the law governing the case so that I can say what needs to be said in the opinion in a way that makes sense to me. I do this in hopes that this process will also produce



an opinion that makes sense to the parties, and gives clear guidance to district judges who are addressing these issues on the front line.

I receive the draft from my law clerk with the assumption that it accurately reflects the record in the case, as well as the governing law. I suspect my law clerks would tell you that I expect perfection from them on these things. Once I get the draft, I sit with my clerk who wrote it, go through the draft, and ask questions. If my discussion of the draft alerts me that there is something about the case I do not understand, my clerk sits with me and teaches me until I do. This regularly requires several meetings, with intermissions for me to read and reread relevant case law as well as parts of the record. As a part of this process, I often press my clerk about whether we could say something in another way that makes the topic more understandable to me. In truth, I am nothing more than a lay person trying to understand a complex or technical subject, with the law clerk who has mastered the facts of the case and the relevant legal precedent serving as my teacher. As Judge Posner points out, these young lawyers who serve as our law clerks come to the courts by way of a seemingly impossible competitive process based on their remarkable merits. I cannot claim to have gotten here by the same path. These young lawyers are, almost without exception, hardworking and brilliant, and they enrich my work, my abilities as a lawyer, and my life. Our country is lucky they are willing to serve our courts in this way.

Judge Posner describes law clerks arriving at our courts, fresh from law school, with an academically inspired tendency for formality in opinion writing.<sup>24</sup> I often observe this in new law clerks as well. However, during the process I have described, in which my law clerks are teaching me what they know about a case, I have also observed that they quickly come to adopt a style of communication more common to lay people. Again, these are enormously talented young people, who easily develop the instinct that the people who are involved in the case will be reading the opinion issued by the court and will want and need to understand it. Also, many law clerks arrive at the appeals courts having already clerked for district judges. For this reason as well, the law clerks understand and adapt to the need to elevate clear guidance to district judges over and above legal jargon when drafting these opinions. Thus, while I understand Judge Posner's concern that

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24. Posner, *supra* note 1, at 27-28.

allowing law clerks to write opinions “encourages a judge to adopt a formalist conception of the judicial role,”<sup>25</sup> my observation is that the conversion can work the other way as well.

Again in the interest of full disclosure, it would not be true to say that all of the drafts written by my law clerks engender the extent of my involvement and the extensive back and forth I have described. Sometimes I receive a draft from them with the correct result that seems easily understandable. Because of the limits on my time, I let these opinions go more quickly and with less discussion.

And sadly, there is yet another tier of cases to which I direct even less attention. Judge Posner mentions his court’s use of staff attorneys,<sup>26</sup> and my court has them as well. These young lawyers are responsible for initiating work on a variety of our cases. For example, they are charged with endeavoring to understand pro se pleadings and inform the judges about the merits of those cases. Another example of the work these young lawyers do is jurisdictional screening. They look to see whether litigants have timely filed their appeal, whether they are appealing what is a final order from the lower court, and whether the parties are properly in federal court to begin with. For these cases, I must rely upon the staff attorneys to review the record and explain it to me accurately. While this court is lucky to have fine and conscientious young people doing this work, this system is a source of some concern for me. I worry about not having enough contact with these young lawyers, as well as the large number of cases for which they are responsible.

I understand that my methods for attending to my work load cannot possibly give all of my litigants the sense that their case got the consideration and treatment they believe it deserved. It is true there are those who have not. I worry that this detracts from the institution of the courts. Almost anyone would agree that efficiency is an admirable trait for the courts, or any other governmental entity. But hardly anyone would rank efficiency as the characteristic they most wish for in the consideration of their own case.

Without a doubt, citizens would be happy to see the work ethic that I see exhibited by the judges of my court. Vacations are few and far between, and rarely am I unable to reach a colleague

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25. *Id.* at 28.

26. *Id.* at 16.

about a case, even if he or she is on vacation. Although we certainly have our disagreements over the substance of the cases we consider together, we all care about giving proper attention to our cases, and honoring the court system we are privileged to serve. Each of us, in our own way, has dedicated his or her life to this court. My own view is that more judges would help us do better work.<sup>27</sup> But the prospect that the population of this court will increase is far from certain. So in the meantime, it is my responsibility and my honor to attend to the work of this court within the confines of my own ability and stamina. That is what I will continue to try and do.

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27. The population of the three states in the Eleventh Circuit—Alabama, Florida, and Georgia—grew from roughly 19 million in 1980 to 33 million in 2010, more than twice as fast as the population of the United States as a whole during that same period. See U.S. CENSUS BUREAU, *Resident Population Data*, <http://2010.census.gov/2010census/data/apportionment-pop-text.php> (last visited Dec. 17, 2012). However, the number of judges on the Court of Appeals has remained the same. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *U.S. Courts of Appeals Additional Authorized Judgeships*, <http://www.uscourts.gov/JudgesAndJudgeships/Viewer.aspx?doc=/uscourts/JudgesJudgeships/docs/authAppealsJudgeships.pdf> (last visited Dec. 17, 2012).