

OP-ED CONTRIBUTOR

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## Judges Should Write Their Own Opinions

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THERE is a crisis in the federal appellate judiciary. No, I'm not referring to the high number of judicial vacancies or overloaded case dockets — though those are real problems. The crisis I have in mind rarely is discussed because it raises too many embarrassing questions. I'm talking about the longstanding and well-established practice of having law clerks ghostwrite judges' legal opinions. We have become too comfortable with the troubling idea that judging does not require that judges do their own work.

With so much news and controversy about what federal appellate judges say in their opinions, it would be natural for a layperson to assume that such opinions actually come from judges' own pens (or keyboards). But ever since the beginning of the law-clerk age, which dates back at least 70 years, most judges have been content to cast their vote in a case and then merely outline the shape of their argument — while leaving it to their clerks to do the hard work of shaping the language, researching the relevant precedents and so on. Almost all federal appellate judges today follow this procedure.

There are, of course, understandable reasons for this arrangement. For one thing, it's efficient: it helps judges manage the ever increasing flow of cases to be decided. It's also familiar: it resembles the modern law-firm model (known to many judges from earlier stages in their careers) in which associates draft documents and senior partners edit them. Furthermore, the law is not a literary pursuit but a system of rules, principles and arguments: in a legal opinion the fine points of language can seem less important than the underlying logic of the decision.

But in truth, much of importance is lost when judges outsource the writing of their opinions to their less experienced assistants. Judge-written opinions require greater intellectual rigor, exhibit more personal style and lend themselves to more honest and transparent conclusions.

An informal review of federal appellate court opinions over the past five years suggests that of the more than 150 active judges, only a tiny number almost always write their own opinions in full, among them Frank H. Easterbrook, Richard A. Posner and Diane P. Wood, of the United States Court of Appeals for the Seventh Circuit, and Michael Boudin, of the First Circuit. A few others evidently write a fair percentage of their opinions from start to finish. Another relatively small group adds stylistic flair like dramatic introductions or figurative language. The former appellate judge Abner J. Mikva has said that when he served on the District of Columbia Circuit, he reserved for himself the opening paragraph of his opinions.

It is no coincidence that Judge Posner, the most influential (and most widely cited) appellate judge of his generation, writes his own opinions. His judicial voice is marked with stylistic touches, to be sure, shunning (and even lampooning) legalese as well as disregarding the traditional five-part structure on which law clerks typically rely. But what most grabs the reader is the voice of a judge thoroughly engaged with a problem in the law and working through it with enthusiasm, almost joy. As Judge Posner himself has written, “I know that only a few of the readers of my opinions are not lawyers, but the exercise of trying to write judicial opinions in a way that makes them accessible to intelligent lay persons contributes to keeping the law in tune with human and social needs and understandings and avoiding the legal professional’s natural tendency to mandarin obscurity and preciosity.”

Unlike lawyers who are paid to argue for just one side in a case, judges are paid to pursue the truth. The bench is free from the limitations of advocacy; judges get to test arguments and follow a line of reasoning wherever it might take them. They get to explore the law. The opinion, properly done, reveals the judge sorting through the problem, thinking on the page. For similar reasons, judge-written opinions are also less vulnerable to a judge’s reflexive political and ideological leanings. The act of writing brings judges closer to the specific details and relevant issues of a case, forcing them to reckon with the case at hand in all its particulars, rather than seeing it as an instance of some more general theory or problem.

There is also the matter of intellectual integrity. Put simply, it cannot be accepted as legitimate that judges can put their names on opinions that they did not write. It’s not quite plagiarism, but it puts me in mind of the product known in the academic world as “managed books”: a professor will use research assistants to not only research a project but also write a first draft — but nonetheless the professor claims the work as his own. The managed books approach has been condemned as an affront to intellectual integrity. There is no principled reason the judicial counterpart should not be similarly condemned. I am reminded of Henry J. Friendly, the great judge of the Second Circuit, who explained that he wrote his own opinions because “they pay me to do that.”

Younger members of the judiciary need to take a hard look at themselves and ask how what they are doing stacks up against the known examples of judging at its highest level — not just Judge Posner and his contemporaries who write, but also gifted writers among judges of earlier eras like Learned Hand and Oliver Wendell Holmes Jr. The next generation will need to accept the opportunities and challenges of appellate judging and dare to do all the work that befits a judge.

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