"MEMORANDA; THEIR VALUE IN THE CASE AND OUT OF IT—PREPARATION OF CASE" (1893)

FOREWORD

By

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Several years ago, Professor Suzanne Ehrenberg published an article in the *Iowa Law Review* in which she described how English courts relied on oral argument to learn about the case at hand while American judges depended on written briefs—what she called "the writing-centered legal process." [1] For those who are interested in that twig (it would be an exaggeration to call it a branch) of legal history that concerns the development of court rules, appellate briefs, and other arcane aspects of litigation, Professor Ehrenberg's article is a gem. [2]

At the trial level, there are two types of memoranda: those that lawyers draft and submit to the court, and those that judges append to their orders explaining their reasons. Though Professor Ehrenberg is concerned primarily with appellate courts, several of her observations help us understand the exasperation that triggered the publication of a short note in the *Minnesota Law Journal* in July 1893. At that time, many trial judges signed orders unaccompanied by memoranda opinions. With no written explanation of the court's reasoning or even what issues had been ruled upon, litigants were sometimes baffled.

The author of the note suggests, almost apologetically, that the trial court

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[1] Suzanne Ehrenberg, "Embracing the Writing-Centered Legal Process," 89 *Iowa L. Rev*. 1159 (2004).

[2] E.g., Charles Cudworth Willson, "Citations," 2 *Minnesota Law Journal* 299 (1894), posted separately on the MLHP.

prepare its own orders and "append to its orders a few words of explanation so that the record will show just what was done." To Professor Ehrenberg, those "few words" have great importance:

> Litigants believe they have a right to know not only what decision a court has reached but how the court has reached that decision. The fully-reasoned judicial opinion shows litigants that their arguments have been considered, even if those arguments were ultimately rejected. Moreover, the written opinion is perhaps the most powerful method of holding the judiciary accountable because it shows litigants the reasoning process employed by the judges deciding their case.[3]

Moreover, while those "few words" help the lawyers and their clients, their preparation may effect the trial judge as well. Professor Ehrenberg identifies the hidden influence of the opinion-drafting process:

> [A] judge who issues a decision extemporaneously from the bench lacks the time, if not the motivation, to exploit the writing process as an analytical tool. The classic speech-centered legal process, therefore, does not truly offer the same opportunities for self-reflection and critique offered by the writing-centered legal process.[4]

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[3] Ehrenberg, supra note 1, at 1194-5.

[4] Ehrenberg, supra note 1, at 1191. But see Charles A. Cox, Sr., "The Brahmin and the Barbarian," *The Hennepin Lawyer* 14 (1999), posted separately on the MLHP, wherein the author relates the following anecdote about his father who practiced from about 1916 to his death in the early 1940s:

> A judge who was a good friend of my father ruled against him on a motion. The judge and my father soon ran into each other and my father proceeded to upbraid his friend for making an unthinkably bad decision. The wording has been adjusted for family reading. "And you didn't even write a memorandum," he scoffed.
>
> The judge smiled benignly and replied, "Har-r-rold, one of the first things I learned on the bench was never to endanger a good decision with a poor explanation."

It is a humerous story with a serious side—some judges lacked confidence in their ability to explain or justify their rulings.

The following note on the "value" of "memoranda" gives us a glimpse of how some trial courts functioned in Minnesota the 1890s. It was a period when old ways of practice were being challenged, and modest reforms proposed. During its brief life, the *Minnesota Law Journal* carried several articles advocating changes in the way lawyers practiced in the state.

The identity of author of the following note was not listed. It appeared on pages 51-2 of the *Minnesota Law Journal* in its July 1893, issue. It is complete though reformatted. The author's spelling and punctuation are not changed.

THE
MINNESOTA LAW JOURNAL.

A PRACTICAL MONTHLY MAGAZINE

Vol. I JULY, 1893. 51

NOTE AND COMMENT.

MEMORANDA; THEIR VALUE IN THE CASE AND OUT OF IT—PREPARATION OF CASE:—We have had called to our attention time and time again cases wherein several orders would be on file in a cause in terms short and sweet, but absolutely unintelligible to the lawyer who is seeking to ascertain just what point the court decides. Frequently "the said motion is hereby denied with $10 costs" means very little to even the attorneys in the case, except that one prevails and the other is defeated. Half the time the defeated party does not know and has no means, save asking the judge, of obtaining any knowledge as to which of several points raised and argued on the hearing, was decisive against him.

Many times a practitioner is investigating a point of law or practice and hears that it was decided so and so in a certain case. He gets the files, and if there is a written order filed, very frequently meets the difficulty above mentioned, and is forced to find judge or attorneys; and in the latter case runs the risk of obtaining a distorted view of the decision. In some of the districts the attorneys draw all the orders on ordinary hearings and they are signed without question. Although this may satisfy the attorneys in the case, it precludes the possibility of the judge making a minute of the questions raised and of his reason for his decision.

Frequently, also, attorneys are satisfied, even upon a difficult question to take the verbal order of the court, as if they alone were concerned in the decisions. It would be considered by the bar at large a valuable improvement if all orders were directed by the rules to be made in writing, and filed the day made; for, quite often, although in fact a written order is made, it is never filed in the case, the respective attorneys being satisfied with the situation as it is.

It would seem that it is most proper for the court to draw its orders itself, except in mere *exparte* matters. Although this might occasion some considerable expenditure of labor *in toto*, yet it would give the court the opportunity of appending to its order a few words of explanation so that the record will show just what was done. A great many times motions are changed on the hearing, and a mere denial or granting of the relief sought will not show the question at issue. If the court made the order and attached a brief memorandum, "he who runs" could read and understand.

Another question to which our attention has been called by members of the bar is that of making up a settled case. It is provided by Rule XXXIX, District Court, that cases may be prepared in narrative form, while this has been modified in the Second District by additional Rule VII, requiring that "a case shall not be made in narrative form, but shall be in the form of "question and answer as at the trial." Objection is made to both these rules, the claim being made that two-thirds of the evidence taken is usually not subject to objection and that there is no reason why parties should be put to the expense of printing in form of question and answer all of the unobjected testimony in the case. Generally, in reducing such matter to narrative form, three or four or more questions and answers are expressed in a few words, while to express the same in form of "question and answer as at trial" would require every word to be reproduced in order to make sense. In one case which has been brought to our notice it made a difference to the party, a man of no means, of about $100 in preparing and printing his case, after a long trial in court.

Another reason urged against such a rule is that the already over worked supreme bench should not be compelled, in doing justice to the parties and themselves, to wade through all this matter, and extract the facts from poorly put questions and semi-intelligent answers. With 50 per cent or more

work before them than they had five years ago, they should be relieved of this labor, and the preparation of the case in concise, narrative form, is the work of the attorney in his office. The Supreme Court of Wisconsin has on several occasions publicly rebuked attorneys for loading up the record in this manner, and unnecessarily increasing the work of considering a cause. It is suggested that *may* be changed to *shall*.

Posted MLHP: April 25, 2010.