

# JUDICIAL WRITING



January 10, 2019  
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Stenzel Law Office, LLC  
Instructor



**Judicial Writing**  
**Wisconsin Tribal Judges Association**  
**January 10, 2019**

9 AM Introduction and overview

**JUDICIAL WRITING**

9:15 AM What are the purposes of legal writing?

9:30 AM Template for decisions – motions up to appellate.

10:30 AM BREAK

10:45 AM Work on template parts – sample cases & exercises

12:00 PM LUNCH

**SPECIAL TOPICS**

1:00 PM Legal research

1:30 PM Stipulations

2:00 PM Difference between Summary Judgment and Motion to Dismiss

2:30 PM BREAK

3:00 PM Whether to write or not

3:30 PM Writing for the Appellate Court

## A STRUCTURE AND METHOD FOR JUDICIAL WRITING

All legal decisions of any length benefit from having a logical and clear format. Legal writing is not creative writing. It is rather a highly structured exercise with fairly narrow goals. Most jurisdictions have few requirements beyond findings of fact and conclusions of law.

Because of the demands of the law, most legal decisions contain many of the same elements as we will see below.

However, before discussing the structure of a judicial decision, let's pause briefly and consider *why* legal decisions are written at all.

Reasons for a written decision:

- Writing forces the judge to explain reasoning (intellectual discipline)
- Gives the parties an explanation
- Starting point for appeal
- May be required
- Makes a written record
- For the public

Written decisions are clearer and easier to follow if they follow the template below. The template can be expanded or reduced depending on the complexity, size and nature of the issues involved. Those elements are:

- Introduction
  - Procedural history
  - Jurisdiction
- Facts (findings)
  - Summary of evidence (testimony, documents, other)
  - Credibility determinations
  - Judicial notice
- Analysis (explanation)
  - Summary of parties' positions
  - Identifying the issue(s)
  - Summary of relevant law
  - Application of law to facts
- Conclusions of Law
  - Specific orders

Decisions on simpler issues may not need all of these elements or some parts can be very short. In more complex cases, with multiple issues and involved facts, each of these parts could have subparts or be much longer. For example, where jurisdiction is not an issue, it may not even need to be mentioned or it may require only a sentence. In other cases where it is contested, it may require many pages of analysis. Nevertheless, the same basic structure will still apply.

## **PROCESS**

The best way to implement structure is to follow the same process at least in the beginning. As you become more practiced and more experienced, you may not need to do these steps so explicitly (because you will be doing them in your head or unconsciously).

Start by entering the headings for each part as listed above: Introduction, facts, analysis, conclusion. As we will see, you may be able to eliminate some parts or subparts. For simple orders, some parts may be combined.

As a judge becomes more adept and familiar with applying this structure, he or she may wish to adapt this structure to the judge's own style or preferences.

## **THINKING FIRST**

Before sitting down to write, it is helpful to have thought about the case first. Many judges have an idea of the outcome due their experience and judgment. (Which is why they are on the bench!) Translating a gut feeling or just outcome into a formal, legal structure has many steps in between.

Any legal outcome must meet the required elements of the law and have the necessary evidence in the record to support findings of facts. This is probably the most important legal aspect of a written decision. It is the most important legal aspect because on appeal, the appellate court will review the trial court decision based on the facts in the record, the applicable law and the trial court's reasoning.

So before sitting down to write, the author should have at least some idea of where she is going.

## **STEPS**

### *Introduction*

The introduction is important, in medium to longer decisions, because it lets the reader know where the decision is headed. This provides context for all the information that is to follow. A common metaphor is building a container. A legal decision contains a lot of information. It helpful for the reader to have a container within which to receive that information. The introduction is the first chance to do that.

In shorter orders, 2 pages or less usually, it may not be necessary to do as much introduction, but even in those orders, the introduction of the case by stating the appearances, the date and the matter before the court is a useful, simple introduction.

Whether to have an introduction or what to put in it, is ultimately a personal style choice. I recommend a paragraph (or at least a sentence or two) that tells the reader how the case arises, the key issue (or issues) and a very brief summary of the outcome and why.

An Introduction is not required. However, decisions without introductions are like newspaper articles without a headline. Without an introduction, the writer is pouring information on the reader without giving the reader a container to put it in. The introduction is the container for the rest of the opinion. Readers need context and their understanding is helped by knowing why they are reading what they're reading. When readers understand better, it is more likely they will accept the Court's ruling and understand their obligations under it.

### *Facts (Findings)*

Most jurisdictions require trial courts to make findings of facts. Findings of facts are based on admissible evidence received by the trial court. Admissible evidence is usually mostly sworn testimony from a witness but can also be documentary, demonstrative, real evidence and evidence through judicial notice.

Making formal findings of fact can be challenging for the trial court and it is where having thought about the bigger picture of the case can be very helpful. By knowing where the outcome is headed, the trial court can be sure to include in the findings the necessary facts needed for the conclusion.

Findings of fact can be in narrative form or numbered paragraphs. Whether findings of fact must be backed up by citations to the record varies by jurisdiction and local practice. Footnotes can also help in this regard.

To the extent possible, the findings should be internally consistent and flow as a story or narrative of "what happened." "What happened" is in quotation marks because in most cases the court's version of what happened is incomplete or even wrong in certain respects. The findings of fact are the court's version of what happened based on the evidence presented to the court. For a variety of reasons, this accounting is a version of real-world events limited by the legal process. Nevertheless, a court-determined version of what happened is required to make legal rulings.

### *Analysis*

The analysis section is not necessarily required but in some ways is also the heart of the decision. It may be called Discussion, or Opinion or something else. Analysis offers the parties and readers an explanation as to *\*why\** the trial court is doing what it is doing. How do the facts support the legal conclusions? Which witnesses' testimony were given greater weight? If the

Court had discretion, why did it exercise it the way it did? Or, if the Court thought it did not have discretion, why not? This is the judge's chance to explain why he or she ruled the way they did.

The Analysis section may also contain a summary of each party's arguments.

To the extent possible, this section will identify the legal issue and the standard or elements the court is applying. Then, a discussion follows of how the facts meet or don't meet the required elements or standard.

The Analysis section contains the heart of the legal reasoning of the case and is where the Court is free to use all the decision-making techniques or methods available in its jurisdiction: application of precedent, statutory construction, legislative history, public policy considerations, procedural defects, constitutionality issues, etc.

### *Conclusions of Law*

Can be short but the conclusions are necessary as this section includes the court's legal conclusions and orders which, at least for the parties, are often the most important part, i.e. "who wins" or what relief is granted. Who is winning or prevailing? How are the legal questions in the case being answered by the Court?

### **DECIDING WHETHER TO ISSUE A WRITTEN ORDER**

It may be that in certain circumstances, a formal written order is not needed. This is probably rare. When there are attorneys involved, it is certainly permissible for the Court to have an attorney write up a simpler order such as setting a future status conference or even a scheduling order.

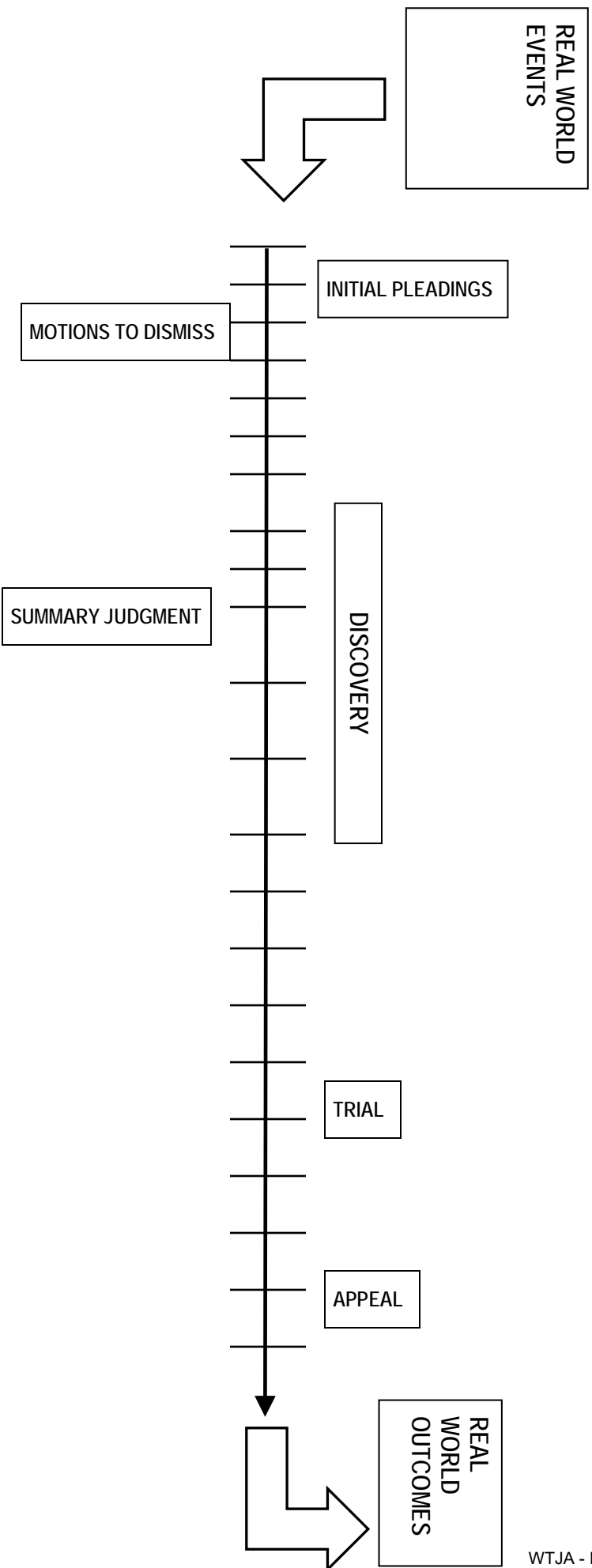
In other circumstances, it may be enough for the clerk to make a docket entry which serves as an "order." Again, this would be for very minor matters, such as re-scheduling or setting matters over. Anything more substantive will usually benefit from a written order.

In some jurisdictions, including federal court, a written decision is not required. But if not done in writing, then the findings of fact and conclusions of law must be made on the record. (See Fed. R. Civ. P 52). (See more on whether to write below.)

### **SUBSTANCE OVER FORM**

Not all judicial decisions use the terms chosen here. However, when you analyze them, almost all have these essential elements in some form or another. Many judicial decisions use different terms or combine them or have different parts under different sections. Some have no headings or overt organization at all. But upon closer inspection, you will see that almost all have this same rough structure holding them together.

# LIFE OF A CASE



- Defendants will work to knock a case off the timeline;
- Plaintiff's job is to try to keep it on track to the end;
- The Court's job is to deal with each issue individually as they arrive and make fair rulings in accordance with law.

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 BIGELOW v. OLD DOMINION COPPER MINING & SMELTING CO.

## BIGELOW v. OLD DOMINION COPPER MINING & SMELTING CO.

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### United States Supreme Court

#### BIGELOW v. OLD DOMINION COPPER MINING & SMELTING CO., (1912)

No. 191

Argued: Decided: May 27, 1912

Smelting Co. [225 U.S. 111](#) (1912) ]

[\[225 U.S. 111, 113\]](#) Messrs. John C. Spooner, George Rublee, Joseph P. Cotton, Jr., Charles H. Tyler, Owen D. Young, Burton E. Eames, and William C. Rice for plaintiff in error.

[\[225 U.S. 111, 124\]](#) Messrs. Louis D. Brandeis and Edward F. McClennen for defendant in error.

Mr. Justice Lurton delivered the opinion of the court:

The question upon which these cases have been brought to this court is whether the Massachusetts court gave to a New York judgment pleaded as bar to a Massachusetts suit that full faith and credit required by the 1st section of article 4 of the Constitution of the United States, and 905, Revised Statutes (U. S. Comp. Stat. 1901, p. 677), enacted in pursuance thereof.

The Old Dominion Copper & Smelting Company, hereafter designated the Copper Company, a corporation [\[225 U.S. 111, 125\]](#) of New Jersey, filed two bills in an equity court of Massachusetts against the plaintiff in error, Albert S. Bigelow, to recover secret profits realized by him and an associate, one Lewisohn, as organizers or promoters of the Copper Company, in selling the mining property of another corporation, called the Baltimore Company, and certain neighboring properties, designated in the transcript, 'outside properties.'

The two sales were for distinct considerations. The bills alleged that when these sales were made the Copper Company was under the absolute control of the two promoters, Bigelow and Lewisohn, and that they divided the profits between them. The fundamental facts in each case were the same. The two cases were heard together in the state courts, and are now heard as if one case, though upon separate writs and distinct records.

Demurrers were interposed and overruled. The allegations of the bills are fully shown in 188 Mass. 315, 108 Am. St. Rep. 479, 74 N. E. 653, where one of the cases was considered on demurrer. Answers were then filed and a great mass of evidence taken. Upon a full hearing the allegations of the respective bills were held to be sustained by the proofs, and final decrees were rendered for the plaintiff in sums aggregating \$2,178,673.33. The decrees were affirmed in the supreme judicial court.

The Federal question, upon which the judgment of this court is sought, arose in this wise: Bigelow, the plaintiff in error here, was a citizen of Massachusetts, and was therefore sued in the courts of that state. Lewisohn, who was Bigelow's associate promoter, was a citizen of New York. He was therefore sued separately in the circuit court of the United States for the southern district of New York. The bills filed there were identical in every essential with those filed in Massachusetts. In the two sets of bills it was alleged that Bigelow and Lewisohn were joint promoters of the Copper Company, and [\[225 U.S. 111, 126\]](#) as such made the sales to it while under their entire control, and that they had realized fraudulent profits. Demurrers were interposed in the New York cases, which were sustained, and the bills dismissed. These judgments were affirmed in the circuit court of appeals for the second circuit. The judgment in one of these cases, that relating to the sale of 'outside properties,' was brought to this court by certiorari and affirmed, the opinion being by Mr. Justice Holmes ( [210 U.S. 206](#) , 52 L. ed. 1025, 28 Sup. Ct. Rep. 634), where the facts of the case are stated.

The final decree in one of the New York cases was pleaded in a supplemental answer in the pending Massachusetts cases as a bar to the suits against Bigelow. The Massachusetts court adjudged that Bigelow was neither a party nor a privy to the New York suits, and was therefore not protected by the judgment therein.

To conclude Bigelow by the New York judgment, it must appear that he was either a party or a privy. That he was not a party to the record is conceded. He had no legal right to defend or control the proceedings, nor to

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## IN RE ABDU

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### United States Supreme Court

#### IN RE ABDU, (1918)

#### No. 31

**Argued: April 29, 1918 Decided: May 20, 1918**

Mr. Silas B. Axtell, of New York City, for petitioners.

Mr. Robert S. Erskine, of New York City, for respondent.

Mr. Chief Justice WHITE delivered the opinion of the Court.

In the trial court the petitioners, six in number, Arabian seamen and members of the crew of a British ship, as libelants sought to enforce the payment of one-half their wages in reliance upon the provisions of section 4530, Revised Statutes, as amended by section 4 of the Act of March 4, 1915, c. 153, [247 U.S. 27, 28] 38 Stat. 1165 (Comp. St. 1916, 8322). In granting an appeal from a decree dismissing their claim the court, in view either of the provisions of the Act of Congress of July 1, 1916, c. 209, 39 Stat. 313 (Comp. St. 1916, 1630a), or those of the Act of June 12, 1917, c. 27, 40 Stat. 157, or both, directed that the appellants be permitted to perfect their appeal without costs.

In the Circuit Court of Appeals the clerk declined to file the record without the deposit to secure costs required by the rules. The court was asked to direct the clerk to do otherwise, but for reasons stated in a brief memorandum (The Nigretia, 249 Fed. 348) it refused to do so. Assuming that this action was based solely on the view that the act of 1916 had ceased to be operative by limitation of time, relying upon the act of 1917, the request for direction to the clerk to file the record without costs or security for the same was again made to the court and refused upon the ground of want of merit in the application, that is, upon the conclusion that the act of Congress relied upon did not relieve seamen from costs in appellate courts. Leave to present a petition for mandamus against the clerk to compel him to file the record without costs was then here granted and the matter is before us on the submission of the rule to show cause consequent upon such permission and the answer of the clerk to the rule setting out the action of the court, in which answer reliance is placed upon the orders of the court which are appended and the two opinions expressed by the court on the subject.

The existence of ultimate discretionary power here to review the cause on its merits and the deterrent influence which the refusal to file must have upon the practical exertion of that power in a case properly made gives the authority to consider the subject which the rule presents. 1 But that does not without more dispel the seeming con- [247 U.S. 27, 29] fusion resulting from the fact that the remedy prayed is directed not to the court below but to its clerk and hence in form the relief sought is a mandamus to direct the clerk to disobey the order of the court, leaving the order unreviewed and unreversed. The incongruity is obvious and we cannot as a general rule sanction it. Looking, however, through form to the essence of things, as no mere independent action of the clerk as clerk is involved, but the authority exerted by the court in directing the action of the clerk complained of is the subject-matter at issue and is the only justification relied upon by the clerk in the answer to the rule, we are of the opinion that in the exercise of a sound discretion we may treat the case from that point of view, that is to say, under the circumstances consider the authority to have made the order with the clerk alone as a technical party to the proceeding.

The contention that the court mistakenly refused to permit the appellate proceedings to be conducted without payment of costs is based upon a provision in the Appropriation Act of June 12, 1917, as follows:

'Provided, that courts of the United States shall be open to seamen, without furnishing bonds, or prepayment of or making deposit to secure fees or costs, for the purpose of entering and prosecuting suit or suits in their own name and for their own benefit for wages or salvage and to enforce laws made for their health and safety.' The provision does not in express words relate to appellate proceedings and the whole argument advanced to sustain the theory that it includes such proceedings rests upon the conception that because the provision was intended to benefit seamen by giving them access to the courts without cost, therefore by necessary implication the statute should be construed as all-embracing, that is, as giving the right to carry on appellate proceedings

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free from costs. But this simply assumes the proposition contended for and after all comes but to the contention [247 U.S. 27, 30] that because the statute gives the right which is asserted therefore the statute should be construed as conferring it and its enjoyment consequently sustained. The error results from disregarding the broad distinction which exists between the right to be heard in courts of justice on the one hand and the necessity for the grant of authority on the other to review the results of such hearing by proceedings in error or appeal. *Reetz v. Michigan*, 188 U.S. 505 , 507-508, 23 Sup. Ct. 390; *United States v. Heinze*, 218 U.S. 532 , 545-546, 31 Sup. Ct. 98, 21 Ann. Cas. 884; *Lott v. Pittman*, 243 U.S. 588, 591 , 37 S. Sup. Ct. 473. This obvious distinction between the two we are of opinion in the absence of a clear and express legislative direction to the contrary excludes the possibility of giving the statute the all- embracing construction sought to be applied to it. And the correctness of this opinion is we think conclusively illustrated by a consideration of prior statutes dealing with a somewhat cognate subject and the decisions concerning the same. Act July 20, 1892, c. 209, 27 Stat. 252 (Comp. St. 1916, 1626-1630); Act June 25, 1910, c. 435, 36 Stat. 866 (Comp. St. 1916, 1626); *Bradford v. Southern Railway Co.*, 195 U.S. 243 , 25 Sup. Ct. 55; *Kinney v. Plymouth Rock Squab Co.*, 236 U.S. 43 , 35 Sup. Ct. 236. In other words, under the act of 1892 conferring a right to prosecute in forma pauperis suits in courts of the United States, which was certainly as broad in its language as the one now under consideration, it was decided in the Bradford Case that the right did not embrace appellate proceedings. And when following that decision the statute was amended by the act of 1910 so as to cause it in express terms to be applicable to appellate proceedings, the right was subjected to accompanying restrictions and safeguards which as held in the Kinney Case made the new right not absolute, but dependent not only upon the limitations which were otherwise put in the statute but also upon the exercise of a sound discretion by the appellate court. The statute before us, as we have seen, which was enacted in 1917 after the decision in the Bradford Case, contains none of the ex- [247 U.S. 27, 31] press provisions as to appellate proceedings inserted in the act of 1910. Thus if resort is to be had to legislative history and the implication of legislative intent as a means of reading into the statute that which it does not contain, a contrary result must necessarily follow, since the conclusion from considering that subject must be that the act of 1917 enacted after the Bradford Case in not expressing the right to be exempt from costs in appellate proceedings was intended to conform and give effect to the rule announced in the Bradford Case.

Rule discharged.

Mr. Justice BRANDEIS, dissenting.

I am unable to concur in the decision of the court. Congress declared without qualification: 'That courts of the United States shall be open to seamen ... for purpose of entering and prosecuting suit ... without ... making deposit to secure fees or costs.' There being no qualification, the words, 'courts of the United States' mean all the courts in which seamen may have occasion to enter and prosecute suits. Seamen have occasion to enter and prosecute such suits in appellate courts. Consequently they should be permitted to do so 'without making deposit to secure fees or costs.'

Mr. Justice CLARKE joins in this dissent.

### Footnotes

[ Footnote 1 ] *Ex parte Crane*, 5 Pet. 190, 193, 194; *Chateaugay Iron Co., Petitioner*, 128 U.S. 544 , 9 Sup. Ct. 150; *Hollon Parker, Petitioner*, 131 U.S. 221, 225 , 226 S., 9 Sup. Ct. 708; *Re Hohorst*, 150 U.S. 653 , 14 Sup. Ct. 221; *In re Grossmayer, Petitioner*, 177 U.S. 48, 49 , 50 S., 20 Sup. Ct. 535.

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**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 14, 2018**

Sheila T. Reiff  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2017AP1896**

**Cir. Ct. No. 2015FA766**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN RE THE MARRIAGE OF:**

**RODI C. ADAMS,**

**PETITIONER-APPELLANT,**

**V.**

**JULIA I. ADAMS,**

**RESPONDENT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Kenosha County:  
JODI L. MEIER, Judge. *Affirmed.*

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

**Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

**INTRO**

¶1 PER CURIAM. Rodi C. Adams appeals from a judgment of divorce from Julia I. Adams. He raises several issues relating to maintenance, property division, and the finalization of the divorce. For the reasons that follow, we affirm.

**F**

¶2 Rodi and Julia were married in 1993. It was the first marriage for Rodi, who brought no substantial assets to the relationship. It was the second marriage for Julia, who brought two pieces of Chicago real estate: a residence on Norwood Avenue and a condo in Hyde Park.

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¶3 Rodi worked on both properties during the marriage, remodeling the residence on Norwood Avenue and performing various handyman jobs at the condo in Hyde Park. Julia also assisted in the remodeling work. The parties later sold the properties, netting roughly \$300,000. That money was used, in part, to purchase other properties, including a rental property in Sturgeon Bay.

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¶4 Rodi and Julia were both employed at various jobs for most of the marriage. At the time of the divorce, Rodi worked as a customs officer, making approximately \$92,000 per year. Julia, meanwhile, worked in retail and had an earning capacity of approximately \$30,000 per year.

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¶5 Following a divorce trial that spanned several months, the circuit court awarded maintenance to Julia in the amount of \$662 per month for a period of five years. The court also reached an unequal property division, favoring Julia by roughly \$92,000. This appeal follows.

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¶6 The determination of maintenance and the division of property rest within the sound discretion of the circuit court. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We will sustain a discretionary decision if the court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a reasonable conclusion. *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). We generally look for reasons to sustain the court’s discretionary decision. *See Steiner v. Steiner*, 2004 WI App 169, ¶18, 276 Wis. 2d 290, 687 N.W.2d 740.

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¶7 The first issue Rodi raises on appeal relates to the circuit court’s maintenance award. Rodi does not challenge the amount or duration of the award in this case.<sup>1</sup> Rather, he suggests that it is inconsistent with the court’s earlier observation that he, at sixty-four years old, was near retirement age. We are not persuaded by Rodi’s argument.

¶8 Here, the circuit court was well aware of Rodi’s age at the time that it issued its maintenance award. In its oral ruling, the court stated, “[Rodi] is 64 years old. I know he wants to retire.... [H]e can retire but he’s paying that amount to Ms. Adams for, approximately, five years, and that’s all.” In making this remark, the court essentially acknowledged that, regardless of when he retired, Rodi would be required to pay the ordered maintenance to Julia. There is nothing inconsistent about this ruling, and we perceive no basis to reverse the court’s maintenance award.

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<sup>1</sup> Rodi concedes both points in his brief, writing, “The amount of maintenance is not at issue in this appeal. The court made appropriate findings concerning the parties[’] respective incomes, and an appropriate division of that income. The duration is really not an issue in a general sense, given the length of this marriage.”

¶9 The next issue Rodi raises on appeal relates to the circuit court’s property division. The court divided the bulk of the marital estate equally, except that it awarded Julia the Sturgeon Bay property without offset, resulting in her being awarded approximately \$92,000 more than Rodi. Rodi asserts that there was no basis for such an unequal division. We disagree.

¶10 Under WIS. STAT. § 767.61 (2015-16),<sup>2</sup> a circuit court must equally divide marital property unless it determines that an unequal division is warranted after considering the relevant statutory factors. The court considered those factors in this case, paying particular attention to “[t]he property brought to the marriage by each party.” Sec. 767.61(3)(b).

¶11 As noted, Julia brought two pieces of real estate to the marriage. The circuit court deemed those assets “substantial” and noted “a huge differential” when comparing them with what Rodi brought to the marriage. Although the court recognized Rodi’s contributions to the properties, it was not persuaded that he had done “\$300,000 worth of work.” In any event, the court concluded that such work was “what spouses do.” Accordingly, it believed that an unequal property division was warranted in the case. On this record, we are satisfied that the court properly exercised its discretion.

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2015-16 version.

¶12 The final issue Rodi raises on appeal relates to the finalization of the divorce. Rodi complains that the circuit court did not finalize the divorce until its oral ruling. He contends that the court should have finalized the divorce months earlier, which may have affected the valuation of certain property like his retirement account. Again, we disagree.

¶13 Upon review of the record, we perceive no undue delay in the circuit court's finalization of the divorce. Although the parties may have completed their testimony months earlier, the court was not yet done hearing evidence. Indeed, on the same day as its oral ruling, the court asked for and received stipulations from the parties regarding the value of their personal property. Waiting for the evidence to close before finalizing the divorce was not an unreasonable action.

¶14 For these reasons, we affirm the judgment of the circuit court.<sup>3</sup>

## CONCLUSION

*By the Court.*—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b).

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<sup>3</sup> To the extent we have not addressed an argument raised by Rodi on appeal, the argument is deemed rejected. See *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

**CASE # 1 – FAMILY LAW – WRITTEN ORDER**

**POSTURE:** Jane Smith and John Webster have two children together. There is a child support order of \$520 per month in place that was set three years ago. Since that time, John lost the job that order had been based on, had a four-month term in jail for an OWI conviction and is still looking for work. He has brought a motion to modify his child support.

**SUMMARY OF TESTIMONY:**

**COURT:** We're on the record in 13 FA 123, In re the Support of J.W. and A.W. Jane Smith, mother, appears in person and is representing herself. John Webster appears in person and is also representing himself. The Tribal Child Support Agency appears by Attorney Lisa Jacobs. We're here on father's motion to modify support. There is proper service in the file. Mr. Webster, please tell me what you're asking for and why.

**WEBSTER:** I need my child support lowered. I haven't had a job in over six months. I had a brief time in jail. I can't pay \$520 per month and my arrears are building up.

**COURT:** Ms. Smith, what is your position?

**SMITH:** John should be able to work at his last job at Allied Plastics for \$12/hr. That last order didn't even count all the overtime he was getting. John almost never sees the kids.

**COURT:** What is the child support agency's position?

**ATTY JACOBS:** Your Honor, our position is that Mr. Webster is not mentally or physically disabled and the Court should impute \$1,100 per month to Mr. Webster which represents working at 35 hours per week at minimum wage and enter an order for \$275 per month.

**SMITH:** That's way too low!

**COURT:** Ms. Smith, you'll wait until you're called on. I assume your position is that the order should stay at \$520 per month?

**SMITH:** Yes.

**COURT:** Ms. Smith do the children primarily live with you?

**SMITH:** Yes.

**COURT:** And how long has that been the case?

**SMITH:** Since the kids were born.

**COURT:** All right, Mr. Webster I'm going to ask you a few questions. What is the highest grade you finished in school?

**WEBSTER:** 12<sup>th</sup> grade.

**COURT:** Have you received any job training?

**WEBSTER:** No.

**COURT:** When's the last time you held a job?

**WEBSTER:** 2016.

**COURT:** What job was that and how much did you make?

**WEBSTER:** Goodwill Industries; I made about \$9.25 an hour.

**COURT:** Are you currently mentally or physically disabled that you can't work?

**WEBSTER:** No.

**COURT:** Do you currently have any income?

**WEBSTER:** No.

**COURT:** Any assets greater than \$500?

**WEBSTER:** No.

**COURT:** How are you supporting yourself?

**WEBSTER:** I live with my parents; they help me out; and my girlfriend too.

**COURT:** Have you been looking for work and applying for jobs?

**WEBSTER:** Yes.

**COURT:** Do you have a valid driver's license?

**WEBSTER:** No.

**COURT:** Do you otherwise have access to reliable transportation?

**WEBSTER:** Sometimes.

**COURT:** Do you have any other minor children?

**WEBSTER:** No.

**COURT:** Why do you think you haven't been able to get a job?

**WEBSTER:** I don't really know; partly because of my criminal record.

**COURT:** Any comments from either Atty Jacobs or Ms. Smith before I make a ruling?

**SMITH:** No.

**JACOBS:** No.

**COURT:** The Court imputes \$1,560 per month to Mr. Webster. That is imputing to him \$9 per hour and 40 hours per week. Based on his responses to me, it is reasonable that Mr. Webster could find full time work at this rate given the economic circumstances in our community which have improved considerably over the last few years.

**LEGAL STANDARD:** "Income imputed based on earning capacity" means the amount of income that exceeds the parent's actual income and represents the parent's ability to earn, based on the parent's education, training and recent work experience, earnings during previous periods, current physical and mental health, history of child care responsibilities as the parent with primary physical placement, and the availability of work in or near the parent's community.

**DETERMINING INCOME IMPUTED BASED ON EARNING CAPACITY.** In situations where the income of a parent is less than the parent's earning capacity or is unknown, and in the absence of credible evidence to the contrary, the court may impute income to the parent at an amount that represents the parent's **ability to earn**, based on the parent's education, training and recent work experience, earnings during previous periods, current physical and mental health, history of child care responsibilities as the parent with primary physical placement, and the availability of work in or near the parent's community. If evidence is presented that due diligence has been exercised to ascertain information on the parent's actual income or ability to earn and that information is unavailable, the court may impute to the parent the income that a person would earn by working 35 hours per week for the higher of the federal minimum hourly wage under 29 USC 206 (a) (1) or the state minimum wage in s. DWD 272.03. As an alternative to imputed income, the court may order the parent who is not a custodial parent to search for a job or participate in a work experience and job training program, including the Children First program under s. 49.36, Stats. If a parent has gross income or income modified for business expenses below his or her earning capacity, the income imputed based on earning capacity shall be the

difference between the parent's earning capacity and the parent's gross income or income modified for business expenses. (Emphasis added).

**BIG LAKE TRIBAL COURT**

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**In re the Support of J.W. and A.W.,**

**Big Lake Child Support Agency,  
Jane Smith,  
Co-Petitioners**

**and**

**Case No. 13 FA 123**

**John Webster,  
Respondents.**

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**DECISION AND ORDER**

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This matter came on the calendar on January 9, 2019. Co-Petitioner Jane Smith appeared in person, without counsel; John Webster appeared in person without counsel and Attorney Jacobs appeared for the Child Support Agency. This matter is here on Mr. Webster's Notice of Motion and Motion to Modify Child Support.

The Court finds as follows:

1. Smith and Webster have two minor children together. A child support order for Mr. Webster to pay \$520 per month was previously set and has been in effect since 2013. Mr. Webster is seeking a modification.
2. Since the entry of the last order, Mr. Webster has lost his job and was incarcerated for about 4 months. He is out of custody at this time.
3. Mr. Webster currently does not have a job. He is looking for work.
4. Mr. Webster last worked for \$9.25/hr, full time, at Goodwill Industries.
5. Mr. Webster has completed 12<sup>th</sup> grade and while he does not have a valid driver's license, he does have reliable transportation.

ORDER: The Court imputes \$9/hr at 40 hours per week for a gross monthly income of \$1,560. Given that Mr. Webster has 12<sup>th</sup> grade education and has recently worked for \$9.25 per hour and there are no other reasons given as to why he can't work, the Court finds it is reasonable to assign \$9.25 per hour for 40 hours per week. This is a 25% order as the parties

have two children. The child support therefore is set at \$390 per month from father to mother effective 1-1-19.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2019.

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Hon. Luke Warmwater

**CASE # 2 – ELECTION DISPUTE – ISSUE OF LAW  
(CANDIDATE FOR SUMMARY JUDGMENT)**

**POSTURE:** Tracy Tribal has filed a challenge to the most recent tribal election results. Specifically, she challenges the results for the office of Chairman. Bob Bracket received 501 votes while Gary Green received 491 votes. During the recount it was discovered that 111 ballots were initialed by the ballot clerk but not signed with a full signature. Tribal law says the ballots must be “signed” by the ballot clerk. Of the ballots in question, 71 of the ballots were for Bob; 40 were for Gary. Therefore, if the ballots are invalidated and not counted, Gary Green would have more votes.

**SUMMARY OF FACTS:**

**PENNY RODGERS (BALLOT CLERK):** I have been the ballot clerk for the last six elections. I normally sign the ballots with my full signature but this year there was a high demand for ballots right at 6 PM, about an hour before the polls close. It was very cold and the line was starting to go out the door. I wanted to prepare the extra ballots very quickly. In order to save time, I initialed the ballots instead of signing. The initials on the ballots matched my handwriting and that I did initial the ballots in question. There is no question in my mind that the votes cast reflect the will of the voters. Tracy is just sore because her father lost the election. 501 votes were cast for Bob Bracket; 491 votes were cast for Gary Green.

**TRACY:** At the recount, which was open to the public, Penny observed and inspected all ballots. One-hundred eleven ballots contained the initials P.R. Those initials are in Penny’s handwriting. Tracy’s interpretation of the ordinance is that the ballots must reflect the signature of the ballot clerk, not merely the initials. This violation of the election ordinance requires that the unsigned ballots be invalidated or at the very least, the entire election be re-done.

**LEGAL STANDARD:** The Election Ordinance states: Sec. 18.45: “All ballots must be signed by the ballot clerk.” Sec. 18.51: “The Court may only enjoin the swearing in of elected officials if it finds: 1) that a violation of this code has occurred and 2) the violation would have changed the outcome of the election.”

**WIND RIVER TRIBAL COURT**

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**TRACY TRIBAL,  
Plaintiff,**

v.

**Case No. 13 CV 202**

**WIND RIVER ELECTION BOARD,  
JAMES CROWDOG, Tribal Secretary,  
Respondents.**

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**DECISION AND ORDER**

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**INTRODUCTION**

This case arises out of an election dispute in the race for Tribal Chairman. Tracy Tribal seeks to have ballots invalidated or in the alternative a new election. One-hundred eleven ballots were initialed but not fully signed by the ballot clerk. If the disputed ballots are voided, the outcome of the election would change. Because we find that the ballot in this case is substantially similar to a signature, we deny the challenge and uphold the election results.

**JURISDICTION**

This court has jurisdiction under Sec. 18.15 of the Wind River Election Ordinance.

**FACTS**

The facts are not in dispute. On January 4, 2019, the Wind River Tribe held its annual election for Tribal Chairman and other Tribal Council seats. The two candidates for chair are Gary Green and Bob Bracket.

Voter turnout was heavy and the Election Board ran low on ballots. In a rush to prepare more ballots, Penny Rodgers, the Ballot Clerk initialed rather than signing with her full name on 111 ballots. All of these ballots were used and votes recorded. Of the 111 ballots containing only the ballot clerk's initials, 70 are for Bracket and 41 for Green. The votes cast by these ballots reflect the intent of those voters and there is nothing irregular or otherwise improper about the 111 ballots, other than being initialed rather than signed.

When the results were tallied on Saturday night, Bracket received 501 votes; Green received 491 votes. The Election Board declared Bracket the winner on Monday, January 6, 2014.

The next day Tracy Tribal filed this lawsuit alleging that the 111 ballots should be voided and Green declared the winner or in the alternative the election results should be voided and a new election held.

### **APPLICABLE LAW**

Chapter 18 of the Wind River Ordinances is the Tribe's Election Ordinance. The relevant sections for the Court's purpose are Sec. 18.45 which requires all ballots to be signed by the ballot clerk and Sec. 18.51 which permits the Court to declare the election invalid and order relief only if two conditions are met: 1) there has been a violation of the code and 2) the violation would have changed the outcome of the election.

### **DISCUSSION**

The facts are not in dispute. The legal question is whether the ballot clerk's initialing of a ballot falls within the meaning of "signed" as that word is used in Sec. 18.45 of the Wind River Election Ordinance. The inquiry starts here because in order for the Court to be able to order relief, it must find that there has been a violation and that the violation would have changed the outcome of the election. Because the Court finds no violation, the Court does not reach the second part of Sec. 18.51.

Ms. Tribal's main argument is that the requirement of the ordinance for signing is plain and clear and initialing is not the same as signing. She further argues that the integrity of the election process will be undermined if initials rather than a full signature are permitted.

The Election Board and Tribal Secretary present two arguments. First, they argue that the term "signing" is broad enough to include initials. They argue that in this situation, Ms. Rodgers' signature was her initials. She was working very quickly due to the immediate need for extra ballots. Second, they argue that even if initials are a technical violation, neither the intent of the electorate nor the integrity of the election process were affected by what they view as a very minor deviation from the ordinance.

The Election Board also points out that the purpose of having the ballot clerk initial the ballots is to that forged or fraudulent ballots cannot be substituted. There is no evidence or allegation that anything like that happened here.

The Court finds that the Election Board has the better arguments. While the matter may be a close call, the Court interprets the term signing to include, on this record, the ballot clerk's initials.

Three facts bolster this conclusion. First, the ballot clerk testified, and Ms. Tribal agreed, that she in fact inspected and initialed all the ballots. There is no question that the initials on the ballot are hers. Second, Ms. Rodgers was not arbitrarily initialing the ballots but doing so for a good reason: the high demand for ballots on election day with a line out the door on a very cold day. Third, there is no evidence or even an allegation that by initialing rather than signing that somehow the intent of the electorate was distorted or compromised.

The word signed in this case can include initials. The Court takes judicial notice that some individuals sign their names by using initials in some or all of their signature.

### **CONCLUSION**

The Court finds there was no violation of the Election Ordinance. Petitioner's request for relief is denied. IT IS SO ORDERED.

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Hon. Mary Louise Perkins

Dated:

### **CASE # 3 – FAMILY LAW - DISCRETION**

**POSTURE:** John and Cheryl were divorced in early 2011. John has brought a post-judgment motion to modify the current placement order. Under the current order Cheryl has primary placement and John has placement every other weekend. The current order is three years old. John is asking for more time, preferably 50/50, substantially equally placement. There are two children in the family, Tyler, 11, and Sophia, 9.

John is basing his request on the fact that he has been sober for two years and lives in a new apartment with a furnished bedroom for each child. He lives about 10 minutes from mother and wants to be more involved in the children's lives.

#### **SUMMARY OF TESTIMONY:**

**CHERYL:** Doesn't think John is responsible enough as a parent. Mom works part-time as a cashier at a convenience store. Relies on child support and help from her parents to make ends meet. The children like visiting their dad, but always want to return home when they're done. John is behind on child support and doesn't deserve more time.

**JOHN:** Currently works full-time as a slot technician at the Casino making \$16.50/hr. Must work second shift on Mondays and Tuesdays; otherwise works during the day. Has a new apartment with two furnished bedrooms for Tyler and Sophia. Has seen the children every other weekend (except 1 time) as allowed for the last two years. Dad has been clean and sober for two years. Had an OWI three years ago and this changed his outlook. Has his license back and is committed to "living better." At the time of the last order three years ago, Dad had gotten an OWI, was living in a studio apartment and had just been fired from his job.

**GAL:** Confirms dad's testimony. Dad appears to be doing well on all fronts: home is appropriate; job is going well; in recovery from drinking and continues to attend AA meetings. Not sure the children are ready for 50/50 because of working second shift on Monday and Tuesday but agrees that dad should have an increase in placement time.

**LEGAL STANDARD:** Under Big Lake law, the moving party must establish that there has been a "substantial change in circumstances," since the last order. If there has been a substantial change, then court must determine whether proposed modification is in the best interests of the children.

**OUTCOME:** Court finds there has been a substantial change in circumstances due to father's life changes (recovery, job, living arrangement). The Court awards shared placement to the parents as follows: Monday and Tuesday w/ mother; Thursday, Friday with father; alternating weekends.

**BIG LAKE TRIBAL COURT**

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**In re the Marriage of:**

**JOHN SMITH,**

**Petitioner,**

**And**

**Case No. 10 FA 100**

**CHERYL SMITH,**

**Respondent.**

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**DECISION AND ORDER**

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This matter came on the Court’s calendar for a hearing on December 20, 2018. John Smith appeared pro se; Cheryl Smith appeared pro se. The GAL for the children, Janice Joplin, appeared in person. The Court finds and orders as follows:

1. The current order in this matter was entered in December, 2015. Under that order the mother has primary placement of Tyler and Sophia; the father has placement every other weekend, Friday, 5 PM to Sunday, 5 PM.
2. The father has established that a substantial change in circumstances has occurred since entry of the last order. Specifically, the father has:
  - a. Entered recovery for alcohol addiction and has been clean and sober for over two years.
  - b. Held a stable job for over two years.
  - c. Established a stable residence with a room for each child.
  - d. Otherwise shown that he is a fit parent.
3. It is in the best interest of the children for them to see their father more than every other weekend. The children indicated to the GAL that they enjoy having placement with their father. The GAL stated that she knows no reason why the father should not have more time with the children. The children are old enough that they can verbalize any special needs or concerns during or after their visits. Furthermore, the children have been visiting their father every other weekend for the last two years without incident. The GAL stated that father works second shift on Mondays and Tuesdays to those days should be avoided for placement.
4. The mother has not presented any valid reasons as to why the father should not have more time with the children. By statute the Court is obligated to maximize each parent’s time with the children.
5. The father has demonstrated that he should be eligible for more time with the children. He has materially improved his situation by establishing a better living arrangement and one

that can accommodate the children. He's also been sober for two years and maintained his weekend visits with the children. The Court sees no basis for denying equal placement.

6. Beginning on Monday, January 14, 2019 the placement schedule shall be as follows: Placement with mother on Mondays and Tuesdays and alternating weekends; placement with father on Wednesday and Thursdays and alternating weekends.
7. All previous orders not inconsistent with this order shall remain in effect.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2019.

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Hon. Joseph Wapner  
Big Lake Tribal Court

**Case #4: Disgruntled tribal member sues Tribal Council for failure to hire.**

BRETT CASING: Has sued the Tribal Council after he was not hired for the Tribal Administrator position. He claims that he should have been hired because he is tribal member at Big Lake and better qualified than the person who was hired, Cindy Smith. Ms. Smith is also a Big Lake tribal member. Mr. Casing claims the Tribe waived sovereign immunity because he is a tribal member and has the right to a grievance and he claims that the Tribe cannot post and interview job candidates without giving them a right to recourse if they are not hired.

BIG LAKE TRIBE: The Big Lake Tribe filed a motion to dismiss based on sovereign immunity. The Tribe's motion argues that there is no waiver anywhere in tribal law and in fact, the Tribe's Government Organizing Ordinance exempts Tribal Council hires from the normal grievance process over hiring and firing.

ORDINANCE EXCERPT: Sec. 2.11 of the Government Organizing Ordinance: "Applicants and employees who are hired and supervised by the Tribal Council are exempt from the provisions of Sections 1 through 10 of this ordinance and are not entitled to grieve a hiring or discipline decision."

**Exercise: Write an introduction to your decision on the Tribe's motion to dismiss.**

## **Case #5: Eviction**

**POSTURE:** Carrie Underwood is a tenant renting a home from Robert Smith, the landlord and owner of the home being rented. The home is located at W1225 Big Pine Road. Mr. Smith brought a Petition for eviction in Big Lake Tribal Court alleging Ms. Underwood has not paid rent for three months. It appears that Ms. Underwood has been avoiding service. The eviction petition was taped to Ms. Underwood's door and also served on a 16-year-old who answered the door and said he lived there.

**CLERK:** The next matter before the Court is 18 EV 25, Robert Smith v. Carrie Underwood. Appearances please.

**MR. SMITH:** Robert Smith.

**COURT:** All right Mr. Smith. The Court notes Mr. Smith is appearing without counsel, representing himself. The Court also notes that Ms. Underwood does not appear.

**COURT:** Mr. Smith, has Ms. Underwood been served?

**MR. SMITH:** Yes, your honor. I've provided the Court with an affidavit of substitute service and my own affidavit that I taped the Notice to Quit and Eviction Petition to the front door of her unit.

**COURT:** I'm a little concerned about going forward with Ms. Underwood not being here. Let me review the Affidavit of Service.

**MR. SMITH:** Well, your honor, Carrie has been avoiding service. She knows this is coming. I've been texting with her and telling her what's going on.

**COURT:** All right, let's swear you in and make a record here.

**[MR. SMITH SWORN IN.]**

**COURT:** OK, Mr. Smith, you're the Petitioner in this action?

**MR. SMITH:** Yes.

**COURT:** And you are the owner of the property at W1255 Big Pine Road?

**MR. SMITH:** Yes.

**COURT:** And you rent that unit to Ms. Carrie Underwood?

**MR. SMITH:** Yes.

**COURT:** And you filed a Petition for Eviction on November 12, 2018 in this Court?

**MR. SMITH:** Yes.

**COURT:** Why did you file the Petition?

**MR. SMITH:** Well, I didn't want to do it. Ms. Underwood has been a good tenant for a few years, but she's often behind in her rent. Now it's gotten to be three months. I've worked with her in the past, but now she's not communicating with me. It's not my business but I think she might be on drugs; I think she's lost her job. She's three months behind, going on four. I need to pay bills too.

**COURT:** OK. Now the issue of service. The Court notes there is an affidavit of substitute service on file from a Mr. Kyle Warner. On November 18, 2018, he left a copy of the Petition with Jeremy Underwood, a resident of the property, who Mr. Warner states is over the age of 18. There is some narrative here in the affidavit.

**COURT:** Now Mr. Smith did you give Ms. Underwood the required Notice to Quit and 14 days to cure?

**MR. SMITH:** Yes, your honor. It's there in my statement.

**COURT:** Ok, yes I see it. Did Ms. Underwood make an effort to cure her overdue rent?

**MR SMITH:** Not really. She brought over a check for \$50 but it bounced when I went to cash it.

**COURT:** Do you have a written lease with Ms. Underwood?

**MR SMITH:** No. It's a month-to-month verbal lease.

**COURT:** Are you asking for a Writ of Restitution?

**MR SMITH:** Yes.

**COURT:** Are you also asking for a money judgment?

**MR SMITH:** Yes, for \$1,200 in back rent.

**COURT:** OK, the Court enters judgment in default in favor of Mr. Smith and against Ms. Underwood. The Court finds that Ms. Underwood is \$1,200 behind in her rent payments to Mr. Smith and that the legal requirements have been met. A Writ of Restitution shall be entered and once signed by the Court, provided to law enforcement to return the premises to Mr. Smith.

**COURT:** Anything further?

**MR SMITH:** No, your honor. Thank you.

## LEGAL RESEARCH

1. What are the primary authorities (constitution, statutes/ordinances, regulations/rules, appellate cases) applicable to the question / topic?
2. Statutory annotations?
3. What is the binding precedent (appellate cases on point), if any, in your jurisdiction?
4. What are the persuasive precedents, if any, in your jurisdiction?
5. What is the difference between binding precedent and persuasive precedent?
6. What databases are available for searching?
7. Do you have the right search terms?
8. What are persuasive precedents from other jurisdictions?
9. How can you find other cases?
10. Looking at other decisions:
  - a. How close are the facts?
  - b. How close is the law?
  - c. How recent or old is the case?
11. Secondary authority
  - a. Restatement of the law
  - b. ALR (American Law Reports)
  - c. Law Review Articles
  - d. Legal Textbooks
  - e. Dictionary
  - f. Legislative history
  - g. Good old Google (but beware)
12. Shepardizing – once a case is found that is on point, how has it been cited or used?
13. Use the Internet.
14. One challenge for a tribal court doing legal research is that most of the information will not be specific to your jurisdiction. Cases and statutes from other tribes, from states and from the federal government are generally regarded as persuasive and not binding authority. Meaning, the tribal court is not bound to follow law from other jurisdictions. This raises several questions:
  - a. Are the other jurisdiction's laws similar enough to be persuasive?
  - b. Is reasoning behind other jurisdiction decision or law similar to policy objective in your own jurisdiction?
  - c. Will your legal community and general community accept looking at other jurisdiction's laws?

### RESEARCH QUESTION:

What constitutes a “substantial change in circumstances” such that a change in placement or child support is permitted?

## STIPULATIONS

The Court is not bound to accept any stipulation put before it. There are various reasons a court may reject a stipulation. For example, a court is not bound to accept parties' conclusions of law or the parties' wishes on other legal matters such as subject matter jurisdiction, a party's standing to sue, or the legal definition of a statutory term.

A stipulation is a recommendation by the parties to the Court. The Court is not obligated to accept or approve the stipulation. Furthermore, until the stipulation is approved by the Court, either party should be free to withdraw.

However, absent gross unfairness, provisions against public policy or other red flag, courts usually trust the parties' knowledge of the case.

Depending on the subject matter area, consider developing a standardized process and/or checklist for stipulations.

Discussion / examples:

- Without further explanation, parties stipulate to child support "held open" even though the percentage standard amount is \$500 per month.
- Even though both parties did not sign the contract, the parties stipulated that the contract was a valid, enforceable contract. (See *Goddard v. Goucher*, 89 Mass. App. Ct. 41 (Feb 2, 2016).
- Judge in NFL / concussion law suit would not approve settlement without changes:
  - Expansion of who was eligible for settlement
  - Expansion of when players / families were eligible
  - Credit for playing in other leagues
- Criminal plea agreements are essentially stipulations. However, the Court still must consider:
  - Factual basis for convictions
  - Interest of victim
  - Interests of general public
- How "hands on" should a court be?
- Should the Court automatically approve any stipulation?
- Can a court modify a stipulation and make it a court order without consulting the parties first? Yes, but consider giving the parties option to withdraw.

For discussion of stipulations see *Hottenroth v. Hetsko*, 2006 WI App 249.

## SUMMARY JUDGMENT and MOTION TO DISMISS

- Summary judgment is only possible when the material facts are not in dispute.
- Summary judgment is a decision by the Court *on the merits* of the dispute before it.
- The most common standard applicable on summary judgment: The Court shall grant summary judgment if the movant shows that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.
  - Moving party must show no disputed material facts and that it is entitled to judgment under law.
  - Opposing party must show a genuine issue of material fact.
  - (Material fact is one that makes a difference).
  - Usually the Court must view the evidence in a light most favorable to the non-moving party.
- Motion to Dismiss: If facts are in dispute, the facts are assumed true, for the purposes of the motion only, as pleaded in the complaint or petition.
- A motion to dismiss is seeking to have the case dismissed because of some legal or procedural problem or threshold that hasn't been met. For example:
  - Failure to state a claim
  - Lack of jurisdiction (subject matter or personal)
  - Sovereign immunity
  - Statute of limitations
  - Lack of standing
  - Insufficient service of process
  - Failure to join a necessary party
- In contrast, a Motion for Summary Judgment is seeking a decision on the merits of the case.
- Motion to Dismiss and Summary Judgment occasionally overlap depending on what is presented to the Court.
- The same structure and method discussed at the beginning of these materials can and should be used for a summary judgment decision.

**BIG LAKE TRIBAL COURT**

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**JANE SMITH,  
Plaintiff,**

v.

**Case No. 18 CV 100**

**BIG LAKE TRIBAL COUNCIL,  
JOHN HOUSEMAN,  
BETTY FORD,  
RINGO STARR,  
Defendants.**

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**SCHEDULING ORDER**

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The parties having appeared on December 1, 2018 at 1 p.m., Jane Smith appearing in person, pro se, the defendants all having appeared in person and by counsel Thomas Harbinger, by phone, the Court held an initial appearance. The Court finds and orders as follows:

1. Defendants' counsel, Thomas Harbinger, will take all necessary steps to be admitted to practice in the next 30 days.
2. Ms. Smith will file her response to Defendants' Motion to Dismiss no later than **January 2, 2019**.
3. The Defendants will submit to the Court and Plaintiff the Tribal Council minutes from the September and October meetings by **January 18, 2019**.
4. The Court will plan to decide the Motion to Dismiss within a week of receiving Plaintiff's response.
5. Discovery requests must be submitted by **March 1, 2019**. Discovery response times will be those found in the Rules of Civil Procedure. Discovery will close by **May 1, 2019**. Discovery is stayed during the pendency of Defendants' Motion to Dismiss.
6. Dispositive motions are due by **June 1, 2019**.
7. Trial is scheduled for **August 1-2, 2019**.

IT IS SO ORDERED.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2019

## WHETHER TO WRITE AND HOW MUCH (OR HOW FORMALLY)

1. How should a trial court decide whether to issue a written order or whether it will issue a summary order or “full dress” opinion or something in between?
2. Criteria:
  - a. Complexity of case (facts and law)
  - b. How well developed is law
  - c. Length of order
  - d. Need for detail
  - e. Intended audience

### EXAMPLES FOR DISCUSSION:

- Setting over an initial hearing on a wage garnishment where both parties are pro se.
- Decision on election dispute
- Decision on membership dispute
- Order on a motion to dismiss for failure to meet statute of limitations
- Final order after contested trial on divorce where all issues are in dispute

When would a written decision be needed?

When could a verbal decision on the record suffice?

How easy is it to get a transcript of a hearing in your jurisdiction?

Remember: verbal decision can be made into a “written” decision by issuing a judgment and attaching partial or whole transcript.

## **WRITING FOR THE APPELLATE COURT**

1. Preparing for the appellate court begins even before writing: trial court must make a good record.
2. Explaining, explaining, explaining
3. Explaining overcoming a presumption
4. Covering key legal issue(s)
5. Making all required findings
6. Explaining an exercise of discretion
7. Explaining credibility judgments
8. Covering all factors in a factor test
9. Covering “what ifs” (Offers of proof where needed).

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 6, 2018**

Sheila T. Reiff  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2018AP686**

**Cir. Ct. No. 2017SC667**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**DAVID J. MASHAK,**

**PLAINTIFF-APPELLANT,**

**V.**

**MORGAN LEIS,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Monroe County:  
TODD L. ZIEGLER, Judge. *Affirmed.*

¶1 LUNDSTEN, P.J.<sup>1</sup> David Mashak appeals a judgment against his former tenant, Morgan Leis. Mashak brought a small claims suit against Leis for

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a). All references to the Wisconsin Statutes are to the 2015-16 version.

unpaid rent, clean up, and repairs. The circuit court awarded damages to Mashak, although the amount was significantly less than what Mashak sought. On appeal, Mashak contends that the circuit court erroneously failed to award him damages for certain categories of damage that Mashak claimed Leis caused to the property. I reject Mashak's arguments, and affirm the circuit court.

### ***Background***

¶2 At a court trial on this matter, Mashak and his tenant, Leis, each testified. Mashak presented pictures of the condition of the property after Leis had moved out. Mashak also called as a witness a neighbor who was familiar with the property before and after Leis's tenancy. The circuit court found that Mashak did not meet his burden to prove that all of the damages Mashak claimed were caused by Leis.

¶3 The circuit court awarded Mashak two months rent under the terms of the lease, damages for cleaning time, door locks, floor damage, and yard work, plus statutory costs. The court then deducted double the amount of the security deposit because Mashak did not provide the required notice related to the security deposit. The total award to Mashak was \$819.24. Mashak appeals.

### ***Discussion***

¶4 Mashak challenges damages with respect to the following: (1) deep scratches on the floor; (2) paint work and trim damage; (3) window blinds; and (4) bathroom plumbing, bathroom flooring, and vanity. I address each topic in turn below.

*A. Deep Scratches on the Floor*

¶5 Mashak complains that he presented evidence of scratches on the bedroom floor, which were too deep to sand out, and received no compensation for this damage. The circuit court found that Mashak failed to prove that Leis was responsible for all of the flooring damage. The court stated: “So we have some flooring issues, which again, there is a difference of who I believe.... What I’m going to award for flooring is \$150, and I think there was some damage done by Mr. Leis, but I believe there was damage there before.”

¶6 Whether or not the tenant damaged the premises is a question of fact. Findings of fact in a trial to the court are affirmed unless clearly erroneous. WIS. STAT. § 805.17(2). The circuit court’s finding regarding the bedroom floor is not clearly erroneous. As the circuit court pointed out, Mashak did not present what the circuit court viewed as reliable evidence of the condition of the floor before Leis’s tenancy, such as “before” pictures or a “check-in sheet.”

¶7 Therefore, I reject Mashak’s argument that he should have been awarded damages for the deep scratches on the floor.

*B. Paint Work and Trim Damage*

¶8 Mashak contends that the circuit court erred in failing to compensate Mashak for his work repainting the walls to cover up marker writing and for damage to a piece of trim. When the court asked Leis if the marker writing was there when he moved in, Leis responded, “No.” As to the trim damage, Leis stated: “It was damaged.... Not that bad, but it was already damaged.” The court did not mention these items in its decision. Thus, as is typically done in such situations, I will assume implicit fact-finding by the circuit court against Mashak.

That is, I will assume the circuit court found that Mashak did not present credible evidence that these items of alleged damage were sufficiently proven.

¶9 Here, once more, Mashak did not present evidence of the condition of the items before Leis moved in, such as pictures or a check list. I acknowledge that Mashak presented a witness who asserted that she was familiar with the condition of the house both before and after Leis was a tenant, but I see nothing in her testimony specific to these items. Moreover, I infer from the court's decision not to award damages for these items that the court did not find Mashak credible in this respect.

¶10 Moreover, Mashak could have asked the circuit court about these items when the court ruled orally, but did not mention them. An appeal should not be a substitute for drawing the circuit court's attention to something the court did not specifically address.

### *C. Window Blinds*

¶11 Next, Mashak complains that, despite Leis admitting to having "wrecked" the blinds, Mashak did not receive \$41.96 in compensation for the blinds. As with the wall painting and the trim, the circuit court's decision did not expressly address the blinds. I acknowledge that the circuit court likely should have included some amount for the blinds, but I decline to reverse the circuit court based on the absence of an award for the blinds. This is a small claims action in which courts endeavor to provide a prompt and overall fair resolution. I conclude that this occurred here. I decline to reverse for further proceedings because of such a minor item. Also, as with the wall painting and trim, Mashak failed to bring to the circuit court's attention the court's failure to address the blinds when the court ruled. As I previously noted, an appeal should not be a substitute for

timely drawing the circuit court's attention to something the court did not specifically address.

*D. Bathroom Plumbing, Flooring, and Vanity*

¶12 Last, Mashak takes issue with the circuit court's determination on the bathroom damage. Mashak's argument proceeds as follows. During the trial, when Mashak described plumbing work he had done after Leis moved out, the circuit court effectively pointed out that Mashak was not "a certified plumber or anything like that," but when Leis testified that Leis had "monkeyed" with the bathtub plumbing so that it would drain, the court made no similar observation. Mashak seems to contend, based on this testimony, that the circuit court could only reasonably have found that the damage in the bathroom, presumably the plumbing, flooring, and vanity, occurred because Leis "monkeyed" with the drain and the "flipper nozzle."

¶13 Whether Leis's actions caused all of the damage Mashak claims is a question of fact. As to the bathroom plumbing, the court stated: "Replacing missing tub vent and drain, these are, again, different things that there is a discrepancy as to what the circumstances were when Mr. Leis moved in. I think that there were issues when Mr. Leis moved in." As to the vanity, which Mashak does not separately address on appeal, the court stated that it was "not satisfied" that Mashak had met his burden of proof. More generally, the circuit court highlighted Mashak's evidentiary deficiencies and determined that Mashak failed to meet his burden of proving that Leis caused the property damage. In context, this general finding by the circuit court appears to apply to the bathroom items.

¶14 In sum, the circuit court was not persuaded by Mashak's evidence, and Mashak has not demonstrated that this resolution of a factual dispute was clearly erroneous.

***Conclusion***

¶15 For the foregoing reasons, I affirm.

*By the Court.*— Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.



After service upon the Election Board was made and various pleadings (answers, motions and briefs) were filed, the Tribal Judiciary heard arguments on March 27, 2018 for three (3) motions: (1) Defendant Election Board's Motion for Summary Disposition; (2) Plaintiff's Emergency Motion to Stay Recall Election; and (3) Plaintiff's Voluntary Dismissal [of Charles "Jim" Petoskey].

Various pleadings (answers, motions, and briefs) were filed with the Tribal Judiciary regarding procedural and factual matters but the critical contested argument proffered by the parties revolves around jurisdiction of the Tribal Court to hear recall matters.

## **II. Opinion and Analysis**

At the forefront, the critical issue to be determined is whether the Tribal Court has jurisdiction to hear recall matters. The Defendant asserts that the Tribal Judiciary lacks jurisdiction over the subject matter because the Plaintiff has not alleged impropriety required by the Tribal Constitution at Article VII, Section 5(c). Conversely, the Plaintiff asserts the Tribal Judiciary does have jurisdiction to hear recall petitions under Article VII, Section 5(c) because the underlying statute at 5 GTBC §§201 et seq. is unconstitutional.

Without delving into the pleadings, procedural or factual, the sole question before the Tribal Judiciary is whether the Tribal Judiciary has jurisdiction to hear a recall matter in which no claim of impropriety is alleged. This question has already been examined and answered by the Tribal Judiciary in 2014 and, for this reason, precedent must control wherein the Tribal Judiciary remains firm that as the judicial branch, it is not the Tribal Judiciary's place to create law from the bench; the creation of laws is conferred to the Tribe's combined executive/legislative branch, the Tribal Council.

### **a. Precedent - *Raphael v. Grand Traverse Band Election Board***

In 2014, the Grand Traverse Band Judiciary, sitting en banc, held that the court does not possess jurisdiction to review decisions of the Grand Traverse Band Election Board relating to recall petitions or elections. *Raphael v. Grand Traverse Band Election Board*, No. 13-2189-CV-CV (May 21, 2014) (en banc) (attached as an appendix). The reasoning behind that holding was that nothing in Article VIII of the Tribal Constitution, which governs Tribal Councilor recalls, removals, and vacancies, authorizes the Tribal Judiciary to assert jurisdiction over recalls. *Id.* at 4-5. In *Raphael*, we detailed our analysis as follows:

Although the Grand Traverse Band tribal court is one of general jurisdiction, the Constitution limits the tribal court's jurisdiction over election and recall matters. In general, the Election Board's decisions in relation to election disputes and recall petition and election disputes are "final and conclusive." Grand Traverse Band Constitution art. VII, § 5(a) (election decisions); 5 Grand Traverse Band Code § 209(d) (recall petition and recall election disputes).

Article VIII governs recall petitions and recall elections. Section 1 governs recalls originated by individual tribal members. Section 1(a) provides that the Tribal Council must enact an ordinance to govern recall petitions and elections under Section 1. The Tribal Council enacted an ordinance to govern recall of elected officials in 1992. 5 Grand Traverse Band Code § 201 et seq.

There are two limitations expressed in the Constitution on the power of individual tribal members to recall elected officials. The first limitation, not at issue here, is that an elected official may not be subject to a recall petition in his or her first year of the official's current term of office. Constitution art. VIII, § 1(a) ("Any elected official of the Band shall be subject to recall at any time after holding office for one (1) year..."); 5 Grand Traverse Band Code § 201(b).

The second constitutional limitation is that no elected official may be subject to recall more than once per term. The Constitution specifically states, "[E]ach official shall be subject to only one recall petition per term." Constitution art. VIII, § 1(a).

\* \* \*

We must decline to decide the appeal on the merits and decline to accept the invitation by both parties to interpret Article VIII, Section 1(a). The structure of Article VIII must be read in its entirety, and to do so compels the outcome we reach today.

As we noted above, Section 1 governs recall petitions originating from voters of the tribe. Section 1(a) provides the two limitations on recalls – the one year buffer period and the bar on more than one recall. Section 1(a) also provides the number of signatures a recall petitioner must gather before the Election Board is required to hold a recall election. Section 1(b) gives the Election Board ten days to verify the signatures collected. Section 1(c) requires the Election Board to hold an election within 30 days of its verification of the required number of signatures. There is no provision for review by the tribal court of any stage of this specific process.

Conversely, Section 2 – governing the recall of tribal officials initiated by the Tribal Council – specifically provides for the participation of the Tribal Judiciary. In Section 2, the Tribal Council may refer elected officials subject to recall by the Council to the Tribal Judiciary. Sections 2(d) through (e) provide the procedural and substantive rules governing the Tribal Judiciary's role in adjudicating the recall of elected officials initiated by the Tribal Council. This court interpreted those rules in the foundational case, *In re McSauby*, No. 97-02-001-CV-JR, 1997 WL 34691849 (Grand Traverse Band Tribal Judiciary, July 29, 1997).

The Constitution does not afford the Tribal Judiciary *any* role in Section 1 recalls. We could perhaps locate jurisdiction in the ordinance enacted by the

Tribal Council that governs Section 1 recalls. But there we read, “Disputes over the validity of signatures and sufficiency of the petitions shall be decided by the election board *whose decision shall be final and conclusive.*” 5 Grand Traverse Band Code § 209(d) (emphasis added). This language mirrors the general exclusion of the tribal court from regular election matters under Article VII, Section 5(a) of the Constitution. There is no other provision for judicial review or involvement in any kind elsewhere in the recall ordinance.

Petitioner Raphael argues that the court should import its Article VII precedents into Article VIII disputes and find jurisdiction that way. We disagree. Article VII specifically allows the Tribal Judiciary a limited role in election disputes; specifically, the Tribal Judiciary may address “allegations of impropriety by the Election Board” under Article VII, Section 5(c). There is no parallel provision in Article VIII, and we decline to read jurisdiction into this Article, especially in light of a tribal ordinance expressly vesting “final and conclusive” authority in the Election Board to decide Section 1 recall matters.

*Raphael*, at 3-5.

We noted in *Raphael* that Section 1 of Article VIII governs the process by which individual Tribal Members may recall sitting councilors. The first line of Section 1(a) dictates that the Tribal Council must enact an ordinance to govern recalls by Tribal members: “An ordinance shall be enacted by the Tribal Council to provide for the recall of any elected official of the Grand Traverse Band.” The council did so on April 21, 1992. 5 GTBC § 201 et seq. A careful review of the recall ordinance shows that the Tribal Council placed the exclusive obligation to address recall petitions and elections on the Election Board and did not provide for judicial review of the Election Board’s decisions.

**b. Application of Raphael.**

The *Raphael* precedent unequivocally and unambiguously clarifies that the Tribal Judiciary does not possess jurisdiction over recalls. In this case, the plaintiff brings a suit attempting to invoke the power of the Tribal Judiciary to issue a stay delaying a recall election called by the Election Board. Plaintiff while citing to the Tribal Judiciary’s jurisprudence and court rules on Article VII, Section 5(c) of the Tribal Constitution, which authorizes the Tribal Judiciary to settle “allegations of impropriety” by the Election Board in the administration of regular elections. However, *Raphael* stands for the decision that Article VII, Section (5), including ancillary court rules, were not applicable then and are still not applicable today to create jurisdiction.

One might disagree with the Tribal Judiciary’s holding in *Raphael*, especially given the reality that any potential Election Board abuse of power is not reviewable by this Court. As we

stated in *Raphael*, “We take seriously our obligation to interpret the meaning of the rights of Tribal Members under the Grand Traverse Band Constitution, and we know from its pleadings, and its able counsel, and its carefully promulgated election regulations that the Election Board does as well.” *Id.* at 7. We similarly expressed our concerns about aspects of the Election Board’s decision in the *Raphael* matter itself, see *id.* at 7-9.

In the current case before the court, Plaintiff alleged violations of his due process rights that give us pause as well. For example, all the parties agreed in oral argument that 5 GTBC § 202(c), which provides the standard the Election Board must follow to allow a recall petition to proceed, is a scrivener’s error at best or an artlessly crafted word salad at worst. Additionally, plaintiff alleges that the Election Board improperly allowed the board chairman to preside over a hearing in this matter after the chairman signed a recall petition that was the subject of the hearing. Still, we declined in *Raphael* and we decline here to create a legal standard from Article VII into Article VIII of the Tribal Constitution.

The Constitution is clear that the Tribal Judiciary has jurisdiction under Article VII, Section 5(c) for allegations of impropriety and Article VIII Section (2) for removals. However, no such jurisdictional authority for recalls exists under either Article VIII Section I or within Tribal laws at 5 GTBC § 201 et seq. For this reason, the Tribal Judiciary will not entertain the act or notion of creating law from the bench; under our democratic system of government and the constitution that governs our Tribal Membership, the role of creating laws lies exclusively with the Tribal Council.

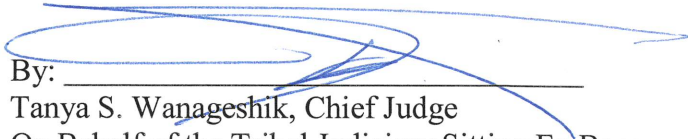
Our decision in *Raphael* was the first instance we are aware of in which the Tribal Judiciary interpreted Article VIII of the Tribal Constitution or the recall ordinance. *Raphael* is now nearly four (4) years old. The Tribal Judiciary continues to hold firm that Article VIII, Section 1(a) places the onus on the Tribal Council to legislate changes in the law regarding Tribal Court jurisdiction or perhaps even conduct a thorough do-over of the recall ordinance.

At bottom, this case is governed by the critical principle of separation of powers. Article V, Section 6 of the Tribal Constitution provides that the Tribal Judiciary is “independent from the legislative and executive functions of the tribal government and no person exercising powers of the legislative or executive functions of government shall exercise powers properly belonging to the judicial branch of government. . . .” Similarly, Article IV, Section 1 of the Tribal Constitution vests the executive and legislative powers of the tribe with the Tribal Council: “The

Tribal Council of the Grand Traverse Band shall be vested with all of the sovereign governmental executive and legislative powers of the Tribe not inconsistent with any provision(s) of this Constitution or federal law.” Most critically for our discussion today is the recall provision in the Tribal Constitution, Article VIII, Section 1(a), which vests the power to create laws for recalls with the Tribal Council; the power to create laws is not vested with the Tribal Judiciary. We reaffirm our decision in *Raphael* in holding that asserting the power to review the Election Board’s decisions, involving recalls without express authorization (jurisdiction), would be usurping the Tribal Council’s explicit powers.

We, therefore, reaffirm the holding in *Raphael* that the Tribal Judiciary is not empowered by the Tribal Constitution to review Election Board decisions relating to recalls. Plaintiff’s complaint must be and is DISMISSED with prejudice. As other motions are DENIED as MOOT.<sup>1</sup>

Date: 3/22/18

By:   
Tanya S. Wanageshik, Chief Judge  
On Behalf of the Tribal Judiciary Sitting En Banc

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<sup>1</sup> We granted the motion to dismiss Charles Petoskey as a defendant at the outset of oral argument, but this opinion and order makes that decision also MOOT.



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## The Seven Writing Strategies of Highly Effective Trial Judges

BY ROSS GUBERMAN ([HTTPS://WWW.LEGALWRITINGPRO.COM/BLOG/AUTHOR/ROSSGUBERMAN/](https://www.legalwritingpro.com/blog/author/rossguberman/)) · MARCH 9, 2014

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Asked to name the world’s best opinion writers, traditionalists might rattle off Lord Denning, Learned Hand, or Oliver Wendell Holmes. Modernists often prefer Antonin Scalia or Richard Posner. And the trendy might cite new kids on the block like Lord Sumption or Elena Kagan.

Those august names all deserve heaps of praise. But the fame that these judges enjoy raises questions of its own: Can you write a “great” opinion if you’re a judge who’s not a household name, or even especially influential? And can you write a “great” opinion in a case that’s not a high-profile constitutional crisis, but just another run-of-the-mill dispute in an overflowing docket?

I say “yes” on both counts. No matter how routine a case, and no matter how little time you have, you can write a great opinion. It may not be “great” for the ages, but it can offer readers a clear, accessible, and easy-to-follow analysis of your reasoning, with even a bit of flair or personality for good measure.

Let’s consider an example from a humdrum sanctions dispute: a routine order written by bankruptcy judge Benjamin Goldgar (<http://www.ilnb.uscourts.gov/judge-benjamin-goldgar-biography>) of the Northern District of Illinois.[1] Judge Goldgar is well regarded but hardly a household name, and the underlying subject matter is anything but sexy. If we dig into this terrific example of trial-judge writing, we can unearth seven key strategies that the name-brand judges use in high-profile opinions as well.

### First Strategy

#### *Easy Listening: Orient the Reader With a Narrative Opening*

Judges often admonish lawyers to “tell a story” in their motions and briefs, but many judges could follow their own advice in their opinions. Most opinions start with an anti-story—a stiff, formulaic passage larded with citations, dates, defined terms, and causes of action. If you’re not intimately involved in the case—and perhaps even if you are—you’re lost after just a sentence or two.

Yet opinions need not start so stiffly. Take the opening of Judge Goldgar’s order:

“ Denton Jackson is one of the most active consumer bankruptcy attorneys in this district, filing nearly 8,000 cases from mid-1996 to the present. More than once, though, Jackson’s efforts to get paid have drawn the court’s attention and resulted in sanctions. Now he faces sanctions again. Earlier this year, seven bankruptcy judges issued orders asserting that Jackson had filed false applications for compensation as counsel for the debtors in 317 pending chapter 13 cases. The applications were false, the orders said, because in them Jackson represented that he had entered into the court’s form retention agreement with the debtor, entitling him to receive a fixed fee of \$3,500 (a “flat” or “no look” fee), when in fact he had modified the agreement to charge additional fees. The orders required him to show cause why he should not be sanctioned for violating Bankruptcy Rule 9011(b).

This accessible opening features both the substance and the style of a true narrative.

First, the substance: The paragraph is built through a *who-what-when-why-how* exposition that draws the reader in by introducing the dispute and answering core questions.

And second, the style: Goldgar’s fresh, confident language is easy on the eye and ear. Not “on more than one occasion,” but “*more than once*.” Not “obtain payment,” but “*get paid*.” Not “however,” but “*though*.” Not “at present,” but “*now*.” He also sprinkles in some strong, active verbs: “*drawn*” and “*faces*” as well as “*filing*” and “*entitling*.” And yet his style also stands out for what is absent: no dates, no citations, no defined terms, no “regarding” or “concerning,” and, thank goodness, no “the instant dispute.”

In other words, we have the makings of a real story here—perhaps even one that you’d like to keep reading about.

## Second Strategy

### *Time Travel: Strip Away Needless Dates*

When I ask judges what they hate about briefs, the cry of “too many dates” often tops the list. Certainly some dates are necessary, but most are not, I’m told. After all, say these judges, it’s painful to read sentence after sentence that starts with “On October 21, 2008,” “On October 23, 2008,” “On October 29, 2008.” But guess what, judges: the same is true of opinions! One solution: As with briefs, an easy way to make opinions more readable is to replace some of the exact dates with words and phrases that explain what happened, in what order, and for how long. Goldgar gets it:

“ In May 2010, attorney Denton Jackson filed a chapter 13 bankruptcy case [] for debtor Sarah O’Neill. **Shortly after filing the case**, Jackson filed a form fee application, Form No. 23. In the portion of the application entitled “Use of Model Retention Agreement,” Jackson checked the box indicating: “The attorney and the debtor(s) have entered into the Court’s Model Retention Agreement.”

*Some months later*, chapter 13 trustee Thomas Lanner objected to Jackson’s application because the [Model Retention Agreement] between Jackson and the debtor (a copy of which Jackson had filed on the petition date) attached an “addendum” that prescribed fees in addition to the flat fee to which Jackson was entitled.

Judges of the world, declutter!

## Third Strategy

### *Order Out of Chaos: Use Bullets and Numbers for Clarity*

One of the best techniques for any lawyer or judge is to “translate” complex facts or arguments into a reader-friendly form. Your best friends here are bullet points and numbered lists, and Goldgar makes good use of both.

In relaying the facts, for example, he uses a clean set of bullet points to relay what most judges would have clumped together in a single tedious paragraph:

“ The addendum [to the Model Retention Agreement] went on to describe six charges for which the debtor would be liable:

- “[L]ate fees of 18 percent per annum from the date below plus reasonable Attorneys fees and court costs” for “any balance due Attorney which is overdue 30 days or more”
- A fee of “\$65.00 . . . for processing each NSF check” presented for the payment of attorney’s fees.
- Attorney’s fees at Jackson’s standard hourly rate . . . .

And later, in his conclusions of law, Goldgar numbers his list of reasons for rejecting the sanctioned attorney’s assertions:

“ These assertions [] will not wash. First, they are factually inaccurate. As discussed earlier, Jackson did not use the [Model Retention Agreement] with the addendum “openly,” . . .

*Second*, Jackson’s assertions are legally irrelevant. Again, an attorney’s Rule 9011 obligations are non-delegable. An attorney has a personal responsibility . . .

*Finally*, Jackson contends that the court’s General Order 11-2 issued in March 2011 confirms the reasonableness of his belief that his statements were true. According to Jackson, the General Order . . .

## Fourth Strategy

### *Take Me by the Hand: Sprinkle In Precise and Varied Transitions*

I might be a broken record when it comes to how the better advocates favor lighter and clearer transitions, but that doesn’t make the point any less true! And you know what I’m about to say: The best judges are just as keen on choice transitions as the best lawyers are. You can get a taste of what I mean by looking at a single Goldgar paragraph. His transitions are varied in length, diction, and even placement—few are weighing down the start of sentences, especially not “however” and “therefore”:

“ Jackson, *however*, claims otherwise. He contends, *first*, that he did in fact enter into the [Model Retention Agreement] in each case, and the representation in each form fee application was *therefore* “true in its literal sense.” Not so. *Certainly*, in each case Jackson and the debtor signed the document, and in no case did Jackson and the debtor alter the document physically by inserting or deleting terms on any of its pages. *But* the addendum Jackson admits using in conjunction with the MRA added terms that changed the compensation to which Jackson was entitled in the bankruptcy case. The addition of *those terms* in a separate document modified the MRA, making it a different agreement, *as much as if* they had been written into the MRA’s own margins. *Having added those terms*, Jackson could not truthfully represent to the court that he had entered into the MRA. *At best*, the representation was a half-truth, and a half-truth “can be just as misleading, sometimes more misleading, than an absolutely false representation.”

(That said, I’m not a big fan of using “certainly” to introduce a concession. For alternatives, consider “To be sure” or even “True enough.” But I much appreciate the quick short sentences like “Not so” and the varied sentence structure.)

## Fifth Strategy

### *Lighten Up: Replace Stale, Stodgy Language with Short, Fresh Words*

So much of what makes for great style comes down to a micro-level struggle to find short, punchy language for long-winded, abstract thoughts. In the passage above, for instance, rather than “*But* the addendum Jackson admits using,” Goldgar could have written “*However*, the addendum Jackson admits using,” yet that would have dragged the sentence down. And elsewhere, he could have written “*Additionally*, the responsibilities of the attorney were not limited to those specified,” but instead he began with “*Nor* were the responsibilities of the attorney limited to those specified.” Light is right.

Throughout his opinion, in fact, I spot a love for crisp language and an aversion to the bureaucratic clichés that mar so much legal writing.

Here’s my Goldgar-gleaned ten-tip cheat sheet:

1. *After*, not “subsequent to”

“ *After the December 2010 show cause order suggested his conduct was sanctionable . . .* ”

2. *Also*, not “moreover” or “additionally”

“ *The addendum also stated that it was “retroactive to cover . . .* ”

3. *As for*, not “with respect to” or “with regard to” or “regarding”

“ *As for Jackson’s claimed lack of intent to mislead, the test under Rule 9011 is objective, not subjective.* ”

4. *Even if*, not “even assuming” or “assuming arguendo”

“ *Even if Lanner had been knowledgeable on these subjects, moreover, and even if he had advised Jackson about the veracity of the fee applications . . .* ”

5. *Here*, not “in the instant case” or “in the present case”

“ *The equitable considerations here point to a severe sanction.* ”

(To avoid dragging the sentence down, put “here” near the verb as Goldgar does, not at the beginning of the sentence.)

6. *Shows*, not “demonstrates”

“ *The problem for Jackson is that the record shows he consulted Lanner about fee agreements other than the [Model Retention Agreement].* ”

(Just add a *that* (<https://www.legalwritingpro.com/articles/G64-stop-cutting-that.php>) after *shows* for clarity: “the record shows that he . . .”)

7. *So*, not “therefore” or “consequently” or even “thus”

“ *The fees for reopening the bankruptcy case [ ] were fees charged only “after the case [was] closed” and so, Jackson contended, were outside the MRA.* ”

8. *Those* (or *this* or *that* or *these*), not “such” or “said”

“ *The addition of those terms in a separate document modified the [Model Retention Agreement], making it a different agreement, as much as if they had been written into the MRA’s own margins.* ”

9. *To*, not “in order to”

“ *To be sanctionable, a misstatement or omission must be more than an innocent mistake; in making the misstatement or omission, the attorney must have been “culpably careless.”* ”

10. *Under*, not “pursuant to”

“ Under Rule 9011(b), an attorney or unrepresented party who presents to the bankruptcy court any “petition, pleading, written motion, or other paper” makes four certifications to the court.

## Sixth Strategy

### *I’m Only Human: Aim for the “Impure”*

Judge Posner splits judges’ writing styles into *pure*—“lofty, formal, imperious, impersonal”—and *impure*—“direct, forthright,” “informal, frank, even racy.” Posner’s own style is notably “impure,” and so are the styles of most of the world’s best-regarded opinion writers, from Lord Denning to Chief Justice Roberts.

Although the “impure” style can spill over into disrespect or self-indulgence, as long as you avoid the “even racy” part of Posner’s formulation, a frank and informal tone can make for a more enjoyable read and a more candid feel.

That very sort of personal touch pervades Goldgar’s entire opinion, a feat that is all the more impressive because the issues before him are so dry. Here are just a few of the ways he enlivens the tone of his opinions through fresh, colloquial language:

“ Flat fee systems are flexible enough, however, to take into account **that unusual animal**, the complex or involved chapter 13 case.

*Jackson’s misrepresentations to the court were quite serious, far worse than simply checking the wrong box on a bunch of forms.*

*If, as he now says, he did not actually intend to conceal anything or mislead anyone, he should certainly have realized that was the effect. The call is not even a close one. All told, Jackson’s moral compass badly needs repair.*

*Jackson gets no points for consulting counsel over a different ethical problem.*

*But Jackson’s “corrective action” was half-hearted at best. He filed amended MRAs in only thirty-three cases and withdrew fee applications in only eighteen. In several instances, moreover, Jackson added insult to injury by committing yet another set of Rule 9011 violations.*

## Seventh Strategy

### *Spice Girl: Exploit Marks That Add Interest and Vary Sentence Structure*

Many trial judges tell me that they just don’t have the time to craft beautiful and elegant and varied sentences. I get it. But opinions still don’t need to sound like a dirge, with one medium-long declarative sentence after another. In that regard, let me share a secret from the work of the best opinion writers. Spice up at least a few of your sentences by using a colon for explanations, a semicolon for sharp contrasts, and a pair of dashes for emphasis. Not surprisingly, Goldgar uses all three techniques:

*Colons for Explanations*

“ Lanner added that after he complained to Jackson about the addendum, Jackson filed what purported to be an amended [Model Retention Agreement] without the addendum that was **merely an altered version of the original**: Jackson had written the word “amended” on the first page and crossed out the phrase “see attached addendum,” but the “amended” MRA still bore the original date and signatures.

*A review of the dockets discloses that in thirty-three 2010 cases, he filed an amended MRA with no addendum attached. In ten of those cases, however, the amendments were unilateral: Jackson simply wrote in the word “amended” on the first page and crossed out the phrase “see attached addendum” on a later page.*

*Semicolons for Contrasts*

(In three of the ten cases, Jackson later filed genuine amended MRAs with new dates and signatures; in the other seven, he did not.)

“ And, of course, no attorney is ever required to participate in the flat fee system; a traditional fee application with a detailed itemization of services can always be filed.

For starters, Jackson did not consult Lanner about using the addendum with the [Model Retention Agreement]; he consulted him about using the addendum with other “customized” fee agreements.

Dashes for Emphasis

“ If no reasonable lawyer would have thought Jackson’s representations were true—and no reasonable lawyer would have—the “pure heart” he claims is beside the point.

So there you have it. These seven strategies take skill, but they need not take more time. And with most opinions being such dusty reads, even a little bit here can do wonders!

What are some other strategies that you like to see in trial-court opinions?

[1] The underlying proceeding is *In re Brent*. I’ve changed the parties’ names.

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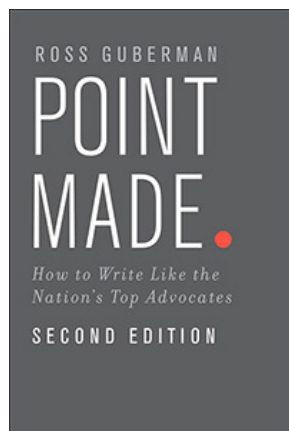
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## NANCY PINNO v. PATTI WACHTENDORF

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### United States Court of Appeals, Seventh Circuit.

**NANCY J. PINNO, Petitioner-Appellant, v. PATTI WACHTENDORF, Warden, Respondent-Appellee.**

**TRAVIS SEATON, Petitioner-Appellant, v. JUDY P. SMITH, Warden, Respondent-Appellee.**

**No. 15-3375, No. 15-3495**

**Decided: January 05, 2017**

Before POSNER, EASTERBROOK, and SYKES, Circuit Judges.

In *Presley v. Georgia*, 558 U.S. 209 (2010), the Supreme Court held that the right of a criminal defendant to a public trial, a right conferred by the Sixth Amendment, extends to the voir dire. *Id.* at 213–14. In the present case both petitioner-appellants argue that this right was violated by the decision of the state trial judge (the same judge in both cases) to forbid members of the public to attend the voir dire phase of the petitioners' trials in a Wisconsin state court that ended in their being convicted.

After the Wisconsin Supreme Court, rejecting the petitioners' Sixth Amendment argument, affirmed their convictions and sentences, they asked the local federal district court for habeas corpus. Both argued that they were entitled to a new trial because their Sixth Amendment rights had been violated. The district judge (the same judge in both habeas corpus proceedings) rejected their claims, awarding judgment for the respondents, who are the wardens of the prisons in which the petitioners are serving the sentences imposed on them by the state judiciary.

Pinno had been convicted of assisting in the mutilation of a corpse and interference with police. She had assisted her son in secretly disposing of the body of his girlfriend, whom the son had murdered a few weeks earlier. Pinno's assistance consisted of transporting the corpse in her car to a friend's house, where her son and a friend of hers burned the body. They then drilled a hole in the ice on a nearby lake and dumped the ashes through the hole, making it impossible for the police to recover any of the body of the murdered woman. For these offenses Pinno was sentenced to eight and a quarter years in prison to be followed by five years of supervised release.

But that gets us ahead of our story, which is focused on the trial, indeed the earliest stage of the trial. The trial judge called for a very large jury pool—a pool of more than 80 prospective jurors. He wanted to assure that enough seats were available for all the prospective jurors to be seated, and he also wanted to prevent members of the public, who would be seated in the audience section of the courtroom, from influencing the jury by remarks or facial expressions. He considered those to be dangers because the case, with its gruesome and bizarre facts, had attracted a great deal of publicity.

So before the prospective jurors entered the courtroom the judge ordered the spectators to leave, and the door to the courtroom to be locked until all the prospective jurors were seated. After they were seated the door was unlocked and members of the public were able to enter, though it's unclear how many entered, or could enter since the courtroom was crowded with prospective jurors and the judge had announced beforehand that he “want[ed] no one else in here during the entire voir dire process until the jury is selected.” Despite that admonition, since the door to the courtroom was open during the voir dire some members of the public—how many we don't know—may have entered, and stayed to observe the voir dire.

An alternative way of handling the crowded-conditions problem would have been to accommodate the members of the public in a different room in the courthouse, where they could watch the trial on a television screen. But no one suggested doing that; nor have we been told whether a suitable room and the necessary equipment existed.

We also don't know how many, if any, members of the public were in the courtroom during the voir dire. But we'll give Pinno the benefit of the doubt and assume there were too few to make the voir dire public within the meaning of the Sixth Amendment's public-trial right. Members of the public, most importantly friends, family,

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or other actual or potential supporters of a defendant, may be able from observing the voir dire to learn things that may help the defense—learn for example that members of the jury panel who end up being selected for the jury are visibly hostile to the defendant, glare at her, yawn and doze, or that the questions asked the prospective jurors by the judge or the prosecutor seem to invite them to regard the defendant as an evil, criminal person. These insights absorbed by the friends of the accused may help to strengthen her defense. Conceivably the presence of a defendant's supporters may also deter any impropriety by the prosecutors or judge, but this seems unlikely because the prosecutors and judge probably wouldn't know whether or which members of the audience were aligned with the defendant.

But the problem for Pinno is that her lawyers did not object to the public's limited access to the trial at the voir dire stage. Pinno calls that ineffective assistance of counsel, a separate ground for a new trial. But it cannot be presumed, and has not been shown in Pinno's case, that the failure of a defendant's lawyers to insist on ample seating space for the public during voir dire evidenced ineffective assistance prejudicial to the client. It may have been neither ineffective nor prejudicial, for it might well be in the defendant's interest not to have members of the public, as distinct from family members, friends, and other supporters, present for the voir dire. A trial may attract members of the public because they're hostile to rather than supportive of the defendant. That might have been a serious problem for Pinno, given the grotesque character of her crime.

The experience of the defendant in our other case, *Seaton*, was virtually identical to Pinno's, though he was convicted of a different and even more serious crime—first-degree reckless homicide: he had punched a person, and the person had died later that day as a result of the injury caused by the punch and the victim's resulting fall to the ground. Though *Seaton's* crime was less grotesque than Pinno's, it was homicide and would hardly have endeared him to the members of the public who attended the trial. Indeed, whereas he had killed a person, Pinno had merely assisted in the destruction of a corpse.

Whether the petitioners benefited or were harmed by the exclusion of spectators from the voir dire phase of the trial, their lawyers forfeited their clients' right to an audience by failing to object to the judge's ruling excluding the audience in whole or part. So the Wisconsin Supreme Court determined, and we are obliged to defer to that determination because it did not result in a decision that was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or that was “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

The petitioners' current lawyers, however, argue that lawyers can't forfeit a client's Sixth Amendment's right to a public trial (including a public voir dire stage of the trial); the right can only be waived—that is, there must be an affirmative statement either by the defendants themselves or by their lawyers acting under instruction from the clients that they do not want members of the public to be present in the courtroom, whether during just the voir dire or at other stages of the trial as well. To waive the right the clients would have to tell their lawyers to tell the judge that their clients were waiving in whole or part their public-trial right. But in the two cases before us the clients evidently agreed with their lawyers not to seek the admission of an audience during the voir dire stage. Nor is such agreement surprising, for as we said it's entirely plausible that a criminal defendant will be hurt rather than helped by having the public present at any stage of his or her trial.

The petitioners cite our opinion in *Walton v. Briley*, 361 F.3d 431, 433 (7th Cir. 2004), where we said that a failure by the defendant's (Walton's) lawyer to object to barring the public from attending the trial did not constitute a waiver by Walton of his Sixth Amendment right to a public trial. But that can't save the petitioners in the present case. For section 2254(d) authorizes a federal court to grant a state prisoner's habeas corpus petition only if the state court's decision of which the prisoner is complaining was contrary to U.S. Supreme Court precedent; it is not enough that the state court's decision is contrary to one of our decisions.



*Walton*, moreover, was a special case; and judicial opinions must be interpreted in context. In an effort to expedite Walton's trial the trial judge had conducted the first two trial sessions, at which most of the prosecution's evidence was presented (so they were critical stages of the trial), late in the evening—so late that the courthouse was locked. The consequence was that members of the public, among them Walton's fiancée, were barred from attending the sessions. The judge had made up his mind about an audience in the courtroom: there wasn't going to be one, and so an objection to the judge's decision wasn't going to do Walton any good in his trial. And thus his Sixth Amendment right had been violated.

Neither of the present cases is like *Waller v. Georgia*, 467 U.S. 39, 48 (1984), either, where the prosecutor asked for exclusion of the public from a portion of the trial proceedings and the defendant's counsel objected. There is no evidence in either case before us that anyone objected to the initial exclusion of the public from the courtroom to enable the entire jury panel to be seated. Given the number of prospective jurors to be seated the trial judge may have had no option but to exclude the public until all the panel members were seated. Maybe he didn't need so many prospective jurors for the voir dire, but that is not argued.

And so the judgments of the district court in these two cases must be affirmed. But we do wish to comment briefly on the length of the parties' briefs. They total 250 pages, of which 31 pages consist of the district judge's opinion (one opinion for the two cases). The other 219 pages are the parties' arguments. There is no justification for such verbosity. These two consolidated cases are simple and straightforward. Our opinion is only seven pages long; and while such compression is not to be expected of the parties, they should have needed, and used, no more than 100 pages at the most to present their claims fully.

AFFIRMED

POSNER, Circuit Judge.

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