Judge Pierre N. Leval

Judge Pierre N. Leval joined the United States Court of Appeals for the Second Circuit after being appointed by President Clinton in 1993. Before joining the Second Circuit, Judge Leval served as a judge in the U.S. District Court for the Southern District of New York. He was born in New York and earned his J.D. from Harvard Law School. Judge Leval served in the U.S. Army, and he clerked for Judge Henry J. Friendly of the U.S. Court of Appeals for the Second Circuit. He is also on the faculty of the New York University School of Law.

BAG: I wanted to ask you, first of all: is there a part of a brief that you consider most important?

PNL: Well, I think the argument is most important.

BAG: Why?

PNL: The argument is the place where the brief-writer really focuses on the reasons — on why that party should win. Many say that the statement of facts is most important. I don't agree. Without question, the *facts* are hugely important. But the answer to any argument raised in a brief will depend on how the facts and the law fit together. In a well-written brief, the statement of reasons in the argument section will include, even if it's repetitious, adequate reference to the facts that bear on that argument. You can't be arguing legal reasons independent of the facts. The argument section will show how the facts and the law fit together to call for a ruling in that party's favor. The statement of facts often meanders in a way that isn't all that helpful. Also, if the brief argues several different points, some of the facts recited in the fact statement will be significant for one point but irrelevant as to others. I recognize that the statement of facts can predispose the court in that party's favor — make that party seem sympathetic. But being sympathetic doesn't necessarily mean

you're going to win. You've got to have the law on your side as well. I recall instances — more than one — from my days in the district court when I ruled in favor of a party whose testimony I found was packed with lies. My sympathies went to the other side. But the lies were about things that, in the end, didn't matter. The crucial facts and the law were on the liar's side. So the unsympathetic liar won. For my money, the statement of reasons in the argument is where the payoff is.

BAG: I think Judge Learned Hand once wrote something about — or maybe it was just somebody writing an article about Judge Hand's opinions — that a lot of judicial writers, unlike Hand, would write up all their cases as if they were slam dunks and as if there were no doubt about it at all. What you seem to be describing about your own opinions — saying "One party's testimony was all lies," but still they win — sounds more like a Hand-like approach.

PNL: Well, I would always welcome being compared favorably to Learned Hand. I recognize there's not much basis for it. But I agree with him that one of the big flaws, one of the frequent flaws, in judicial writing is the tendency to overargue the correctness of the court's ruling. It may come from the fact that judges used to be lawyers advocating for their side and also from the natural competitiveness of human beings. But some questions are not easy to decide. I don't think judges should conceal the difficulty — should conceal the doubts about whether the reasons on one side overcome the reasons on the other. Courts shouldn't use rhetorical tricks to make the decision seem more obvious and persuasive than it was. They shouldn't exaggerate. If it's a close case, one that's not easy to resolve, the court shouldn't conceal that. Exaggerated arguments distort the law.

BAG: If you believe that, Judge Leval, you must see a lot of judicial writing that is somewhat disappointing because it's overstated.

PNL: I do. I agree with that. I think that judges very frequently cloud the law by rhetorical devices that are designed to make their solution to the problem seem more obvious or more clearly correct than it is.

BAG: And yet, the counterargument that I sometimes hear is that if you display some of the doubt and some of the difficulty in coming down a certain way, the opinion might seem wishy-washy. Why is that not true?

PNL: Will the opinion seem wishy-washy? What does that mean? And what does it matter? A judge's job is to analyze the problem clearly — to understand and state the facts clearly in relation to the law as it applies to those facts. Suppose the judge says, "The answer isn't easy. These respectable arguments favor the plaintiff. And these other respectable arguments favor the defendant. We think on balance (for reasons we explain) that the plaintiff wins, but we recognize that the arguments the other way have some force." Is that wishy-washy? I suppose people may say so, but so what? Precedential courts are not in the business of entertaining audiences. They don't write to please or to get voters to vote for them. They write for two purposes: first, to explain why one party wins the case — why one party gets the money or gets Blackacre; second, and sometimes more important, they write to clarify the law for future application to other cases. The facts of the future cases will never be identical to the facts of the precedent. How the precedent should apply to them will be distorted if the precedential decision exaggerates. A forthright explanation will better illuminate the law for the future, even if it's wishy-washy, than bogus, overinflated rhetoric.

BAG: Let's go back to briefs for a moment. If the argument section is the most important part of the brief, what is your entry into briefs? What do you look at first?

PNL: I generally look at the argument headings at the very front of the brief to get a sense of what's involved. It's annoying to be reading facts without knowing why I'm reading them. Sometimes a clerk will come in to me to discuss a case and will start telling me a lot of facts. I want to know, Why are you telling me these things? What is this going to be about? I like to know before I hear the facts what is the question I'm going to have to answer, so that I can tell, This fact is important; that fact is important; these other facts, they don't really matter at all. So I really don't like to read the statement of facts before knowing what are the legal questions involved. And then as I read the facts, I know what I think is important.

BAG: Do you think the same principle would apply to a bench memo or to a research memo? In practice, any reader needs to understand the question before just encountering a lot of facts.

PNL: Yes, I think so. And as a matter of fact, we have this habit in judicial opinions, and in briefs, of setting out the facts in the front, but it's not clear to me that that's the best way of doing it. I mean, it's good to have them somewhere where you can find them, and they might as well be in the front. But I think a well-written brief, while it has the facts section in the front, in its argument section, even at the risk of some repetition, is going to repeat facts that are crucial to this argument, so that the important facts are built into the argument, and the argument is molded around the facts that it depends on.

BAG: Do you think there's a problem with counsel — a fairly pervasive problem — of having a stand-alone statement of facts, and then not adequately integrating those facts into the argument section?

PNL: Yes, I think that weakens the brief. You need to argue the facts. In appellate courts now, the practice of the argument of appeals has changed enormously from what it was quite a long time back. For one thing, in the old days courts had plenty of time to hear arguments, and they generally had not studied the case before the argument. And so arguments in courts of appeals would begin with long statements of facts. Today, time schedules are quite tight. We characteristically accord 10, 12, 15 minutes to a side in appellate argument. The judges have studied the case, and if counsel starts out in the old-fashioned way that we learned in law school, saying, "The facts of this case are . . ." and starts to recite them, it will be about 10 seconds before a judge cuts them off and says, "We've read the briefs, counselor. Will you get to your arguments?"

BAG: How important is the statement of the issues?

PNL: I think it's quite important. I think that successful advocacy requires that the issue be framed in a manner that's favorable to the desired result. It's a challenge, in brief-writing and in advocacy, to frame the issues in a manner that will compel the answer that counsel desires. I think it's also extremely important in good judicial writing that the judge understand exactly what is at issue.

BAG: Have you noticed that the "Whether" one-sentence format kind of leads to an inept framing of the issues?

PNL: Yeah, it's often tough to do it well. Sometimes the issue is simply too complicated to pack into one phrase. It's not even a sentence; it's a sentence fragment. And there are times where

the questions presented are totally unhelpful, both to the court and the arguing party. It is not helpful to the arguing party to simply present the question in a neutral way that doesn't present any reason to side with the plaintiff rather than the defendant: "Whether the contract provided a right to enter the property at will." Well, there's nothing about that statement that gives you a clue whether you should think that there was such a right or wasn't such a right. I think that counsel miss an opportunity when they draft the question presented in that down-the-middle way that doesn't try to build in reasons that favor their side. I think there should be a close relationship between the formulation of the question presented and the argument heading later on in the brief. Both of them should be structured in a manner that not only states what the issue is, but builds into the statement an argument why the answer should be the one that favors that lawyer.

BAG: The way you're talking about issue-framing reminds me very much of something Karl Llewellyn said in a speech a few days before he died: "the first art is framing the issue so that if your framing is accepted, the case comes out your way — that you win." This was, however, the only point that I know of on which Charles Alan Wright and I fundamentally disagreed.

PNL: Oh, really?

BAG: Because I'm with Llewellyn, and I think like you — that it should favor the litigant that you're writing for. But Charlie believed that legal issues should be entirely objective so that you wouldn't know how it should come out from reading the question.

PNL: That the framing of the legal issue should be entirely objective?

BAG: That the framing of the legal issue should be totally objective.

PNL: I guess we're talking about psychology, essentially. We're saying, "How are you more likely to persuade the judge?" I suppose that I understand Charlie's argument. If you frame the question presented in a manner that's overaggressive, the judge might react adversely. The judge might think, Oh, I'm being manipulated. And maybe that's right. But I would counter that if you try to do it in a manner that seems to be perfectly fair and objective, while at the same time you are furnishing the reasons why it should come out your way . . . it's a tall order [chuckling].

BAG: The more I've experimented with framing the issues, the way I've found to do it in a way that favors your side is to write it syllogistically — where you have a major premise and a minor premise built in. But you try to keep it short — under 75 words or so. Do you see very many issues like that in the Second Circuit — where people will break it out into separate sentences, culminating in a question mark pretty rapidly, but laying out some of the premises?

PNL: It's rare. It's rare. My impression is that, nowadays, people don't pay a lot of attention. It's only the best lawyers who are extremely careful and thoughtful about that aspect of their brief. Most of the briefs you see have not given much thought to the questions presented. They just put something there as if it didn't matter at all. I don't think this is the world's most important thing. The first question you asked me was, "What is the most important part of the brief?" I would never say that the question presented is the most important part of the brief. I just think it is a little opportunity to persuade. You ought to make the best use of every part of it, and you can get some use out of the questions presented.

Now, I completely agree with an aspect of Charlie's view of this, which is that if you overstate your case — if you present the question in a manner that is obviously manipulated and false and illogical — you're going to turn off the court. You may lose the case right there. So exaggeration . . . it's a terrible mistake for a lawyer under any circumstances to say something indefensible, to say something in any part of his brief or performance that will turn off the jury, the judge, the reader of the brief, whatever.

BAG: How often do lawyers make indefensible statements — engage in obvious hyperbole before you?

PNL: They do it. It's hard to say how often, but I'm remembering an oral argument a few years ago. The plaintiff was a salesman who had been fired. He alleged discrimination. I don't remember the details. The plaintiff's job was to service a client of the employer. The client didn't like the plaintiff — complained about him — and the plaintiff got canned. The defendant — that's the employer — had good arguments available. The plaintiff was fired for reasons that had nothing to do with discrimination. It was because he had done a bad job of pleasing the client. Instead, he opened with an exaggerated argument: "The fundamental rule is, the client is always right." And I said, "You mean to say if the client doesn't want to deal with a salesperson who's black, or who's Jewish, or who's Catholic, or who's French, that that means the boss is entitled to fire the salesperson? The client is *always* right?" "Well, I wouldn't say that, Judge." "But you just did." So this was a lawyer who came close to blowing a winning case with the first words out of his mouth.

BAG: How important is the look of the page to you as a consumer of briefs? Do you care about, or do you notice, or do you

think it's maybe even subliminally persuasive how well the lawyer knows how to lay out an argument, just visually?

PNL: I'm not sure if I know how to answer that. I'm probably like everybody else: manipulated to some degree by an attractive-looking page. When you pick up a book and the print looks nice on the page — there's something that's comforting and pleasant about reading it — I have no doubt I'm vulnerable to that kind of seduction. But I hope not too vulnerable. I hope I retain my ability to focus on the issues rather than on the aesthetics of the brief.

BAG: Are there any tricks of typography that bother you?

PNL: [Chuckling.] Well, at my age I need large type. Recently, we've made a requirement that appellate briefs be printed in — I forget what it is — 14-point type?

BAG: 14-point.

PNL: I'm grateful for that.

BAG: Do you see excessive boldfacing, underlining, excessive italics, and that kind of thing?

PNL: Sometimes, but it doesn't bother me. I really try to focus on what the issues are.

BAG: Let's talk about mediocre briefs. What is it that makes so many briefs mediocre that so many lawyers ought to work on to improve them significantly?

PNL: It's hard to generalize. There are so many reasons why a brief might not be very good. Writing a brief is a high art, and it requires a lot of work. It is often said, and I think it's quite right, that hard work is more important than anything else in litigation — that the litigant, like the judge, needs to think very deeply, carefully, analytically about the issue being argued. Often you see slapdash briefs that mechanically toss off citations or quotations, that argue in a conclusory manner without really mastering or presenting

a good explanation of why their side is consistent with the legal precedents and governing law and should win. You not only should show that the law, as it exists, favors your side winning, but you might also need to show that this is good, that the law should be interpreted that way, that this is a good interpretation. Sometimes counsel faces a situation where the precedent is unfavorable, and the lawyer's job is to convince the court that the court should either about-face and reject the old precedent, or find a way of distinguishing this case, or saying that that precedent only goes that far and this case is in another realm. So arguing a case is an extremely demanding job, and people who are very good at it and work hard at it do it well, and people who don't work at it or aren't very good at it don't do it all that well [laughter]. It's like anything else. We've talked previously about the importance of relating the facts to the arguments. If counsel argues the principles of law in a very abstract way that fails to show how *these* facts are involved in *these* principles of law and why it's important that the law be interpreted to favor his client on *these facts*, that would be a failing. That would be a mediocrity in the brief.

BAG: How would you characterize the quality of the briefs that you generally see?

PNL: Oh, they range from superb to awful. I guess the greatest number are so-so — not very impressive but reasonably workmanlike.

BAG: What are the qualities of a superb brief?

PNL: Well, I guess first of all, in order to be superb — to really get rave reviews — the brief needs to be taking on a challenging, difficult question. If you have a question, an issue, in which the law clearly and obviously favors your side and it's right squarely on point, right down the middle, your

brief — even getting as good as it can be — probably won't rate as superb because it's too easy under those circumstances. A superb brief is a brief that takes on a difficult job and makes a persuasive argument that a less skilled or competent lawyer might not have succeeded in making. But counsel should not be worried about writing a brief that will merit the label "superb." Counsel's job is to write a brief that will win the case. Looking for high marks may be risky and counterproductive. Sometimes a brief that's workmanlike and adequate is what's best.

BAG: I want to follow up on something you said earlier about showing not just that the law is on your side but that the result is just and right as well. Why is that important — not just simply to show that you have met the three prongs of some test but that the result is also the just result?

PNL: There are times when courts state the test in an inadequate fashion without having foreseen all the possible variables. A prior opinion says, "The essential elements of the test are A, B, and C." And the facts of this case may reveal that that's not a sufficiently subtle or good test — it's a test that was really devised without sufficient forethought about certain kinds of future cases — and that the test shouldn't just be A, B, and C, but maybe instead of C, it should be C-prime, something a little different from C. Or maybe it should be A, B, and C, unless D is present, in which case — even with A, B, and C — D would require a different result. So it's not enough just to say, "Oh, the prior case said A, B, and C; in this case we've got A, B, and C — end of inquiry." You may need to persuade the court that when the court previously said A, B, and C, they got it right, and the A-B-C test produces a satisfactory result in this case. Or counsel on the other side may need to argue that the A-B-C test was fine

for those facts, but the test doesn't work when D is present. The prior court was not anticipating a case of this nature, where D is also present — D changes the math.

BAG: Do you have any particular pet peeves as a reader of briefs? Does anything irk you?

PNL: Well, I'm irked by overargument. Perhaps I shouldn't be irked because counsel do the best they can. And sometimes I find it unfortunate when judges berate lawyers, in criminal cases particularly, when the lawyer makes bad arguments — I probably do it too — and say, "Why are you arguing this? That's ridiculous." Well, a lawyer has a job to do and is doing the best the lawyer can. The lawyer appealing a criminal conviction has an obligation to find and make the best arguments that can be found. Sometimes the best argument available is worthless. That's not the lawyer's fault. But you often find a lawyer exaggerating their points or going overboard. That's annoying and unhelpful to their case.

BAG: You clerked for Judge Henry Friendly here on the Second Circuit?

PNL: I did.

BAG: What did you learn about writing from him?

PNL: I think I learned something very important about writing. A lot of people take a view that judges, in writing their opinions, should make use of rhetorical devices to produce better, more readable prose. To the extent the goal is clarity, then I agree. But if the goal is to produce prose that is more beautiful, more imaginative, more lively, more captivating, it's a big mistake. If Friendly had a failing — he didn't have many — it may have been that his writing is sometimes hard to follow. One reason was perhaps that he assumed a degree of intelligence on the reader's part that approached his own, but nobody's does. On the other hand, among his great

strengths was that he saw very clearly what the problem was, and he addressed it very directly, and he never tried to mask the difficulty or complexity of the problem. He would present his explanations in their full complexity. He would not use rhetorical devices to make it seem as if the answer was easier than it really was. When judges use these rhetorical devices, they obscure the issue and provide less useful guidance for the future — less valuable ability to distinguish this case from another case — than if they dealt with the full complexity of the problem, even if it makes tough reading. Can I read you an example?

BAG: Sure, sure.

PNL: I wrote about this point a number of years ago, and I was just looking at it before you came. And I was contrasting Friendly . . .

BAG: Can I see the book?

PNL: The book is published by Yale.

BAG: I have this book.

PNL: Well, I was a participant in that symposium, and I talked about my disagreement with the notion that judges should try to write great literature. That's not what they're there for. I talked about some of the phrases from judicial writing that have been admired — unwisely in my view: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*"[1] — a phrase that's much admired, but it seems to me to have done very little to clarify the reasons for the opinion in that case. Or "Property does not have rights. People have rights."[2] Or here's this famous one about pornography: "After saying that only hardcore pornography is

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[1] *Lochner v. N.Y.*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[2] *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).

unprotected, I shall not today attempt further to define it, and perhaps I could never succeed, but I know it when I see it, and the motion picture involved in this case is not that."[3] That seems to me to be abdication from the judge's duties. The judge's duty is not to write some aphorism that will be very quotable. We could say the same about *principal place of business*: "I shall not today attempt to define it, but I know it when I see it, and this is not a principal place of business" [laughter]. A judge's duty is to have reasons and explain what the reasons are for deciding a case one way or another. I'm getting away from Henry Friendly. Friendly didn't deal in aphorisms like that. He would explain without dodging necessary complexity. Here's an example from an opinion he wrote in the year I clerked for him — this had to do with a *Palsgraf*-like situation, *Wagon Mountain*-type situation. He wrote, "We see no reason why an actor engaging in conduct which entails a large risk of small damage and a small risk of other and greater damage, of the same general sort, from the same forces, and to the same class of persons, should be relieved of responsibility for the latter simply because the chance of its occurrence, if viewed alone, may not have been large enough to require the exercise of care. By hypothesis, the risk of the lesser harm was sufficient to render his disregard of it actionable; the existence of a less likely additional risk that the very same forces against whose action he was required to guard would produce other and greater damage than could have been reasonably anticipated should inculpate him further rather than limit his liability."[4] Well, that's

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[3] *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (the quotation being somewhat modified).

[4] *Pet. of Kinsman Transit Co.*, 338 F.2d 708, 725 (2d Cir. 1964).

a horrendous mouthful. As literature, it's awful — but as law, it was superb. It explained a very complex problem and explained it clearly. If the explanation requires that kind of complexity, a judge shouldn't shirk from it just because it won't play well on Main Street.

BAG: What is your view, Judge, of footnotes?

PNL: I don't have a very strong view on footnotes. They're fine. They often serve a good purpose. If it would be helpful to explain something a little further, but it distracts from the central argument, it's often helpful to put it in a footnote.

BAG: Judge Pratt, I think, used to circulate an annual count of "footnoters" on the Second Circuit, I guess with the idea that they were almost footnote offenders. How did you fare?

PNL: That was not his greatest contribution to the law [laughter]. I know that Justice Goldberg told his clerk, who became Justice Breyer, "Don't ever use footnotes," and years ago, when Breyer was an appeals judge, I heard him say that he never had. I'm not sure that he's adhered to that. I think it's a little fetishistic. Footnotes often have a useful purpose.

BAG: I've heard a report in the last two weeks that Justice Breyer has backslid on that point.

PNL: Well, if so, that probably was good reasoning on his part, good thinking. I was just working on a footnote earlier today in which we are interpreting a provision of New York law, and there is a 1931 New York holding that seemed to me to depend on an antiquated, illogical, and bad proposition of law. My case did not turn on that proposition of law, but it was peripherally involved. I wrote a footnote saying something to the effect that "I'm not at all sure that the New York Court of Appeals today would adhere to what it said in 1931, which has been rejected by the Restatement." I thought it was worth putting this into our opinion. It might

stimulate litigants to ask the New York court to take a new look at the question. But it did not belong in the body of the opinion. A footnote seemed right.

BAG: Judge Leval, you have two portraits that I saw in your reception area: one of Judge Friendly and one of Judge Weinfeld. And you mentioned to me as we were coming in that Judge Friendly would sometimes write with string citations. If I recall correctly, Judge Weinfeld put citations in footnotes.

PNL: Yeah, I think he did.

BAG: Did you ever discuss this with him?

PNL: No. We discussed a lot more important things — and more interesting [laughter].

BAG: Would you be surprised to learn that I think that this is very important [laughter]?

PNL: Really?

BAG: Well, why is it necessary in the beginning of the twenty-first century to have volume numbers and page numbers in the middle of text?

PNL: Oh, no. I think putting citations in footnotes is fine. I think that it can be excellent to put the citations in footnotes. Yeah, I think that that's just fine. But on the other hand, I can't say that the 99.999 percent of the judges who put their citations in the text are committing a terrible offense. I wouldn't be the least bit opposed to a revision of the whole judicial system that would put the "131 F.3d 992, 994" down in the footnote; I think that would be just fine.

BAG: Spottswood Robinson did that in 1967, and then John Minor Wisdom and Alvin Rubin started to do it in 1983. But it does seem to improve the flow of the writing.

PNL: Oh, sure.

BAG: Why do you suppose we're so slow to reform that?

PNL: The practices of courts and judges have changed less over the years than practically anything else on the face of the earth. Judges don't need clients. Judges don't need to modernize in order to continue to exist. Everybody who's in business, whether it's in the business of teaching . . . if you're teaching, you need to attract students to your university or your school. If you're in business, you need clients. Judges don't need clients. And as a result, judges are pretty slow to reform the way they conduct trials and write opinions. So you don't get a lot of reexamination of whether there are better ways to write judicial opinions. Putting citations in footnotes would be just fine, but it's hard to get courts to change their practices. A few years back, my brilliant and wonderful colleague Jon Newman had a simple and superb idea. It involved numbering the paragraphs of our opinions so that pincites would identify more precisely what they relied on. It was a great idea, but it takes more than a great idea to change judicial practices.

BAG: Does it matter whether most citizens can understand judicial writing?

PNL: It's a nice idea but not really attainable. In many ways, this doesn't really matter because, by and large, the citizenry do not read the opinions. What the public reads about judicial opinions is what the press has digested and reported. Writing so that the general public will understand sounds too good to be true, and it is. Law is complicated. Understanding law requires years of study and experience. Terms of art that are expressed in a concise phrase are symbols that incorporate volumes of complex background. Someone who has no familiarity with that complex background cannot understand the terminology. I sometimes make a special effort to write an opinion that will be understood by one with

no legal training. At times I've received compliments from nonlawyer friends who tell me they understood my opinion perfectly and then go on to demonstrate that they didn't understand it all. I don't think this is a goal that can realistically be achieved.

BAG: How important is it that judges write well?

PNL: It depends what you mean by "writing well." It's extremely important that they write well, in the sense that they state clearly what their reasoning is. And of course, this is something that feeds on itself — how clear your thinking is depends to some degree on how clearly you can express it in your writing. Often, one thinks that one has understood a proposition very well, but when one tries to spell it out, one hits roadblocks and finds that one has really not understood it as well as one thought. So clear writing is conducive to clear thinking and ensures that the thinking really will be clear. And furthermore, it's extremely important that the judge communicate clearly what the reasons really were that justified this opinion — to clarify where the law is going, to help lawyers advise their clients, and to help future opinions, and to help lawyers write briefs in the future — it's very important that the reasoning be clearly explained. But that doesn't mean it has to be beautiful writing; it can be ugly writing. That doesn't matter. Judges shouldn't strive for beauty in their writing. In fact, when they do, they do a disservice to their profession and their job. And why do I say it's a disservice? Because it's so hard to think clearly and write clearly about these complex problems. It is so difficult that you need to devote all of your energy and all of your available time to that objective. And to the extent that you were diverting your energies and your time and attention to literary beauty in the writing, you are likely sacrificing clar-

ity. First of all, you're going to fail because none of us have any reason to think we're great writers. We're not great writers. We have captive audiences — they have to read what we write because it defines the law. They don't read us because of the beauty of our prose; they read us because they need to argue their next cases and to counsel their clients. We owe it . . . our job requires that we devote all of our energy to the clarity of our thinking and explanation — not to rhetorical devices that make us look like great prose stylists. The other point is that by doing that, we cloud rather than clarify. We make it less clear exactly what the issue or the determinative factors were.

BAG: How would you characterize Judge Weinfeld's prose style?

PNL: He was an extremely careful, methodical judge. There were significant influences from the fact that he was a district judge rather than an appellate judge. He was very painstakingly attentive to demonstrating that his decisions were faithful to the precedents. He was not particularly into presenting things as if he were carving out new interpretations. He was an extremely assiduous, conscientious, hardworking judge beyond . . . Well, when he was a judge, he was well known when he was young for arriving at the courthouse at 6:15 in the morning. But that was nothing compared to when he arrived when he was old. When he moved uptown from the East Village, he began to leave his home at 3:15 in the morning. He took the 3:15 Express at 59th Street, and he'd arrive at 3:45 in his office and start his day of work. But his writing was quite different from Friendly's: it was more devoted just to showing that for every proposition he uttered there was sound precedent, and he was staying within it.

BAG: Who are the judicial writers on the bench today that you most admire?

PNL: Oh, I think Steve Breyer is a terrific writer and a terrific thinker — I think he's a great judge. So is Ginsburg. Dick Posner is a splendid judicial writer, much better, I think, in his judicial writings than in his nonjudicial writings, in which he's enormously prolific and, I think, less careful — appropriately so. His judicial writings are splendid. Mike Boudin is an extraordinarily fine judicial writer. I'm not mentioning my colleagues on this court because I think they're all excellent. We have a fabulous court. I wouldn't distinguish between them.

BAG: Of course. I blush, in a way, to ask you a question like this, just because I have a feeling you're sort of impatient with minutiae, but do you have a view on contractions?

PNL: Do I have a view on contractions?

BAG: *Can't*, *won't*, and so on.

PNL: No. I don't use them a great deal in opinions, nor do I abjure them. I don't think it's terribly important whether one uses them or not. I think the payoff in good advocacy and good judicial writing has to do with things very different from that sort of rhetorical trivia.

BAG: How much can the quality of writing — the quality of advocates' writing — affect the outcome of the case?

PNL: How much can the quality of the advocate's writing affect the outcome of the case?

BAG: Can bad writing lose a case, and can good writing help win a marginal case?

PNL: Sure. Sure it can. It's embarrassing to say so because a judge ought to believe in the principle that the case should come out right, and is not going to have the result changed because the one side got the more muscular knight arguing in his favor. Now, I suppose you're probably asking about appellate. Of course, if you're asking about jury trials,

obviously the more charming and the more well-spoken lawyer can quite easily influence a jury better than a lawyer who lacks those qualities. Does the same thing hold true when you're talking about a lawyer's arguments before a high court? Well, one hopes it wouldn't happen too often, but it surely happens sometimes. For example, there are times when a lawyer fails to make the winning arguments and instead advances losing arguments. So I don't know how many times I may have made a wrong decision in a case because the lawyer never made the right arguments that would have been winners. As I mentioned to you earlier — it happened to me very recently — that if we had just sat there and listened to the arguments the lawyer was making, they would have been losers. But we had to practically force the good arguments down the lawyer's throat to get him to make them.

BAG: Do you have any views on how legislative drafting and contractual drafting could be improved?

PNL: One thing I know about legislative drafting is that it's very, very difficult — it's extremely difficult. It's awfully easy for us judges to sit back and scoff at what bad drafting we frequently find in statutes. But it's really hard. It's very, very difficult.

BAG: Why is it so hard?

PNL: Because you just cannot anticipate all the things that will come up. Legislative drafters write a rule to govern a set of facts they have in mind. But then a million variants arise that no one could've anticipated, and a million questions arise whether the rule does or doesn't cover them. Today, Congress takes a very different view of legislative drafting from what it had a number of decades back. It used to be that Congress and the courts were in a kind of partnership. Congress would draft statutes that would give a general

direction, setting out the general principles. Usually, they were very short statutes that would tell the kind of thing that Congress had in mind, without trying to spell out every detail. ("Every contract, combination . . . or conspiracy, in restraint of trade . . . is . . . illegal."[5]) Then, in litigated cases presenting innumerable variants of facts, courts would work out the details so as to carry out the purposes of the statute. It was a working partnership. Nowadays, the view prevails in Congress (and among some judges) that courts are the enemy of Congress — determined to undermine what Congress intended. So Congress undertakes to draft new statutes spelling out every conceivable detail so that no court will ever have the opportunity to interpret and undermine. Well, it can't be done. There is no such thing as anticipating every circumstance that will arise. There is no such thing as eliminating ambiguity from statutes. And the more one writes, the more ambiguities one creates. I think Congress makes a mistake in trying to write statutes in this manner. While I recognize the value of having the law spelled out in a statute where it's easier to find, it has become extaordinarily difficult to understand statutes because they are now so complicated and hundreds of pages long. I think that the enterprise functioned better when Congress wrote its statutes more simply rather than trying to answer every question that will arise, and regarded courts as their partner rather than an enemy that's trying to undo the will of Congress. That's not what courts are trying to do. Courts are trying to interpret the statute faithfully, but it's not always easy.

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[5] 15 U.S.C. § 1 (2012).

BAG: How does this observation play out for contractual drafting? That is, don't contract drafters try to do the same thing and hem in judicial discretion?

PNL: Sure they do. And it's a meaningful analogy because, when parties create a contract, they are essentially creating the law that will govern the transaction, or the relationship, between them. But the interests involved in contract drafting are very different from legislative drafting. A statute affects the public interest, and the court has as much interest as Congress in protecting the public interest. A contract affects only the interests of the parties — which one will prevail over the other in some future dispute. When that dispute arises, the court will have no reason to favor either party. There is virtually nothing to tell the court how to decide other than the words of the contract. The parties therefore have an interest in nailing everything down as clearly as possible. At the same time, they are constrained by the expense of paying lawyers to anticipate and negotiate every conceivable eventuality. What's at play is very different.

BAG: Well, Judge Leval, I want to thank you very much for your time today.

PNL: Well, it's a pleasure.

BAG: Is there any question that I should have asked you that I didn't? I could ask you: is there a particular way that you think that judicial writing could be improved?

PNL: We tend to compose our opinions by stitching together quotations from prior opinions. Often, in the explanatory portion of an opinion, every assertion of a proposition of law is in quotation marks — copied from a prior opinion. I think this is a mistake. It substitutes quotation for thought and often produces confusion, rather than clarification. The impetus may be a desire to project fidelity to previously

established law — "See, I am not an activist. Everything I say comes from a prior opinion." Or it may be the excessive influence of our law clerks. Whatever lies behind it, it works poorly. The words quoted were often written about something significantly different. Furthermore, the passage may have been dictum and may have received little attention. The fact that it was said before doesn't necessarily mean that it is the best way to explain the law, especially as it applies to the new case. Often the judge who wrote the words in the prior case would not have intended them to apply to this significantly different situation. Of course, judges must remain faithful to binding precedent. But we would do much better if, instead of fetishistically quoting from prior opinions, we would think hard about explaining in the best and clearest way exactly what are the reasons that compel the judgment in this case. And every time a court states a rule in a manner that will become precedent, the court should test its formulation of the rule against the most inhospitable hypothetical facts. If the rule continues to work as intended, even in the most inhospitable facts, then it has been correctly formulated — at least correctly so as to achieve the court's objective. If, on the other hand, the rule doesn't work in other fact situations, that means it hasn't been formulated properly and the formulation needs some tinkering — some revision. Holmes told us that hard cases make bad law. The way I see it, it's the easy cases that often make bad law. Why? In easy cases, where there can be no doubt which side should win, the court has less incentive to think carefully about the formulation of the governing rule. Virtually any formulation will come out with the deserving side winning, and the court is less likely to subject its formulation to rigorous testing to see if it still works in less favorable circumstances. In hard cases, where there are respectable arguments going both

ways, the court is more likely to be aware of the danger of a sloppy formulation of the rule — one that goes too far in this or that direction. Another closely related point is that we very frequently fill our opinions with pronouncements of rules that don't necessarily have any bearing on who's going to win the particular case, or why. This is the modern manner of writing opinions — a minitreatise, broadly explaining the whole area of law. I think it's misguided. I think that what we should do is focus on exactly what is the question at issue, and set forth rules only to the extent that they help explain why this party wins and that one loses. Writing an opinion in a manner of a treatise doesn't fulfill the function of the opinion, which is to explain in a manner that clarifies the future direction of the law why one party wins and the other party loses.

BAG: It's a common failing, isn't it?

PNL: It's extremely common. I don't know what it's attributable to, but opinions are longer, more encyclopedic, and less focused on the determinative issue.

BAG: What about the problem of overquoting in briefs?

PNL: The function of a brief is extremely different from the function of an opinion. The objective of a brief is to convince the judge to go your way. The objective of the opinion is to write clear law that clearly explains why the winner wins the case. If the brief-writer finds a statement in an earlier opinion that seems to favor his side of the case, he must quote it as a precedent favoring his side — even if, in the prior opinion, those words were ill-conceived and problematic, or were written about a very different set of facts. The lawyer's duty is to win for his client — not to clarify the law. That responsibility belongs to the court.

BAG: Well, Judge, thank you again.