Chief Judge Sandra L. Lynch

Judge Sandra L. Lynch is Chief Judge of the United States Court of Appeals for the First Circuit. She joined the bench in 1995 after being appointed by President Clinton. She is the first woman judge — and Chief Judge — on the First Circuit. Judge Lynch was born in Illinois and earned her J.D. with honors from the Boston University School of Law. After law school, Judge Lynch clerked for Judge Raymond J. Pettine of the U.S. District Court for the District of Rhode Island. She then served as Assistant State Attorney General for Massachusetts and as General Counsel for the Massachusetts Department of Education.

BAG: I'm here with Judge Sandra L. Lynch, United States Circuit Judge in Boston, Massachusetts, and we're going to talk a little bit about legal writing today. I wanted to ask you to talk a little about the importance of logic in brief-writing.

SLL: Well, there is a certain accepted conventional architecture to how a brief is structured, but I think before we get there, the point is that that architecture actually reflects, in many ways, the architecture of the law. I think that the law is a logical system. People sometimes laugh when I say that, but in fact, my class in Logic and Philosophy in college was the single best training for law school that I could have had. And so I think that the lawyers, before they write briefs, ought to be thinking through the inherent logic of their case. What is the major proposition? What does it depend on? Are there exceptions to that proposition, and if so, what are the reasons for those exceptions? What reasons — policy reasons or legislative reasons — support the propositions that you're going to put forward in a brief? So I think you really ought to get it organized in your head before you even start to think about writing a brief. Now, the architecture of brief-writing itself has conventions that reflect the logic of law. Let's start with the first convention. You have

to state the issues for the court before you even describe what the case is about. That's to help you focus on what the ultimate point of the brief is. And then you go through the table of contents. But then you get into what the case is about. And to say that the law is very logical is not to say it's disconnected from the real world and the facts which give rise to the problems that you are trying to solve in a case. The fact part of the brief, to my mind, is very, very important. And it's typical that young lawyers don't understand how important the facts are. They come out of law school and think it's all a matter of legal propositions. But those propositions arise out of particular problems that society and the law have to deal with. So the fact part of the brief, to my mind, is extremely important — only it has to be honestly presented, and there are conventions about how you do that. It depends on how the case comes up. Is it a jury verdict for the government in a criminal case? Is it a summary-judgment motion in which all inferences have to be drawn against the moving party? Is it an evidentiary ruling that depends on just a fair weighing of the background facts? But very often, young lawyers are ignorant of those conventions about how you present the facts, how you view them, through what lens you apply them.

BAG: What are the most common mistakes that people make in trying to write a statement of facts?

SLL: Oh, they're too much advocates, and they ignore the lens. Another common mistake, by the way, has to do with not giving us, in the addendum of the brief, the opinion that is being reviewed. The federal rules require that. Very often, lawyers forget about it. I'd say maybe about 10 percent of the cases that we get, the lawyers have not put that opinion into the brief. When I pick up briefs to read them, I start by

reading the opinion to be reviewed. And so I have a fair sense of the facts that gave rise to the problem from reading that. If the lawyers then recite the facts in a way that's different from the way it was cited in the district court, then there has to be a justification for it. Are they saying there was clear error in the rulings? Or have they basically misjudged the standard by which they have to present facts? And if they've misjudged the standard, if they've been too much of an advocate, it sets up a reaction that works against them — which is that if they can't honestly recite the facts, in light of the lens through which you have to look at the facts, then how can I trust what they say about the law in the next sections? So I think it's very important that you be intellectually honest when you write briefs.

BAG: You read the district court's opinion first, and then in what order do you read the actual briefs?

SLL: Oh, I always read the appellant's brief first. And sometimes at the end of reading the appellant's brief, they haven't made a very convincing case, and it's quite a temptation not to go on and read the other side's brief. But I always do go on and read the other side's brief because I want to feel that I have a complete picture of the problem before I'm being asked to resolve the case.

BAG: I've heard a couple of judges say that they will read a brief until they're not getting anything useful, and then they may skim or they may stop. Does that square with your experience at all?

SLL: Oh, well, it squares with my experience in the sense that judges have a thousand different ways of approaching these things. Under the press of work that we have — and it's enormous — we all have to do speed-reading of various sorts. I would choose to do it a little differently, but that's a perfectly valid approach.

BAG: Let's go back to your point about logic. Are you surprised at how few lawyers seem to understand even the concept of a syllogism?

SLL: You know, that's hard. I think that there is very little formal training, as there might have been a century ago, about uses of language and the way that sets up in accordance with logical principles. I don't think that means that lawyers don't get it. They may not use that language, but they are nonetheless trying to present a persuasive argument.

BAG: I suppose that every legal issue has a major premise and a minor premise and then a conclusion that follows. At least every argument should be reducible to that, shouldn't it?

SLL: Every honest argument should be reducible to that. But that's one of the reasons why the facts are so important, because often I find that lawyers assume that a major premise is in fact the correct premise for their case, when in fact the real-life problem that's been presented is a slightly different problem with some variations on it that the major premise wasn't designed to solve. And the good lawyers will ask, "Well, why does the major premise exist? What problem was it meant to resolve?" There's this sort of logic to that, and if they see that their problem actually is a little bit different, then it opens up variations on the major premise. It's one of the beauties of the common law — that it's so much more nuanced and allows for recognition of different problems in which the balance of interests might come out differently. So I don't want to push this logic point too far, but I think that good lawyers have to think in a logical way.

BAG: I've tried to get lawyers to figure out their syllogisms and write syllogistic issue statements that are not overt advocacy. I find that lawyers have trouble with the minor premise.

SLL: Yes.

BAG: Why is the minor premise so tricky?

SLL: Well, on that one, I'm going to defer to you because you've been dealing with the lawyers, trying to teach them this. You know, there is a danger in too much abstraction — which is to say there's a tendency not to think through your own case but to go out there and look for what are the established major and minor premises in the law, and then try to adapt your case to that. Well, of course lawyering in part involves that, but in part it involves recognition of these differences that I've just been talking about.

BAG: Do you find that brief-reading is often sort of hunting for what is the issue? Where is the major premise mentioned? You find it on page 10 for the first time. Where's the minor premise? Well, it's buried back on page 7. Do you find that to be a common problem?

SLL: [Laughter.] More common than I would like, sure. But that goes back to lawyers who haven't thought through their cases. They may sit down to write before they've done the thinking they need to do.

BAG: What have you learned since becoming a federal judge that would cause you, if you were to go back into practice, to write a little differently?

SLL: I don't think that there was sufficient emphasis on clarity — clarity of thought, the major premise, the minor premise, but clarity of expression as well, and the need for organization. You know, I'm talking about legalese — that sort of comfortable jargon that lawyers are capable of slipping into. But most cases resolve down to a few key questions, and those few key questions may turn on facts, they may turn on law. And I'm surprised at oral argument. Frequently — and I do read the briefs; I'm well prepared — frequently, I'll

say to the lawyer, "You know, I think at the heart of your case is this proposition." And the lawyer looks a little stunned and says, "Exactly, Your Honor. You managed to get it." And I don't know if they're stunned that a judge got it, or they're stunned because they hadn't quite thought of it that way. So when I was writing briefs, I don't think I appreciated how important that moment of clarity was. The President of Wellesley College has a wonderful expression. She talks about the simplicity on the other side of complexity, and the lawyers should be trying to cut through the complexity and get to the simplicity that is on the other side.

BAG: There is a simplicity on this side of complexity that never really grapples with the complexity, isn't there?

SLL: That's right. That's right. That's another common failing of lawyers. And you see that at oral argument when the judges start asking questions and a problem suddenly looks a little more complex than the lawyer had anticipated. The good lawyers, of course, will have thought through some of those issues and will come into court very happy to be questioned because it can win their cases on that questioning. But very often, lawyers fall back on, "Well, Your Honor, that's an interesting question, but that isn't this case." We say, "Well, we have to think through these issues, because whatever rule we come up with in this case is going to be applied to other cases, so we need to think through those."

BAG: So the President of Wellesley College — what is her name?

SLL: Diana Chapman Walsh [President of Wellesley College from 1993 to 2007].

BAG: And she's suggesting that all this talk about simplicity . . . yes, simplicity is important, but you have to work through the complex stuff to get to the other side of it.

SLL: Yes, and I think she's right about that. And indeed, that's part of the art of judging — that we work through complexity in order to come up with statements that are clear and understandable. I think part of the accountability built into being a judge — and there are very few mechanisms of accountability — but one is that we have to explain ourselves. A lot of other disciplines simply make decisions without providing an explanation about why it is the right decision. And when it comes to opinion-writing, I think it's quite important that an average person be able to read an opinion in the end and understand what it was about. And so judges have a similar burden of not obfuscating things; of not using language that will confuse people; of being able to clearly express what the problem is, what the solution is, and why that solution makes sense.

BAG: So you think that it's important to our legal system that ordinary people — say, a smart high-school student — should be able to understand a judicial opinion?

SLL: That's one of my ambitions, one of my goals. I don't think that we write just for lawyers. I think that we write for the public as a whole. Of course, it's inherently a tough thing to do because law itself is complicated, and whatever the ambitions, there are certain legal phrases — *standard of review* being one — that we have to use. So I'm not suggesting abandoning legal writing in order to put things in terms that a high-school student could understand, but that, within the constraints, we ought to try to be as understandable to the public as possible.

BAG: Now, you and I have never spoken face-to-face before this morning?

SLL: Right.

BAG: And you probably know nothing about my views about citations, so I would want to get that on the record before I pose the question. I really believe that one of the primary problems with understandability in judicial opinions is pockmarking the opinions with citations: "99 F.3d 464, 466." And if you stripped away a lot of these bulked-up citations that bulk up the paragraphs, judges could actually follow the logic of their own opinions a little better.

SLL: Well, that's good advice to me. Thank you [laughter].

BAG: Why do you suppose citations continue to pockmark opinions, though, when it really is just a typographic convention? In using typewriters, it had to be done that way, but law reviews and treatises have never pockmarked their writing with all these numbers.

SLL: Well, let me ask you: are you talking about putting them into footnotes, or are you talking about trying to eliminate excess citation?

BAG: What I advocate is putting all citations in footnotes but never actually putting a sentence in a footnote — never saying anything in the footnote. John Minor Wisdom used to write this way. Alvin Rubin wrote this way. And there are more and more judges around the country beginning to do that.

SLL: I'll think about doing that. But I don't have an overall philosophic position on it. I do agree that things that interrupt the flow of the logic of an opinion are to be avoided.

BAG: Let's talk about oral argument a little bit. What are, say, your two major recommendations for presenting a good oral argument?

SLL: The first is: welcome questions. You know, if you stand up there and say just exactly what's in the brief . . . we've all read the brief, and you're not really advancing your cause very much. So I think getting to the key points quickly, but

then inviting, welcoming questions. There are so many lawyers who look frozen in fear when they get a question. They shouldn't feel that way. They should think, This is a great way that I can hit a few more balls out of the park; I can help my case. And that means, in preparing for oral argument, what you're preparing for is not the script of what it is you've already said — it's, Well, gee, what would somebody who is intelligent ask me that might challenge me on these points? And on that, when I was in law practice, I used to think of it in these terms: take a cab; explain to the cab driver in not too many words what the basic problem is and what the question is that's got to be answered; then provide the possible answers and explain why one is better than another. So a similar sort of thought pattern before you go before appellate-court judges: What are they going to be asking about? What are they curious about? Am I pushing the law into a new realm? If so, what are some of the possible problems involved here? Is my position going to leave everyone with the feeling of unfairness and injustice? If so, what is the answer on the other side? And by all means, you have to be ready to answer your opponent's arguments — to acknowledge them, to understand them, and to provide an answer. There may not be a very good answer; you may be coming into court with a losing case. But in that case, acknowledge that these are the limits of your position. You're arguing them in good faith. So I just think oral argument is a wonderful thing for lawyers if they can afford — if their clients can afford — it. They absolutely ought to seek oral argument; they shouldn't waive it. And I think it's better done in person and not through videoconferencing. Our court, unusually among the federal circuits, doesn't use this very often. Sometimes in an emergency a judge will partici-

pate by videoconferencing. Sometimes the lawyers ask us to do it because they don't want to travel to Boston from Bangalore or Puerto Rico, and it's less expensive for their clients. Those are obviously choices lawyers are entitled to make, but if I were a lawyer, I'd much rather be in front of the court personally arguing and trying to pick up from the judges the vibes about what they're worried about.

BAG: Is there too much argument in oral argument, and would lawyers be better in thinking of this as a conversation with the court?

SLL: Oh, yes. The very best oral arguments are conversations with the court. And very frequently in the courtroom you can get a chemistry going where both sides are thinking through the issues well beyond what was said in the briefs. And the good advocates understand their case well enough . . . they go in there, they have this certain confidence level, and then they can take it up to the next level. To pay tribute to one of my colleagues on the Federal Circuit — Timothy Dyk, when he was in private practice, argued an extremely important case in front of me that went to the Supreme Court. But he was superb, and he was superb in part because he had thought through all of the problems that the panel had thought through, and he had answers for all of them. And that's unusual, and it was such a pleasure to have him. It's such a pleasure to have good lawyers appear in front of us.

BAG: You had a lot of experience as a practitioner before going on the bench, and of course you clerked for a federal judge, but were you nevertheless surprised when you got onto the First Circuit about the . . . were you dismayed at the quality of the brief-writing?

SLL: I was surprised; I wasn't dismayed. I was surprised that there were a number of briefs that weren't of the quality that I

would have expected. A number were — and of course, some were really pretty amazing, well-done briefs. I think it's become harder for lawyers because they are under such economic pressure from clients, and they might like to spend an additional 20 hours or so thinking through the issues, getting ready for oral argument, but either the clients can't pay for it or the workload is prohibitive. And then there's the problem of the opportunities to go to federal court, and the opportunities to argue before us are diminished. And we see more than a few large law firms who have taken on the Criminal Justice Act or pro bono immigration cases, simply to give the lawyers in their firms some opportunity to argue those cases. So sometimes it's the partners who are in arguing before us, even in the pro bono cases [laughter]. So the associates have gotten a chance to work on the briefs but, sadly, not to orally argue the cases.

BAG: Judge Calabresi suggests that the very best briefs are the ones that are pro bono cases that the associates in major firms really care about.

SLL: Well, I wish I could join him in that optimistic statement, but I can't because there's a pragmatic problem. They may be good lawyers, but frequently they are in fields that are extremely complex, such as habeas corpus law or immigration law. And unlike the day-to-day practitioners in those areas, they don't really understand the structure, so we get briefs that are not on point, that may have misstated the standards. There is something to be said for expertise.

BAG: Do you think that judicial opinions could be shorter?

SLL: Absolutely. If we had more time, I think they'd be shorter [laughter]. But partly this is a function of our workload as well. To reach that simplicity on the other side of complexity takes a great deal of work. And I know that some of my

opinions are too long but that I've reached the correct result, and I don't have time to pare them down because I need to get on to the next case. It's a painful aspect of judging. I think if we actually had more time, we could write better opinions, and they would be shorter.

BAG: Is it a drag on the legal system to have overlong opinions?

SLL: Oh, of all of the inefficiencies in the legal system, overlong opinions are surely a minor matter. Would it be better to have shorter opinions? Of course, I think it would, but I don't think the social cost is so high.

BAG: Could you describe your own opinion-writing process?

SLL: Yes. I tend to strive for opinions that are extremely well organized, are tight, where the logic of it is very clear. I also think it's very important that opinions not be disrespectful to anyone that participates in the process — not be disrespectful to the lower-court judges that are involved, or to counsel, to the parties, or to other members of the court. This isn't just a personal preference; this is inherent in the accountability that judges have to show. Once judges start behaving in disrespectful ways to other people, then I think it tends to lead to a certain lowest-common-denominator approach that, in turn, fosters a certain disrespect for the judiciary as a whole. Furthermore, we're certainly not on a mission. There's no reason for us to be dismissive or demeaning to anybody else. We're far from perfect ourselves.

BAG: Do you have an opinion on the use of arcane words in judicial opinions? [Both laugh.]

SLL: Oh, you know, there are so many different styles. I tend not to use arcane words, but then perhaps my larger objectives of clarity and of communication would preclude me from doing that anyway. But some people just love words. They love to use words that are uncommon and out of fashion —

just as, you know, you could read James Joyce or you could read Ernest Hemingway. I tend to think the better judicial opinions are more like Hemingway: shorter, more direct, to the point.

BAG: How could law reviews be improved?

SLL: [Chuckling.] Well, I think my point is not so much about how they're written as the fact that they seem to have become self-referential and not so much concerned whether they're providing anything of use, either to the judiciary, to the bar, or to the public. There is a growing sense of legal academia's writing as its own justification for being, and I tend to think of the law as a pragmatic field meant to resolve problems for society. And I'm sorry that there are so few law-review articles that are really of use to judges. Occasionally, I find some, and sometimes there are some very useful insights. Someone once told me that the law reviews keep tabs on how often an article is cited in another law review but not how often it's cited by a judicial opinion. I don't know if that's true, but if that is true, that's sort of an odd placement of priorities. Is it true?

BAG: I think it is true, yes, unfortunately. But there are various people who take various counts. And of course, Judge Posner wrote the book about evaluating the number in various kinds of places. But people keep track of these things differently, and maybe different faculties put different emphases on them. How do you think legal academia could be usefully reformed in the teaching of law? I'm thinking particularly, Why can't something as simple as the importance of syllogistic thinking and even enthymemes — what they are and how they're used in legal argumentation — why shouldn't that be a standard part of legal education?

SLL: It should be, in my view, a standard part of even an undergraduate education — about how to engage in critical thinking. I don't think one survives today without a facility for critical thinking and without a facility for reexamining standard propositions. Especially with economic development moving at an accelerating pace, it seems to me that one has to be more willing to be critical about the ideas of the past. If law schools would build on that, I think that would be terrific because I'm a believer in a liberal-arts education, which teaches critical thinking as a foundation for just about any field one can go into. The ability to think critically ought to include sort of scientific methods of thinking critically as well. So my preference would be that it's an accepted part of undergraduate education, but of course it's not there. And I think the law has always provided, to government in particular, people who have been trained in how to think and how to communicate, and it's been of enormous value to our country. Many of the law schools are now revising their curriculum to be interdisciplinary. If that, again, goes to how one thinks critically in different fields, I think that would be a very good thing. But I'm not running a law school, and I know they have lots of problems [laughter].

BAG: What is the best use of law clerks?

SLL: To make the judge smarter and better than the judge would otherwise be in solving a problem posed by a given case. I think that's the primary usage. The next one is that judges are all artifacts of our particular time periods in life, and the clerks reflect newer thinking about things. So when the clerks come in and you talk through a case and engage in a debate about a case — which I certainly encourage around here — we get the benefit of newer generations of thinking about it.

So that's not a mechanistic answer; that's a sort of overall answer to why law clerks are important for judges.

BAG: Do you see any problem in the widespread use of law clerks to draft judicial opinions?

SLL: Oh, well, there are myriad subquestions inherent in that. Because of the workload, almost all of us have law clerks do drafts of opinions — doesn't mean that they do all the drafts, and it certainly doesn't mean the draft is accepted uncritically before it becomes a final decision. It's simply a workload-sharing mechanism that I think is a reality today. The real problem would be if the judge somehow deferred the judicial decision-making role to a law clerk, and that I don't see. So I don't want to overstress the dangers of this. I think it's something that we have to accept, and I don't see abuses of it. Nothing goes out of here that isn't my work in the end.

BAG: Do you have an opinion on the use of legalese?

SLL: Ah [laughter], well, there are certain phrases that are common stock in the law — *standard of review* is one; *clear error* is another; *plain error* is another. These are all terms of art that have subsidiary meanings that have content to them. If that's what's meant by legalese, it's unavoidable. If it's the jargon, the use of Latin, the use of obscuring phrases, that's not a very good idea. So I think that that question, like so many others, resolves into a series of subquestions about what are we actually talking about when we talk about legalese.

BAG: But if we exclude terms of art and just focus on the jargon — *pursuant to*s, *whether vel non*s, and so on.

SLL: Right, right. I think lawyers, as they become more mature, are less likely to use those phrases in some ways. I think that young lawyers take great comfort in them because they're afraid they may not quite yet know what they're doing, and

if they put it in the standard legalese, they feel better about it. But of course, it leads to repetition, it leads to overly long things, it leads to obscuring your points — and so it's better to move away from using that type of language.

BAG: I had some associates at a major firm recently tell me that they really felt they needed this stuff — that they needed the jargon, they needed the *pursuant to*s and so on — to feel lawyerly at that point in their career, and maybe, ultimately, they could let go of it. Is that an example of reaching, ultimately, the simplicity on the other side of complexity?

SLL: Well, I think you put your finger on exactly what I was talking about: the use of language of the past as a sort of emotional security blanket and that people move beyond that. But that's not really what I meant by the simplicity on the other side of complexity. That involves a great deal more work — a great deal more thought, pushing yourself — that really doesn't have to do with maturing beyond using legalese.

BAG: Could I pose to you the hardest question people ask me at seminars? Associates at firms will say, "I'd love to write well, and I really care about it, but I work for this partner who loves legalese, who changes every *before* to *prior to* . . ."

SLL: Oh, dear [laughter].

BAG: ". . . who, when I have *Ajax, Inc.*, will put (*'Ajax'*)."

SLL: All that stuff I take out when my law clerks do it. Oh, you know, I'm not an expert in survival skills for associates in law firms, but of course they have to be cautious when that's what the partner wants on something.

BAG: But you must have mentored quite a few associates through the years?

SLL: Yes, I did. Sure.

BAG: And there does seem to be a great deal of frustration on their part about these first two or three years of practice when they're ghostwriting, essentially. How can they continue to hone their skills and care about writing beyond that very difficult period?

SLL: Do work for other partners in the firm who have different styles. Do cases — small cases, perhaps pro bono cases — where they can write their own briefs. Remember that someday they won't be an associate. Someday they'll have more power and responsibility, and they can return to what they think is a way of writing that has more integrity. People are lawyers for a very long time. The frustrations of the first few years of practice eventually work themselves out.

BAG: Judge Lynch, I wish this interview could go on and on. You've been very generous with your time, and I want to thank you.

SLL: Oh, well, thank you. I've learned quite a lot from this. Thank you.