Written Opinions in State Intermediate Appellate Courts: Current Landscapes and the AI Horizon

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ABSTRACT

This article explores the writing of opinions in forty-two state intermediate appellate courts (SIAC). First, the article summarizes the history of written opinions in SIACs and surveys the rules that states have developed for when and what SIACs write. These rules differ, though, which leads to questions about why we permit, and even encourage, limits on SIAC explanatory writing. The second section of the article explores four common justifications for these limitations: correcting error entails less writing than developing law; writing is not needed for deciding appeals; law clerks write most SIAC opinions; and writing hampers efficiency and productivity. I conclude that none of these justifications support limitations on explanatory writing in SIACs.

Nonetheless, the flawed justifications for the current landscape of SIAC writing are relevant in the AI horizon. The third section of the article considers how each of the justifications aligns with AI writing. Truly, courts are at a crossroads. If SIACs move towards the AI horizon reflexively, maintaining the same writing rules and practices they have now, decisional quality may decline. But, if SIACs take this opportunity to integrate AI, evaluate their standards of quality, and revisit their writing rules, their work product could improve. These courts can better meet the civic purpose for which they were created.

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INTRODUCTION

This article explores the writing of opinions in forty-two state intermediate appellate courts (SIAC). It explains the rules that states have developed about when and what SIACs write. Not all the rules are the same, though, with noteworthy patterns and variations across the country. Nine states, for example, allow SIACs to decide appeals with no writing at all, and several more encourage a circumscribed, short-form opinion. That raises questions about why we permit, and even encourage, limits on SIAC explanatory writing. This article considers four common justifications for those limits. Ultimately, these justifications are unpersuasive because explanatory writing is important for SIACs, just as it is important for legal analysis in other courts.

If I had completed this article in 2021, it likely would have been sufficient for me to describe the landscape of SIAC rules and evaluate the justifications for less explanatory writing. The emergence, however, of Artificial Intelligence (AI), including Generative AI, lifts our eyes from the landscape in front of us to the horizon just beyond. AI is changing legal writing in practice and education.[1] AI will

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1. *See, e.g.*, ABA Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024) (discussing the ethical challenges that Generative Artificial Intelligence poses for lawyers); Jonathan H. Choi, Amy Monahan & Daniel Schwarcz, *Lawyering in the Age of Artificial Intelligence*, 109 MINN. L. REV. 147 (2024) (testing the effect of AI assistance on law student legal analysis); Steven R. Smith, *The Fourth Industrial Revolution and Legal Education*, 39 GA. ST. U. L. REV. 337 (2023) (chronicling recent technological changes for legal practice and education); Eugene Volokh, *Chief Justice Robots*, 68 DUKE L. J. 1135, 1156-59 (2019) (considering the potential of "AI judges").

change how courts write. Accordingly, this article considers how current SIAC rules may interact with AI capabilities.

Section I summarizes the history of written opinions in SIACs. It traces the shift in the United States from a culture of oral advocacy to written advocacy, as well as the meandering history of reporting and publishing opinions. Section I then explains current writing rules for the states that have SIACs. It details the states that require writing and those that do not, and it details the rules and criteria that govern when and how SIACs write.

Section II explores SIAC writing at a deeper level. Given the writing rules, it seeks to understand why states allow—and sometimes demand—less explanatory writing. I consider four justifications. First is the justification that SIACs do not need to write substantively because they merely correct error, rather than develop law. Second is the justification that writing is not necessary for appellate decision-making. The idea is that appellate courts can render decisions based only on the parties' arguments and the trial court's decision. A third justification is that law clerks, not judges, write most SIAC opinions, so little is lost with less explanatory writing. And fourth, I consider whether efficiency and productivity justify less writing. In the end, I conclude that none of these justifications support less explanatory writing in SIACs, and they may harm the decisional process if they promote long, rote, or tedious SIAC writing. Rather than prescribe when SIACs write or the forms of their writing, states and courts should focus on the quality of written opinions. A meaningful, responsive opinion may be short. Indeed, it may be shorter than a template product built on repetition and empty formalism.

Section III of the article considers how each of the four justifications align with AI writing, as known today. Courts face an important choice. If they move towards the AI horizon reflexively, maintaining the same writing rules and practices they have now, decisional quality will decline. But if SIACs take this opportunity to integrate AI, evaluate their standards of quality, and revisit their writing rules, their work product could improve. They can better meet the civic purpose for which they were created, and they can respond more meaningfully to the audience for whom they write.

Finally, it is worth highlighting why SIACs deserve study. SIACs around the country are work horses, deciding many more appeals than state courts of last resort. They are the only appellate experience for most litigants in state court, given that courts of last resort generally are empowered to deny certiorari.[2] SIAC review is often plenary, which means they decide all types of legal disputes—state and federal—that touch upon all aspects of life.[3] And they complete this

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2. *See* Edward W. Najam, Jr., *Caught in the Middle: The Role of State Intermediate Appellate Courts*, 35 IND. L. REV. 329, 330 (2002).

3. *See* Tracey E. George & Albert H. Yoon, *Measuring Justice in State Courts: The Demographics of the State Judiciary*, 70 VAND. L. REV. 1887, 1895 (2017) ("State courts are open to the full range of disputes that arise in this country.").

work in the shadow of trial courts and courts of last resort, as well as in the shadow of federal courts. For opinion-writing, legal scholars weigh heavily towards discussing federal courts. Sometimes articles about opinion-writing do not even identify that they are discussing only federal courts, ignoring, by subtle omission, that state courts even write. The degree of imbalance is troubling. State courts, after all, "handle more than sixty times the number of civil cases as federal courts."[4] Nonetheless, the scholarship about federal courts proved to be valuable in exploring SIAC writing, and I rely on it appreciatively.

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In the end, we should study SIACs because increasingly they must judge under pressure. They have "growing caseloads with finite resources," and "[t]hey must determine how best to handle an avalanche of paper, leverage productivity through technology, and manage human resources and facilities to produce a steady stream of timely, well-reasoned written opinions."[5] Studying SIACs, we might learn when pressures on judging are too strong to maintain a fair and robust appellate process.

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I. HISTORY AND FEATURES OF WRITTEN OPINIONS IN SIACS

This section's two goals are to summarize the history of written opinions in SIACs and to explore features of SIAC writing today. Much of the history is common among SIACs, especially because the history tracks the evolution of written opinions in federal court. The writing features of SIACs, however, vary across jurisdictions. This section offers a numerical analysis of those writing features. It also discusses SIAC practices holistically, identifying patterns and special examples. Overall, the survey serves as a foundation for section II of this article, which evaluates the justifications for the rules, and section III, which considers how AI aligns with current writing norms.

A. HISTORY

Written opinions in state courts reflect the larger history of legal writing in the United States. They reflect an evolution from an oral to a written legal tradition. They also track the development of *stare decisis* in the United States, as we moved towards a legal system that respected precedent and sought to follow what had been decided in similar cases. In early American courts, judges issued opinions orally because that was the practice in English courts.[6] England prized oral advocacy and oral decision-making.[7] The best advocates were understood to

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4. Zachary D. Clopton, *Making State Civil Procedure*, 104 CORNELL L. REV. 1, 4 (2018).

5. Najam, *supra* note 2, at 332.

6. Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1179 (2004).

7. *See id.* at 1166; Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, 243 (2008); Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on Their History, Function, and Future*, 10 J. APP. PRAC. & PROCESS 247, 248 (2009).

persuade with dynamic speech. They were present before the bench to answer questions skillfully.[8] And judges were expected to speak their decisions aloud as a check on the exercise of power.[9] Appellate judges in England even deliberated in open court to show their thought process.[10] At this time in England, writing was perceived as flat and unresponsive.[11] Until the late 1700s, English law treated the outcome of the case, not the reasoning that lead to it, as binding.[12]

As for recording decisions, in the Middle Ages, some but not all court proceedings were recorded in Plea Rolls.[13] Written records of appellate decisions prepared by "reporters" began to appear in England by the 1600s.[14] Reporters attended court, summarized what the judge said from the bench, and published these summaries.[15] They chose which cases to publish, as well as how to summarize the court's reasoning.[16] Also, English appellate judges spoke their opinions seriatim, meaning one after the other, rather than with a single majority, dissenting, or concurring recitation.[17] Likewise, English reporters summarized each judge's oral decision seriatim in the written reports.[18]

American courts followed the English traditions of oral decisions, reporters, and seriatim.[19] The traditions, however, of oral decisions and seriatim did not last while the tradition of reporters evolved significantly on American soil. For oral decisions, a scarcity of trained lawyers in the United States and the size of the country mattered.[20] Lawyers in Colonial America returned to England for training, but after the Revolution, most lawyers trained by "reading the law," which necessitated written words.[21] The size of the country inhibited travel to hear oral argument and judicial decisions, which also necessitated written words.[22] Deeper than these practicalities, though, America's written Constitution signified a belief

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8. Ehrenberg, *supra* note 6, at 1170–71.

9. *Id*. at 1175–77.

10. *Id*. at 1167, 1169.

11. *Id*. at 1170–71.

12. *See* MICHAEL P. FIX & BENJAMIN J. KASSOW, US SUPREME COURT DOCTRINE IN THE STATE HIGH COURTS 19 (2020); Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 974 (2009).

13. FIX & KASSOW, *supra* note 12, at 13.

14. *Id*. at 16; WILLIAM DOMNARSKI, IN THE OPINION OF THE COURT 12 (1996).

15. DOMNARSKI, *supra* note 14, at 12–13.

16. *Id*. at 13.

17. M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 292 (2008); *see also* Skylar Reese Croy, *The Demise of the Law-Developing Function: A Case Study of the Wisconsin Supreme Court*, 26 SUFFOLK J. TRIAL & APP. ADVOC. 1, 5–6 (2021); Thomas B. Bennett et al., *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817, 827–28 (2021); Joshua M. Austin, *The Law of Citations and Seriatim Opinions: Were The Ancient Romans and The Early Supreme Court on The Right Track?*, 31 N. ILL. U. L. REV. 19, 29–30 (2011).

18. *See* Henderson, *supra* note 17, at 293–94.

19. *See* Ehrenberg, *supra* note 6; Abramowicz & Colby, *supra* note 12, at 974–75; DOMNARSKI, *supra* note 14, at 6-7.

20. *See* Ehrenberg, *supra* note 6, at 1179–80.

21. *Id*.; Kravitz, *supra* note 7, at 255; *see also* FIX & KASSOW, *supra* note 12, at 20–21.

22. Ehrenberg, *supra* note 6, at 1180; Kravitz, *supra* note 7, at 255.

Fn23 Fn24 Fn25 Fn26 Fn27-28 in written law.[23] Written words defined rights and principles of power. They reduced distrust and guarded against tyranny.[24] So, too, for judicial work—written words affirmed the rule of law and checked power.[25] In 1784, Connecticut was the first state to require written judicial decisions.[26] Other states followed over the next century.[27] The U.S. Supreme Court ended oral opinions in 1834.[28]

As for the English tradition of seriatim decisions, it persisted in America until Fn29 Fn30 Fn31 the 1800s.[29] Justice Marshall ended the practice for the U.S. Supreme Court in 1835, intending to develop clear case law with a unified bench.[30] State appellate courts also abandoned the method.[31]Increasingly in the 1800s, judicial work became written, not oral, and its formal presentation reflected the thoughts of several judges at once, not one judge at a time. These changes—prizing written judicial work and abandoning seriatim—explain why the third tradition of reporters took hold in America and expanded into the written opinions that we read today.

Before reporters, attorneys might keep private notes of their litigation history Fn32 Fn33 Fn34 Fn35 to share with judges in later cases.[32] A more formal system of reporters emerged in federal and state courts in the 1800s.[33] As in England, American reporters initially summarized what they heard in court.[34] In time, however, judges began to share with the reporters the notes they had prepared to deliver oral opinions.[35] Presumably, these reports, as compared to their predecessors, included more of the judge's words and less of the reporter's gloss. As more time passed, judges began writing the entire report of the case to create the written opinion we know Fn36 today.[36] Even the meaning of "reporter" changed from a person summarizing the

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23. *See* Christine M. Venter, *Dissenting from the Bench: The Rhetorical and Performative Oral Jurisprudence of Ruth Bader Ginsburg and Antonin Scalia*, 56 WAKE FOREST L. REV. 321, 327 (2021) ("For a new democracy that had thrown off the colonial yoke and drafted a new constitution, it was important that the law be clear and consistent.").

24. *See* Ehrenberg, *supra* note 6, at 1178–79. State constitutions showcased the power of written words earlier than the U.S. Constitution. *See* William C. Vickrey, Douglas G. Denton & Wallace B. Jefferson, *Opinions as The Voice of The Court: How State Supreme Courts Can Communicate Effectively and Promote Procedural Fairness*, CT. REV.: J. AM. JUDGES ASSOC., at 75 n.5. (2012); Kravitz, *supra* note 7, at 255–56.

25. *See* Anastasoff v. United States, 223 F.3d 898, 900 (8th Cir. 2000), *opinion vacated on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000) ("[T]he assertion of the authority of precedent had been effective in past struggles of the English people against royal usurpations, and for the rule of law against the arbitrary power of government"); Vickrey et al., *supra* note 24, at 75 (noting that California adopted written opinions to manage corruption).

26. Kravitz, *supra* note 7, at 249.

27. California, for example, ended oral opinions in 1879. Vickrey et al., *supra* note 24, at 75.

28. Kravitz, *supra* note 7, at 250.

29. *See* Henderson, *supra* note 17, at 304.

30. *Id.* at 313; *see also* Bennett et al., *supra* note 17, at 831–32.

31. Croy, *supra* note 17, at 6.

32. *See* Charles J. Stiegler, *The Precedential Effect of Unpublished Judicial Opinions Under Louisiana Law*, 59 LOY. L. REV. 535, 537 (2013).

33. *See* DOMNARSKI, *supra* note 14, at 6–7.

34. *See id.* at 7.

35. *See id.* at 13.

36. *See id.* at 10.

law to our modern understanding of a reporter as simply the place where judicial work is memorialized. By the end of 1800s, written opinions were the norm for state and federal appellate courts.[37]

That did not mean, however, that all written opinions would be publicly available or equally important. Until the late 1800s, for example, the reporting and dissemination of federal appellate opinions was incomplete and unpredictable.[38] Reporting required resources, as did housing written opinions on library shelves.[39] In the early 1900s, it became common to bemoan the growth of reported opinions. "There was too much case law for anyone to master, effectively search, or house."[40] Jurisdictions responded by developing different categories of opinions. Some written opinions were published in bound books that were available to anyone who held a reporter in hand. Other opinions were given to litigants only, with an unpublished copy filed administratively.[41] Also, many jurisdictions prohibited citation to unpublished opinions,[42] which meant the opinions were binding on the parties only and held no precedential weight for future litigants or judges.[43]

Federal and state appellate courts distinguished opinions as published and unpublished and precedential and non-precedential.[44] The U.S. Supreme Court's opinions were published.[45] But by the early 2000s, the federal circuit courts, state courts of last resort, and SIACs developed a patchwork of practices towards publication and precedent.[46] Growing caseloads further drove the differentiation of appellate opinions.[47] Unpublished and non-precedential opinions were considered faster to write, so having more of them, it was believed, would hasten judicial workflow and alleviate backlogs.[48]

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37. *See id*. at 16.

38. *See id*. at 16–23.

39. *See id*. at 17.

40. Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533, 543 (2020); *see also* Mary Whisner, *Exploring Precedent*, 107 L. LIBR. J. 605, 612–13 (2015). Increased caseloads in federal courts in the mid-1900s further stressed the system. *See id*.; DOMNARSKI, *supra* note 14, at 23.

41. *See* Whisner, *supra* note 40, at 611.

42. *See id*.; David R. Cleveland, *Appellate Court Rules Governing Publication, Citation, and Precedential Value of Opinions: An Update*, 16 J. APP. PRAC. & PROCESS 257, 257 (2015).

43. *See* Whisner, *supra* note 40, at 611; COUNCIL OF CHIEF JUDGES OF THE STATE CTS. OF APPEAL, THE ROLE OF STATE INTERMEDIATE APPELLATE COURTS 5 (2012).

44. *See* Cleveland, *supra* note 42, at 257.

45. *See* SUP. CT. R. 41.

46. *See* Melissa M. Serfass & Jessie Wallace Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions: An Update*, 6 J. APP. PRAC. & PROCESS 349 (2004) [hereinafter Serfass & Cranford 2004]; McAlister, *supra* note 40, at 544–45; Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 414 (2013).

47. *See* Levy, *supra* note 46, at 407–08; Merritt E. McAlister, *Missing Decisions*, 169 U. PA. L. REV. 1101, 1110 (2021); VICTOR E. FLANGO & THOMAS M. CLARKE, REIMAGINING COURTS: A DESIGN FOR THE TWENTY-FIRST CENTURY 20 (2015).

48. *See* McAlister, *supra* note 47, at 1110.

Although court administrators valued unpublished and non-precedential opinions in pursuit of efficiency, by the early 2000s, lawyers questioned the fairness of obscuring portions of decisional law and the propriety of letting appellate judges choose what became precedent.[49] The federal courts responded with Federal Rule of Appellate Procedure 32.1, which allowed citation to any appellate opinion issued after January 1, 2007.[50] The rule, however, did not end unpublished opinions or non-precedential opinions for the federal appellate courts; it only allowed for citation.[51] States, too, continue to differentiate opinions as published or not published, precedential or not precedential, and even citable and not citable.[52] Constitutional challenges to these practices of differentiation in state courts have failed.[53]

Forty-two states have SIACs.[54] These courts emerged across the country beginning in the late 1800s, with new SIACs created even in the last few years.[55] Close-up, each SIAC has a distinct creation story that reflects politics and social forces within its state.[56] But a wider lens shows that SIACs share a common purpose to ease appellate workflow wrought by "population growth, expanded post-conviction and appellate rights in criminal cases, increases in legislation and government regulation, expansion of appellate jurisdiction to include the review

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49. *See* Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429 (2005); McAlister, *supra* note 47, at 1111.

50. FED. R. APP. P. 32.1.

51. *See* McAlister, *supra* note 47, at 1113–14; Rachel Brown et al., *Is Unpublished Unequal? An Empirical Examination of the 87% Nonpublication Rate in Federal Appeals*, 107 CORNELL L. REV. 1, 16 (2021).

52. *See* Cleveland, *supra* note 42; Serfass & Cranford, *supra* note 46; Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251 (2001) [hereinafter Serfass & Cranford 2001]; *see also* Lauren S. Wood, *Out of Cite, Out of Mind: Navigating the Labyrinth That Is State Appellate Courts' Unpublished Opinion Practices*, 45 U. BALT. L. REV. 561, 561–62 (2016); William Gaskill, *State Court Papers in the United States: A 50-State Guide*, 45 INT'L J. LEGAL INFO. 244 (2017).

53. *See, e.g.*, Schaaf v. Kaufman, 850 A.2d 655, 658–59 (Pa. Super. Ct. 2004); Weatherford v. State, 101 S. W.3d 227, 233 (Ark. 2003) (memorandum opinion); State v. Landry, 776 A.2d 1289, 1291 (N.H. 2001); Johnson v. State, 847 P.2d 810, 811 (Okla. Crim. App. 1993).

54. *Intermediate Appellate Courts*, BALLOTPEDIA, https://ballotpedia.org/Intermediate_appellate_courts (last visited June 26, 2024) [https://perma.cc/ZRX9-KC5N] [hereinafter *Intermediate Appellate Courts*]. In the remaining nine jurisdictions that do not have SIACs, litigants raise appeals from the trial court directly to the court of last resort. These jurisdictions are Delaware, the District of Columbia, Maine, Montana, New Hampshire, Rhode Island, South Dakota, Vermont, and Wyoming. *See id.*

55. *See id.* Illinois has the oldest SIAC, created in 1877, and West Virginia has the youngest, created in 2021. *See id.*; *see also* W. Warren H. Binford et al., *Seeking Best Practices Among Intermediate Courts of Appeal: A Nascent Journey*, 9 J. APP. PRAC. & PROCESS 37, 46–53 (2008).

56. *See, e.g.*, Renee Cohn Jubelirer, *Communicating Disagreement Behind the Bench: The Importance of Rules and Norms of an Appellate Court*, 82 LAW & CONTEMP. PROBS. 103, 116 (2019) (discussing the history and special jurisdiction of the Commonwealth Court of Pennsylvania); Jamie Pamela Rasmussen, *A History of the Missouri Court of Appeals: The Role of Regional Conflicts in Shaping Intermediate Appellate Court Structure*, 17 J. APP. PRAC. & PROCESS 245, 248–49 (2016); Edmund M.Y. Leong & Peter Van Name Esser, *The Development of Hawaii's Appellate Courts: An Organizational Perspective*, 33 U. HAW. L. REV. 875, 882–85 (2011); Sam Hanson, Jonathan Schmidt & Tara Reese Duginske, *The Minnesota Court of Appeals, Arguing To, and Limitations of, An Error-Correcting Court*, 35 WM. MITCHELL L. REV. 1261, 1264–66 (2009); James T. Worthen, *The Organizational and Structural Development of Intermediate Appellate Courts in Texas*, 46 S. TEX. L. REV. 33, 34–36 (2004).

of agency decisions, and a societal trend toward resolving social and economic controversies through the legal system."[57] In other words, SIACs added a layer of review to ennoble the certiorari power of courts of last resort and lighten their dockets.[58]

That approach only works if SIACs hear and resolve appeals that would have ended up in courts of last resort. Accordingly, SIACs tend to have plenary review,[59] and litigants have an automatic right to appeal.[60] But dispute resolution in intermediate appellate courts face dual demands of quality and efficiency. An important metric of SIAC success is the extent to which litigants accept their judgments and do not seek certiorari from the court of last resort. Quality, well-reasoned decisions that demonstrate the court's legitimacy will increase the odds of acceptance.[61] At the same time, SIACs are expected to process appeals more quickly than courts of last resort.[62] They were created to be a filter, hearing all appellate cases, terminating most, and assisting analytically for the small percentage of cases that continue to the courts of last resort.

B. FEATURES OF SIAC WRITING

The dual demands of quality and efficiency challenge every SIAC. These challenges have led states to regulate, and often to limit, SIAC writing. Indeed, a tapestry of rules has developed about (1) when SIACs may write, (2) what SIACs may write, and (3) the meaning of what SIACs write. This article focuses on the first two categories, the "when" and "what" of SIAC writing for deciding appeals.[63] Note that I am not focusing on the third category of rules that pertain to the meaning of what courts write. This category includes the precedential effect, publication, and citation rules for SIAC decisions. Others have explored this category, including, for example, David Cleveland, Melissa Serfass, and Jessie Cranford, who charted federal and state rules of publication and citation between 2001 and 2015.[64] Nonetheless, I reference the meaning rules when they overlap with the writing rules. For example,

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57. COUNCIL OF CHIEF JUDGES OF THE STATE CTS. OF APPEAL, *supra* note 43, at 2.

58. *See* Victor Eugene Flango, *State Supreme Court Opinions as Law Development*, J. APP. PRAC. & PROCESS 105, 106 (2010); Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 360 (2002); Croy, *supra* note 17, at 27.

59. A few states, for example, Alabama, Pennsylvania, Tennessee, and Texas, separate SIAC review between civil and criminal appellate courts. *See Intermediate Appellate Courts*, *supra* note 54.

60. Litigants may bypass the SIAC for a small number of matters. In most states, for example, death penalty appeals are heard in the court of last resort. *See* COUNCIL OF CHIEF JUDGES OF THE STATE CTS. OF APPEAL, *supra* note 43, at 4 n.6.

61. *See* Vickrey et al., *supra* note 24, at 78; Judson R. Peverall, *Inside State Courts: Improving the Market for State Trial Court Law Clerks*, 55 U. RICH. L. REV. 277, 294–95 (2020). Indeed, one report estimated that courts of last resort hear less than ten percent of the cases heard by SIAC. *See* COUNCIL OF CHIEF JUDGES OF THE STATE CTS. OF APPEAL, *supra* note 43, at 5.

62. *See* COUNCIL OF CHIEF JUDGES OF THE STATE CTS. OF APPEAL, *supra* note 43, at 2.

63. The article does not include SIAC actions that do not dispose of an appeal, for example, orders granting extensions or allowing more time for oral argument. The focus of this article is writing rules that pertain to ending an appeal.

64. *See* Cleveland, *supra* note 42; Serfass & Cranford 2004, *supra* note 46; Serfass & Cranford 2001, *supra* note 52; *see also* Wood, *supra* note 52; Jeffrey O. Cooper, *Citability and the Nature of Precedent in the Courts of Appeals: A Response to Dean Robel*, 35 IND. L. REV. 423 (2002).

several states do not have criteria for how their SIACs write, but they have criteria for publication that will inform SIAC writing.[65]

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FIGURE 1: Summary of SIAC Writing

Forty-two (42) states have SIACs:[66]	Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin
Thirty-three (33) states require SIACs to decide appeals with explanatory writing:[67]	Alabama, Alaska, Arizona, California, Connecticut, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas, Virginia, Washington, and West Virginia

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65. *See infra* notes 102-07.

66. *See Intermediate Appellate Courts*, *supra* note 54.

67. *See* ALA. R. APP. P. 54(a)-(b); ALASKA R. APP. P. 214(a)-(b); ARIZ. SUP. CT. R. 111(a); CAL. CONST. art. VI, § 14; HAW. R. APP. P. 35(a); IDAHO APP. R. 38(a); ILL. SUP. CT. R. 23(a)-(c); IND. R. APP. P. 65(A); IOWA CT. R. 21.26(1); KAN. STAT. ANN. § 60-2106(a) (2024); KY. R. APP. P. 40(A); LA. UNIF. R. CT. APP. 2-16.1; MASS. GEN. LAWS ch. 211A, § 9 (2024); MICH. CT. R. 7.215(A); MINN. R. CIV. APP. P. 136.01(a); MISS. R. APP. P. 35-B(d); MO. CONST. art. V, § 12; NEV. R. APP. P. 36(c); N.J. R. CT. 2:11-3(a); N.M. R. APP. P. 12-405(A); N.Y. C.P.L.R. 5522(a) (McKinney 2024); N.C. R. APP. P. 30(e); N.D. R. APP. P. 35.1; OHIO REPORTING OP. R. 3.5; OKLA. STAT. tit. 12, § 1.200-1.202 (2024); PA. COMMW. CT. INTERNAL OPERATING PROC. § 413; S.C. APP. CT. R. 220(a); TENN. APP. CT. R. 10; TEX. R. APP. P. 47.1; VA. CODE ANN. § 17.1-413 (A) (2024); WASH. REV. CODE § 2.06.040 (2024); W. VA. R. APP. P. 21(a). Note that Connecticut and Maryland do not specify whether SIAC opinions are in writing, but their publication rules assume so. *See*

Nine (9) states allow SIACs to decide at least certain appeals without explanatory writing:[68]	Arkansas, Colorado, Florida, Georgia, Nebraska, Oregon, Tennessee, Utah, and Wisconsin
Thirteen (13) states do not distinguish between written forms of SIAC decisions:[69]	Arkansas, California, Colorado, Connecticut, Idaho, Kentucky, Maryland, Massachusetts, Mississippi, Nevada, North Carolina, Ohio, and Washington
Seven (7) states have three categories of written forms for SIAC decisions:[70]	Illinois, Louisiana, Michigan, Minnesota, Missouri, Oklahoma, and Wisconsin
Twenty-two (22) states have two categories of written forms for SIAC decisions:[71]	Alabama, Alaska, Arizona, Florida, Georgia, Hawaii, Indiana, Iowa, Kansas, Nebraska, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, and West Virginia

Conn. Gen. Stat. § 51-215A (2024); MD. R. REV. CT. APP. & SPEC. APP 8-605.1(A).

68. *See* ARK. SUP. CT. R. 5-2(f); COLO. R. APP. P. 35(a); FLA. R. APP. P. 9.315(a)-(b); GA. CT. APP. R. 36; NE. CT. R. APP. PRAC. § 2-107(A)(2); OR. R. APP. P. 10.30(1)(a)(i); TENN. APP. CT. R. 13; UTAH R. APP. P. 31 (b). State law seems to require the Wisconsin Court of Appeals to "provide a written opinion" in every case. WIS. STAT. § 752.41(1) (2024). However, the court's internal operating procedures also provide for "oral opinions" that are "transcribed" into a written opinion. WIS. CT. APP. INTERNAL OPERATING PROC. VI.(5)(h).

69. In the following provisions, the states refer to a written opinion without distinguishing between categories of writing. *See* ARK. SUP. CT. R. 5-2(e); CAL. CONST. art. VI, § 14; COLO. R. APP. P. 35(a); CONN. GEN. STAT. § 51-215a (2024); IDAHO APP. R. 38(a); KY. R. APP. P. 40(A); MASS. GEN. LAWS ch. 211A, § 9 (2024); MD. R. REV. CT. APP. & SPEC. APP. 8-605.1(a); MISS. R. APP. P. 35-B(a); NEV. R. APP. P. 36(c); N.C. R. APP. P. 30(e); OHIO REPORTING OP. R. 3.5; WASH. REV. CODE § 2.06.040 (2024). Once the opinion is written, however, these states may distinguish between published and unpublished forms. *See infra* notes 102-07.

70. *See* ILL. SUP. CT. R. 23(a)-(c); LA. UNIF. R. CT. APP. 2-16.1; MICH. CT. R. 7.215(A); MINN. R. CIV. APP. P. 136.01(a); MO. SUP. CT. R. 84.16(a)-(b); OKLA. STAT. tit. 12, §§ 1.200–1.202 (2024); OR. R. APP. P. 10.30, 10.35; WIS. CT. APP. INTERNAL OPERATING PROC. VI.(5)(a).

71. *See* ALA. R. APP. P. 54(a)-(b); ALASKA R. APP. P. 214(a); ARIZ. SUP. CT. R. 111(a); FLA. R. APP. P. 9.315, 9.330; GA. CT. APP. R. 36; HAW. R. APP. P. 35(a); IND. R. APP. P. 65(A); IOWA CT. R. 21.26(1); KAN. STAT. ANN. § 60-2106(a) (2024); NEB. CT. R. APP. PRAC. § 2-107(A); N.J. CT. R. 2:11-3; N.M. R. APP. P. 12-405(A); N.Y. C.P.L.R. 5522(a) (McKinney 2024); N.D. R. APP. P. 35.1(a).

Twenty-two (22) states have criteria for choosing between categories of written forms for SIAC decisions:[72]	Alabama, Arizona, Florida, Georgia, Illinois, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Tennessee, Texas, Utah, West Virginia, and Wisconsin
Thirteen (13) states have criteria for choosing whether to publish SIAC written decisions:[73]	Alabama, California, Colorado, Indiana, Michigan, Nebraska, Nevada, New Jersey, North Carolina, Oregon, Pennsylvania, Washington, and Wisconsin

Let us begin with when SIACs write. Most states, thirty-three out of forty-two, require SIACs to write a decision for each appeal. A handful mandate this writing by constitution or statute,[74] but most do so by court rules. Importantly, nine states do not require writing, at least for some appeals. The Colorado Court of Appeals, for example, may "affirm without opinion" unless it is "vacating, modifying, reversing, setting aside, or remanding."[75] The Arkansas Court of Appeals may decide without writing when it affirms an unemployment compensation case.[76] States that do not require explanatory writing usually let the judges decide whether to write, although Tennessee and Utah let litigants choose an expedited appeal in which the court issues a decision without an opinion.[77] Florida involves litigants, too, but in the other direction; litigants may request a written opinion,

72. *See* ALA. R. APP. P. 54(a)-(b); ARIZ. SUP. CT. R. 111(b); FLA. R. APP. P. 9.315(a)-(b); GA. CT. APP. R. 36; ILL. SUP. CT. R. 23(a)-(c); IOWA CT. R. 21.26(1); KAN. STAT. ANN. § 60-2106(a) (2024); LA. UNIF. R. CT. APP. 2-16.1; MINN. R. CIV. APP. P. 136.01(a); MISS. R. APP. P. 35-B; MO. SUP. CT. R. 84.16(b); NEB. CT. R. APP. PRAC. § 2-107(A); N.J. CT. R. 2:11-3; N.M. R. APP. P. 12-405(A); N.C. R. APP. P. 30(e); N.D. R. APP. P. 35.1; OKLA. STAT. tit. 12, §§ 1.200-1.202 (2024); TENN. APP. CT. R. 10; TEX. R. APP. P. 47.4; UTAH R. APP. P. 31(b); W. VA. R. APP. P. 21(c); WIS. CT. APP. INTERNAL OPERATING PROC. VI.(5)(a).

73. These states identify criteria for publication separately from any criteria for choosing between categories of written decisions. In other words, they do not conflate publication and form in their rules. *See* ALA. R. APP. P. 54(c); CAL. CT. R. 8.1105(c); COLO. R. APP. P. 35(e); IND. R. APP. P. 65(A); MICH. CT. R. 7.215(B); NEB. REV. STAT. 24-1104(2); NEV. R. APP. P. 36(c)(1); N.J. CT. R. 1:36-2(d); N.C. R. APP. P. 30(e); OR. R. APP. P. 10.35(1); PA. COMMW. CT. INTERNAL OPERATING PROC. § 412(a); WA. R. APP. P. 12.3(d); WIS. STAT. § 809.23(1) (2024).

74. *See, e.g.*, CAL. CONST. art. VI, § 14; MASS. GEN. LAWS ch. 211A, § 9 (2024); MO. CONST. art. V, § 12; WASH. REV. CODE § 2.06.040 (2014).

75. COLO. R. APP. P. 35(a).

76. *See* ARK SUP. CT. R. 5-2.

77. *See* TENN. APP. CT. R. 13 and UTAH R. APP. P. 31.

perhaps inducing the Florida District Courts of Appeal to write even though they are not required to.[78]

When SIACs do write, what they write varies in length and detail of analysis. In 2009, the National Center for State Courts (NCSC) spoke to this range in recommending four categories of opinions: full opinion, memorandum opinion, summary/dispositional order, and other opinion.[79] Full opinions have "expansive discussion," memorandum opinions have "limited discussion," and summary/dispositional orders have "little, or more typically, no discussion." Other opinion is a catchall phrase for opinions of "unknown" specificity or when the court "cannot differentiate" between the categories.[80] I have not found any states with a four-category scale, as suggested by NCSC. However, seven states have adopted a three-category scale.[81] Louisiana tracks the language of the NCSC using the categories of full opinion, memorandum opinion, and summary disposition.[82] Most common, present in twenty-two states, is a two-category scale.[83] Usually, in these states, the categories are opinion and memorandum opinion. Opinion is reserved for a full written answer; whereas memorandum opinion includes writings that are shorter and less detailed.[84]

Along with the number of categories for opinion form, several states have rules by which SIACs are meant to determine which form to adopt. Here, we observe states trying to describe what SIACs do and seeking to parse differences in the cases they review. The urge is to separate hard from easy cases, novel questions from routine ones. In twenty-two states, SIACs have rules to follow in choosing the form of their written answer.[85] These states list criteria to justify one form or another. Common criteria for writing full opinions include creating new law, modifying existing law, explaining existing law, criticizing existing law, discussing constitutional law, a novel question of law or fact, discussing a question of significant public importance, and discussing a point of conflict within the

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78. *See* FLA. R. APP. P. 9.330.

79. Shauna M. Strickland & William E. Raftery, *Caseload Highlights: The New Appellate Section of the State Court Guide to Statistical Reporting*, 16 COURT STATS. PROJECT 1, 4 (2009).

80. *Id.*; *see also* Flango, *supra* note 58, at 111 (supporting NCSC's classifications but noting that "the new terminology is not yet in widespread use"). Others, too, have endeavored to categorize appellate opinions by length and degree of discussion. For example, one study of SIACs classified opinions in three categories: (1) signed, authored opinions, (2) unsigned, per curiam opinions, and (3) unpublished opinions. Binford et al., *supra* note 55, at 53. Merritt McAlister studying unpublished federal decisions offered four more categories: "publishable," "memo," "avoidant," and "Kafkaesque." *See* McAlister, *supra* note 40, at 568. McAlister was discussing federal unpublished opinions, but his characterizations represent a common assessment of diminished quality in unpublished judicial work.

81. *See supra* Figure 1.

82. *See* LA. UNIF. R. CT. APP. 2-16.1, 2.16.2(A).

83. *See supra* Figure 1.

84. *See, e.g.*, ARIZ. SUP. CT. R. 111(a); HAW. R. APP. P. 35(a); IND. R. APP. P. 65(D); S.C. APP. CT. R. 220 (a); TEX. R. APP. P. 47.2(a).

85. *See supra* Figure 1. Note that these twenty-two states are not the same twenty-two states that have two categories of written forms for SIAC decisions.

Fn86 appellate courts.[86] A dissenting or concurring judge also may lead the bench to
Fn87 issue a full written opinion.[87]

Likewise, criteria for writing something less than a full opinion include when settled law governs the case, when the trial court's factual or evidentiary findings
Fn88 were sound, or when the trial court did not err or abuse its discretion.[88] In these moments, state rules may authorize little writing. For criminal appeals in New Jersey, for example, if "some or all of the arguments made are without sufficient merit to warrant discussion in a written opinion," the court may affirm by simply
Fn89 identifying the meritless arguments.[89] According to internal operating procedures,
Fn90 SIACs in Pennsylvania may "adopt[] the trial court's opinion in its entirety."[90] Several states that have rules with criteria for writing less than a full opinion allow SIACs to affirm by referencing the criterion in the rule that applies—in other words,
Fn91 these courts may affirm with a simple citation to a court rule.[91]

Noteworthy, in Oklahoma, Oregon, and Texas, the memorandum decision is the
Fn92-93 default form.[92] Otherwise, courts "may" issue a full opinion or something less.[93]
Fn94 Ordinarily, the full court or the panel of judges hearing the appeal chooses.[94] The
Fn95 presence of a concurring or dissenting opinion also may influence the choice.[95]
Fn96 Litigants may request one form or another in a few states, as well.[96]

A handful of states stand out in the specificity by which they discuss the written opinion forms. Consider Illinois: it allows its SIAC to write a full opinion, a concise
Fn97 written order, or a summary order.[97] Each form is delineated in separate provisions. The full opinion is written only for a new rule of law, a modification, explanation, or criti-
Fn98 cism of an existing law, or the discussion of a conflict of authority within the court.[98]

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86. *See, e.g.*, ARIZ. SUP. CT. R. 111(b); ILL. SUP. CT. R. 23(a); KAN. R. APP. P. 7.04(b)(1); LA. UNIF. R. CT. APP. 2-16.1(A); MINN. R. CIV. APP. P. 136.01(b). For a discussion of parallel standards for writing opinions in federal courts of appeals see Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1296 (2008).

87. *See, e.g.*, ARIZ. SUP. CT. R. 111.

88. *See, e.g.*, GA. CT. APP. R. 36; IOWA CT. R. 21.26(1); MISS. R. APP. P. 35-B(d); MO. R. CIV. P. 84.16(b); W. VA. R. APP. P. 21(c); *see also* Binford et al., *supra* note 55, at 56-57 (discussing SIACs' use of summary dispositions).

89. *See* N.J. R. CT. 2:11-3(e)(2).

90. *See* 210 PA. CODE § 69.415 (2024).

91. *See, e.g.*, NEB. SUP. CT. R. § 2-107(A)(2); N.J. R. CT. 2:11-3(e); N.D. R. APP. P. 35.1(a)(8); OKLA. STAT. tit. 12, § 1.202(e) (2024).

92. *See* OKLA. STAT. tit. 12, § 1.200(b) (2024); OR. REV. STAT. § 19.435 (2024); TEX. R. APP. P. 47.4. Moreover, in Florida, summary affirmances in criminal appeals are so common they are considered "the default response." Steven N. Gosney, "*What Are My Chances on Appeal?" Comparing Full Appellate Decisions to Per Curiam Affirmances*, 18 J. APP. PRAC. & PROCESS 115, 124 (2017).

93. *See, e.g.*, ALASKA R. APP. P. 214(a); COLO. R. APP. P. 35(a); GA. CT. APP. R. 36; ILL. SUP. CT. R. 23; N. M. R. APP. P. 12-405(B); TENN. APP. CT. R. 10.

94. *See, e.g.*, ILL. SUP. CT. R. 23; KAN. R. APP. P. 7.04(b)(2); LA. UNIF. R. CT. APP. 2-16.1(B); MINN. R. CIV. APP. P. 136.01(a).

95. *See, e.g.*, ARIZ. SUP. CT. R. 111(b)(4); TEX. R. APP. P. 47.4.

96. *See, e.g.*, ALASKA R. APP. P. 214(a); FLA. R. APP. P. 9.330(a)(2)(D); W. VA. R. APP. P. 21(b).

97. *See* ILL. SUP. CT. R. 23; *see also* Bert I. Huang & Tejas N. Narechania, *Judicial Priorities*, 163 U. PA. L. REV. 1719 (2015) (describing the turbulent history of Rule 23).

98. *See* ILL. SUP. CT. R. 23(a).

The second form, a written order, must "succinctly" include "a concise syllabus of the court's holding(s) in the case," "the germane facts," "the issues and contentions of the parties when appropriate," "the reasons for the decision," and "the judgment of the court."[99] That differs from the third form, the summary order, which describes the case and resolves the dispute with "citation to controlling precedent" but "without a discussion of the facts."[100] Ohio, too, has detailed rules about captions, introductions, and numbered paragraphs in opinions.[101]

Some states, thirteen in total, differentiate opinions through publication rather than in forms of writing. Alabama, for example, will publish all concurring and dissenting opinions.[102] Texas publishes opinions in all civil cases, but not in all criminal cases.[103] Otherwise, the criteria for publication resembles the criteria for writing a full written opinion; states assume SIACs will be able to decide whether the opinion says something new or important. Maryland states that its intermediate appellate court should publish only the opinions "that are of substantial interest as precedent."[104] Moreover, like the choice of form of the written opinion, the decision to publish often rests with the court or the judges hearing the appeal.[105] Some states allow parties to request that an opinion be published or not published.[106] Several states, however, presume that memorandum opinions and summary dispositions will not be published.[107]

The survey of SIAC writing, so far, has focused on most states that proscribe when SIACs write and the form of what they write. Significant, though, five states presume their SIACs will write opinions and provide little to no explanation of the written form. Connecticut, Idaho, and Maryland have no rules about how

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99. *See* ILL. SUP. CT. R. 23(b).

100. *See* ILL. SUP. CT. R. 23(c). Similarly, Wisconsin, by internal operating procedures, allows its court in a memorandum opinion to "reduce or omit the statement of facts and give only the reasons for the decision with a minimal analysis of reasoning." WIS. CT. APP. INTERNAL OPERATING PROC. VI(5)(a).

101. *See, e.g.*, Ohio Reporting Op. R. 2.2, 2.5, 3.5. Ohio also allows districts within the Ohio Court of Appeals to adopt local rules of practice. OHIO APP. R. 41.

102. *See* ALA. R. APP. P. 54(c); *see also* ARIZ. SUP. CT. R. 111(b)(4) (authoring a dissenting or concurring judge to have the court issue an opinion that will be published).

103. *See* TEX. R. APP. P. 47.2(b)-(c).

104. *See* MD. R. REV. CT. APP. & SPEC. APP. 8-605.1(a).

105. *See, e.g.*, IOWA ORG. & P. APP. CT. R. 21.22(3); KY. R. APP. P. 40(D); 210 PA. CODE § 69.412(a) (2024); VA. CODE ANN. § 17.1-413(A) (2024); *see also* Edwin H. Stern, *The 2008 Chief Justice Joseph Weintraub Lecture: Frustration of an Intermediate Appellate Judge (and the Benefits of Being One in New Jersey)*, 60 RUTGERS L. REV. 971, 983 (2008) (discussing New Jersey Appellate Division's publication rules and customs). Wisconsin is unusual in having a publication committee that chooses opinions for publication, but "the deciding judges offer a recommendation." *See* WIS. STAT. § 809.23(2); WIS. CT. APP. INTERNAL OPERATING PROC. VI(7)(a).

106. *See, e.g.*, ILL. SUP. CT. R. 23(f); MICH. CT. R. 7.215(D)(1); OR. R. APP. P. 10.35(1). Wisconsin allows "any person" to request publication. WIS. STAT. § 809.23(4).

107. *See, e.g.*, ALA. R. APP. P. 54(c); ARIZ. SUP. CT. R. 111(a)(2); HAW. R. APP. P. 35(b); IND. R. APP. P. 65 (A); MICH. CT. R. 7.215(A); MINN. STAT. § 480.08 (2024); MO. SUP. CT. R. 30.25(b); NEB. REV. STAT. 24-1104(1); OKLA. STAT. tit. 12, § 1.200(c) (2024); S.C. APP. CT. R. 220(a); TENN. APP. CT. R. 10; W. VA. R. APP. P. 21(e).

SIACs write.[108] Kentucky and Massachusetts require only that SIACs explain their reasoning.[109] These states give SIACs complete discretion whether to write and how to explain their analysis as they deem fit. They also allow appellate judges to develop customs and guidelines organically to serve the writing culture of their courts. Those benefits, as explained in section II below, outweigh whatever uniformity standardized rules provide.

Indeed, even among some of the states that have rules about what SIACs write, judges retain discretion. The Virginia Court of Appeals, for example, may issue a full opinion or a memorandum opinion, but the primary rule is that it "state in writing the reasons for its ruling."[110] Arkansas also allows affirmance without opinion in unemployment compensation cases, but for all other cases, the Arkansas Court of Appeals must write opinions in the "conventional form."[111] The Texas Court of Appeals "must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal."[112] While falling short of complete discretion, these states at least recognize that complexity and discernment are inevitable in appellate judging.

The take-away, then, from this survey of writing rules is that several strict rules exist, setting, for example, default forms for decisions and specific writing instructions. Several limiting rules exist too, allowing courts to decide some appeals without writing or encouraging courts to adopt short opinion forms. At the same time, states sprinkle discretion by letting judges choose between forms of writing or whether to publish. The variations in the rules reflect, once again, the dual demands that SIACs face for quality and speed. They also reflect an ambivalence about SIAC writing, as explored in section II.

II. COMMON JUSTIFICATIONS FOR LESS EXPLANATORY WRITING IN SIACS

Given that SIACs were meant to have larger caseloads and process appeals more quickly than courts of last resort, structural differences developed between the two levels. For example, courts of last resort generally would have certiorari power, but SIACs would not.[113] Accordingly, courts of last resort would choose important cases worthy of thorough explanation, whereas SIACs would hear a range of appeals. Writing, too, evolved differently between the two levels of appellate courts. Specifically, this section considers four justifications for why rules developed limiting when and what SIACs write: (A) correcting error entails

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108. Maryland, however, directs their SIAC to report opinions "that are of substantial interest as precedents." MD. R. REV. CT. APP. & SPEC. APP. 8-605.1(a).

109. *See* KY. R. APP. P. 40(A)(2); MASS. GEN. LAWS ch. 211A, § 9 (2024).

110. VA. CODE ANN. § 17.1-413(A) (2024).

111. ARK SUP. CT. R. 5-2. Actually, "conventional form" is new language added to the rule in 2017. Beforehand, the Arkansas Court of Appeals could issue memorandum opinions, whereas today they must issue opinions in all cases except unemployment compensation cases. Arkansas, then, is an example of a court moving towards more, not less, explanatory writing.

112. TEX. R. APP. P. 47.1.

113. *See* COUNCIL OF CHIEF JUDGES OF THE STATE CTS. OF APPEAL, *supra* note 43, at 1.

less writing than developing law; (B) writing is not needed for deciding appeals; (C) law clerks write most SIAC opinions; and (D) writing hampers efficiency and productivity. None of these justifications fully support limitations on SIAC writing but understanding them is important as SIACs approach the AI horizon.

A. CORRECTING ERRORS REQUIRES LITTLE EXPLANATION

A common justification for why SIACs do not need to write full opinions is that they review the trial court for error, and if they do not find errors, substantial explanations are unnecessary. The justification hinges on a distinction between correcting errors and developing law. SIACs, the reasoning goes, correct errors while courts of last resort create and develop common law.[114] But that distinction is weak in practice. First, SIACs review different kinds of errors. While some mistakes in trial court rulings are obvious, many are not. An obvious mistake is a trial court misstating the governing law, which, indeed, SIACs may easily correct. [115] A trial court also might err in its process for resolution if, for example, it did not attend to the parties' arguments or explain its decision.[116] Notice, though, that process errors are less clear than misstatements of law, which means correcting them requires reflection and discernment.

Next, consider an appeal that questions the trial court's application of settled doctrine. Facts will be the focus. The appellate court will ask whether the facts on appeal match the facts in previous cases and whether they warrant a different application of governing law. These considerations are thoughtful and deliberative, not at all like clear errors with automatic answers. As Chad Oldfather illustrates, "[i]t is one thing to ask whether a deadline was satisfied, and quite another to ask whether on a given set of facts one party owed a duty to another."[117] Appeals for correction of injustice require even more thoughtful scrutiny as the court considers objective law and subjective equities. These are delicate questions that should lead to careful answers. Over time, and the accretion of decisions, these careful answers develop the law. So, while courts of last resort might develop law in a "'macro' sense," SIACs also develop law in a "'micro' sense."[118]

The distinction, Oldfather explains, between error correction and law development dwells in formalism. If law is "mechanical"[119] and "mathematical,"[120]

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114. *See id.* at 27; Flango, *supra* note 58, at 105-06; Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49, 49 (2010); Judge Aldisert stated that appellate review served three, not two purposes: correct mistakes, develop the common law, and "ensure[] uniform administration of justice throughout the jurisdiction." Ruggero J. Aldisert, Meehan Rasch & Matthew P. Bartlett, *Opinion Writing and Opinion Readers*, 31 CARDOZO L. REV. 1, 12 (2009).

115. Oldfather, *supra* note 114, at 55.

116. *Id.* at 62.

117. *Id.* at 57.

118. Matthew E. Gabrys, *A Shift in the Bottleneck: The Appellate Caseload Problem Twenty Years After the Creation of the Wisconsin Court of Appeals*, 1998 WIS. L. REV. 1547, 1558 (1998).

119. Oldfather, *supra* note 114, at 51 (quoting Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605 (1908)).

120. Oldfather, *supra* note 114, at 53.

appellate judges should easily and uniformly correct mistakes. Formalism prescribed neat lines between intermediate appellate courts and courts of last resort because "there was no reason to suppose that appellate courts could or should make law, and consequently no reason for appellate courts to exist other than as a means for ensuring that trial courts followed the law."[121] If, however, one accepts that law is indeterminate and malleable, that it "is not math,"[122] finding and correcting errors is not so simple. Nor is it easy to mark the line between finding mistakes and developing law. Formalism was the predominant jurisprudential theory of the late 1800s when many SIACs were first created.[123] Its legacy continues today when we think of appeals as a check on arithmetic and when we ignore indeterminacy in the law. It continues when we ignore the full range of thinking that SIAC review requires. Perhaps, "the present institutional design of our appellate courts rests on an outmoded understanding of how the law works."[124]

The problem is more than theoretical because many of the writing rules discussed in section I direct SIACs to write when they are making law but not correcting mistakes. With the best of intentions, appellate judges will interpret and apply the directions differently.[125] But also, these directions are subject to abuse. Possibly, judges might designate a decision as error-correcting to avoid writing for political reasons, or to avoid public scrutiny.[126] If the error-correcting label is applied more often to certain types of cases, for example, criminal, civil rights, or family law, these areas of law will not develop as they should. Indeed, in the 1990s the Illinois Supreme Court restricted the number of full opinions that the Illinois appellate courts could publish and the length of those opinions.[127] The limitations compelled appellate judges to choose carefully which opinions developed law and which corrected error. The result was that criminal appeals were published less often than civil appeals.[128]

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121. *Id.* at 65; *see also* Chad Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 317 (2009).

122. Oldfather, *supra* note 114, at 53.

123. *See id.* at 65 (explaining the creation of federal appellate courts).

124. *Id.* at 68.

125. *See* Brown et al., *supra* note 51, at 29 (reviewing literature highlighting the subjectivity in federal judges' decisions about publication); Logan Hetherington, *Keeping Up with Your Sister Court: Unpublished Memorandums, No-Citation Rules, and the Superior Court of Pennsylvania*, 122 DICK. L. REV. 741, 762–63 (2018) (noting that the Superior Court of Pennsylvania has disposed of matters of first impression in unpublished opinions).

126. *See* Cooper, *supra* note 64, at 428 ("The ability to dictate whether or not a particular decision will have any precedential effect . . . raises the possibility that a court will decide a particular case for reasons unrelated to legal merit, avoiding any negative future ramifications of its decision by declaring that the case may not be cited in subsequent litigation."); Robert A. Mead, *Unpublished Opinions and Citation Prohibitions: Judicial Muddling of California's Developing Law of Elder and Dependent Adult Abuse Committed by Health Care Providers*, 37 WM. MITCHELL L. REV. 206, 259 (2010) (exploring the relationship between unpublished opinions and elder abuse law in California).

127. *See* Huang & Narechania, *supra* note 97, at 1731.

128. *See id.* at 1752; *see also* Gosney, *supra* note 92 (reviewing the chances of a written opinion for criminal appeals in Florida); TEX. R. APP. P. 47.2(b)–(c) (requiring publication for all civil appeals, but not for all

Moreover, forcing SIACs to label appeals as law development or error correction may lead to unnatural ratios for publication of affirmances and reversals. If a court reserved writing and publication for the hardest cases, those in which it developed law, we might expect more published opinions for reversals. After all, reversals signify that at least two sets of decision-makers—a trial judge and an appellate bench—disagreed. However, courts may instead publish similar numbers of affirmances and reversals, as has happened in Illinois[129] and Florida.[130] Perhaps appellate courts are sensitive to having too many reversals, leading them to balance affirmances and reversals to "signal[] judicial quality" and "preserve collegiality" between trial and appellate judges.[131] Lost in this balance is a reliable standard for opinion writing and publication.

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Further appellate review presents another problem in sustaining the illusion between error correction and law development. Imagine a trial court rules in a case without written explanation. On appeal, the SIAC treats the matter as error correcting and offers little to no explanation of its affirmance. Next, a party appeals the SIAC decision to the court of last resort, which grants certiorari. The high court must now complete a thorough review and write an opinion without any analysis from the trial and intermediate courts. Or maybe the high court will remand to the intermediate appellate court, requesting explanation and lengthening the timeline for resolution of the case. Either way, SIACs in these moments squander the opportunity to ease appellate workflow and resolve disputes expeditiously.

SIACs not writing opinions foreclose essential appellate process and law development. Some states, for example, reserve the grant of certiorari in the highest court to cases in which the SIAC issued a full written opinion. In Florida, summary dispositions from the intermediate appellate court cannot be used to prove conflict jurisdiction in the Florida Supreme Court,[132] which could stop litigants from bringing to the state's highest court the very questions that divided lower courts. Moreover, a state court's decision about writing or the need for further review may be wrong. The U.S. Supreme Court has decided important cases for which state courts of last resort declined to grant certiorari.[133]

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Certainly, some appeals will be easier than others, and some appeals will require less explanation than others. Trouble arises when labeling easy cases in the category of "error correction" and harder cases in the category of "law development." Those terms are imprecise, compromising directions for appellate judges to differentiate between them. Indeed, we perpetuate the illusion that correcting error differs cleanly from developing law despite theoretical disputations and practical evidence. If the

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criminal appeals).

129. *See* Huang & Narechania, *supra* note 97, at 1760.

130. *See* Craig E. Leen, *Without Explanation: Judicial Restraint, Per Curiam Affirmances, and the Written Opinion Rule*, 12 FIU L. REV. 309, 322 (2017).

131. Huang & Narechania, *supra* note 97, at 1756.

132. *See* Leen, *supra* note 130, at 312.

133. *See* Solimine, *supra* note 58, at 360.

distinction is weak, so is using it as a justification for allowing SIACs to write less often and less thoroughly.

B. WRITING IS NOT NEEDED FOR DECIDING APPEALS

Requiring or allowing SIACs to resolve appeals without written decisions suggests that writing is not necessary for appellate decision-making. But states expect written decisions for some appeals, and often for all decisions that their courts of last resort issue, which raises questions of when writing is needed and what writing contributes to appellate decision-making. Writing science has lessons for us, which I summarize below, along with relevant legal scholarship. These insights are valuable today, and perhaps more so for the AI future drawing near. Ultimately, this section shows that writing is valuable but prescribed formats and lengths are not.

Until the mid-1900s, discussions about writing were prescriptive, detailing the composition of sentences, paragraphs, and essays. The five-paragraph essay was set and so
Fn134 were rules of grammar for expository writing.[134] But, in the 1960s and 1970s, research-
Fn135 ers began to ask how people write rather than what they should write.[135] Writing, they
Fn136 reinforced, was a process, not simply a product.[136] Writing scientists developed three
Fn137 steps in the writing process: planning, translating, and reviewing.[137] "Writers *plan* what they are going to say and how they are going to say it, they *translate* these plans into sentences, and they *review* what they have written to ensure that it says what they want
Fn138-139 it to say."[138] Early theorist described a monitor in the brain supervising each step.[139]

Fifty years later, planning, translating, and reviewing continue as essential steps in
Fn140 the writing process, even as scientists refine and reconceptualize them.[140] Importantly, scientists now emphasize recursion in writing; rather than moving from one step to the next in a fixed order, writers are understood to move fluidly between planning, translation, and reviewing.
Fn141 Fn142 Indeed, research shows that skillful writers move more fluidly than novice writers between these steps.[142]

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134. HANDBOOK OF WRITING RESEARCH 12 (Charles A. MacArthur, Steve Graham & Jill Fitzgerald eds., 2006) [hereinafter HANDBOOK OF WRITING RESEARCH 2006].

135. *See id.* at 12–13.

136. *See id.* at 277.

137. *See* Linda Flower & John R. Hayes, *A Cognitive Process Theory of Writing*, 32 COLL. COMPOSITION & COMMC'N 365, 369 (1981).

138. THE COGNITIVE DEMANDS OF WRITING: PROCESSING CAPACITY AND WORKING MEMORY EFFECTS IN TEXT PRODUCTION 5 (Mark Torrance & Gaynor Jeffery eds., 1999).

139. *See* HANDBOOK OF WRITING RESEARCH 2006, *supra* note 134, at 26.

140. *See* HANDBOOK OF WRITING RESEARCH 2006, *supra* note 134, at 115. In 1996, for example, John Hayes reconceptualized the steps of the writing process from planning, translation, and reviewing to reflection, text production, and reviewing. Reflection included the original idea of planning, along with added dimensions of decision-making and inferencing. Text production replaced translation to include more sophisticated modeling for how people produce written text. *See id.*

141. EXECUTIVE FUNCTIONS AND WRITING 219 (Teresa Limpo & Thierry Olive eds., 2021).

142. *See id.* ("Composing a text cannot be reduced to the linear implementation of planning, translating, transcription, and revision. Skilled writers indeed compose texts with frequent fluent phases made up of short

Writing science also has shifted from studying the writer as a lone individual, with internal traits of cognition, to a social being in a writing community.[143] For example, the Writer(s)-within-Community model "proposes that the community in which writing takes place and the cognitive capabilities and resources of those who create it simultaneously and reciprocally influence writing."[144] The model moves between individual capabilities and communal expectations. Overall, this research reflects what many know instinctively about writing: it is an individual act and a social act, both a personal movement of internal mental processes and a choregraphed exchange among people to share and transform information.[145]

In appellate chambers, writing should follow the recursive steps of planning what to say, putting ideas into words, and reviewing what was written. These steps may lead judicial writers to revise considerably as they put initial thoughts into words and refine drafts to better explain the holding. When SIACs do not write, they will not take these steps. Also, writing science suggests that SIAC authors write in a community that influences their work product. It stands to reason that a culture of SIAC writing develops skills and expectations within the courts; a community of judges, law clerks, and litigants will reinforce the standards that develop.[146] Similarly, rules that lead to less explanatory writing in SIACs will build communities of writers that tolerate lesser norms of expertise and accountability.[147] Necessarily, they will have writers with less experience thinking of what to say, finding words to say it, and editing what has been said.

Beyond the steps of writing themselves, science also has explored the writing process as an element of cognition. The scientific literature, in line with human experience, approaches writing as one of the most complex and demanding cognitive tasks. Scientists, for example, have studied executive functions in relation to writing. Executive functions "supervise cognitive functioning."[148] They allow us to manage daily life and matter most when "success depends upon an individual being capable to sustain attention, manipulate ideas, resist to temptations, think before acting, and/or deal with unanticipated challenges."[149] Writing, of course, entails exactly those skills of keeping attention, manipulating ideas, and

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pauses and long bursts of language that can combine different clauses or sentences."); *see also* Mary Barnard Ray, *Writing on the Envelope: An Exploration of the Potentials and Limits of Writing in Law*, 49 DUQ. L. REV. 573, 585–86 (2011).

143. *See* HANDBOOK OF WRITING RESEARCH 89 (Charles A. MacArthur, Steve Graham & Jill Fitzgerald eds., 2d ed. 2016).

144. *Id.* at 41.

145. *See* Oldfather, *supra* note 86, at 1306 (explaining that a writer must "move from an immediately accessible (to her) private meaning to a public meaning that can be accessed solely through the medium of words").

146. *See* Ehrenberg, *supra* note 6, at 1192 ("The judge who issues a written opinion necessarily chooses her words with greater care than one who issues an opinion extemporaneously from the bench.").

147. *See* Stephen B. Burbank, *Judicial Accountability to the Past, Present, and Future: Precedent, Politics, and Power*, 28 U. ARK. LITTLE ROCK L. REV. 19, 21 (2005) (discussing the "threat" of "alternatives to traditional appellate decisionmaking" in federal appellate courts).

148. EXECUTIVE FUNCTIONS AND WRITING, *supra* note 141, at 207.

149. *Id.* at 4.

responding to new thoughts. Researchers have sought to understand how executive functions "direct and regulate [writers'] thoughts and behaviours."[150] They have explored how executive function assists writers in each step of writing, as well as how they cycle between the steps.[151]

Working memory is another concept with broad application in cognitive science that researchers have studied specifically in relation to writing. It "entails the ability to temporarily store and simultaneously process information"[152] and is instrumental for all steps—planning, translating, and reviewing—in the writing process.[153] Writers use working memory, for example, to remember the ideas they want to write down or when comparing the thoughts in their mind to the words written on the page.[154] Different models of working memory exist, but they agree that working memory is a "limited-capacity system."[155] Using working memory to correct spelling, for example, leaves less of it for composing text.[156] Overall, "efficient writing requires freeing working memory resources by automatizing low-level processes such as transcription and spelling to allow interactions between the high-level writing processes."[157]

Executive function and working memory will matter in appellate courts too. Writing means thinking. Judge Aldisert wrote, "If a judge wants to write clearly and cogently, with words parading before the reader in a logical order, the judge must first *think* clearly and cogently, with thoughts laid out in neat rows."[158] When SIACs write decisions they think about the subject of the decision and they likely transform their understanding of the subject for future cases, as well.[159] Justifying a decision in writing may develop the judge's "initial understanding of the proper resolution," perhaps changing the result, but more often "affect[ing] the rationale or the terms of the justification, which will themselves have independent significance in a precedential sense."[160] The cognition of writing also takes time, which "ensures that deciding the deciding court has considered all relevant factors, researched the applicable law and given the case the thought it deserved."[161] Moreover, writing demands that lawyers integrate the creative (right) and logical (left) parts of their brains.[162]

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150. *Id*. at 235.

151. *Id*. at 209.

152. *Id*.; *see also* Andrew M. Carter, *The Reader's Limited Capacity*, 11 LEGAL COMM. & RHETORIC 31, 36 (2014).

153. HANDBOOK OF WRITING RESEARCH 2016, *supra* note 143, at 30.

154. EXECUTIVE FUNCTIONS AND WRITING, *supra* note 141, at 209.

155. *Id*. at 210.

156. EXECUTIVE FUNCTIONS AND WRITING, *supra* note 141, at 210–11.

157. *Id*. at 211.

158. RUGGERO J. ALDISERT, OPINION WRITING 20 (2012).

159. *See* Oldfather, *supra* note 86, at 1306; RICHARD A. POSNER, REFLECTIONS ON JUDGING 46 (2013).

160. Oldfather, *supra* note 86, at 1319.

161. Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 512 (2015).

162. *See* Laurel Currie Oates, *Beyond Communication: Writing as a Means of Learning*, 6 LEGAL WRITING:

Interestingly, writing may not assist in certain types of legal decisions. Chad Oldfather, for example, suggests that writing hinders decision-making in "negative justification" cases.[163] These cases "turn on relatively inarticulable factors," demanding instead "a summary, almost intuitive determination."[164] The judge cannot "articulate all the reasons for his decision," which may lead him to "overweigh the articulable components of his analysis relative to other factors."[165] Requiring judges to give reasons may lead them to manufacture them when they cannot easily explain a decision.[166] Oldfather, at least, also notes that negative justification cases are difficult to identify[167] He emphasizes the benefits of writing for other types of appeals.[168]

Consider, too, how trial court decision-making differs from appellate court decision-making. Trial judges and juries may reach decisions, especially about facts, with some degree of "gestalt intuition."[169] On appeal, however, disputes are more likely to be framed around principles, values, precedent, and analogies. The parties have more time to crystallize points of comparison and interpretation. For these types of arguments, judicial explanation is possible, and writing is valuable. The losing party, for example, might be disappointed with a court's interpretation but still respect the court's decision if it is coherent and reasoned.[170]

Writing may exacerbate divisions between judges because they are forced to specify their disagreements.[171] Yet, writing also may lead those judges to better explain themselves to each other and the public. It should lead courts to treat precedent respectfully, nurturing "a spirit of compromise between past decisions and today's preferred outcomes."[172] If American society—and its judges—become more polarized, explanatory writing will be more important when judges seek to justify contentious results. Indeed, distrust contributed to the development of a writing culture in American law in the 1800s.[173]

J. Legal Writing Inst. 1, 2 (2000).

163. Oldfather, *supra* note 86, at 1320.

164. *Id*. at 1322.

165. *Id*.; *see also* Ashley S. Deeks, *Secret Reason-Giving*, 129 YALE L.J. 612, 634 (2020) ("One concern might be that when people reason about their own opinions, they focus only on justifications that support their decision and ignore negative arguments unless they anticipate needing to rebut them.").

166. *See* Cohen, *supra* note 161, at 521–22. Note that Cohen's research compares expectations of reasoned decisions between common law and civil law systems with a focus on U.S. federal courts.

167. Oldfather, *supra* note 86, at 1321.

168. *Id*. at 1330–31.

169. Andrew Jensen Kerr, *The Perfect Opinion*, 12 WASH. U. JURIS. REV. 221, 245 (2020).

170. *See, e.g*., Rebecca Hollander-Blumoff, 65 ARIZ. L. REV. 643, 649 (2023) ("[I]ndividuals who believe that outcomes are produced via a procedurally just process are more likely to adhere to, accept, and feel satisfied by a legal decision."); Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, 59 HOUSTON L. REV. 103, 147 (2021) ("Parties to a legal dispute have a right to feel that their participation has been meaningful–that the court has taken their arguments seriously and given them full consideration. A one-sided opinion is unlikely to enable all parties to the dispute to feel that way."); Lebovits et al., *supra* note 7, at 244 ("The losing party must be satisfied that its arguments have been considered and fairly evaluated.").

171. *See* Cohen, *supra* note 161, at 515.

172. Glen Staszewski, *A Deliberative Democracy Theory of Precedent*, 94 U. COLO. L. REV. 1, 23 (2022).

173. *See supra* notes 24–25.

Moreover, written opinions show judicial work, which the public otherwise does not see.[174] They make *stare decisis* possible. As an opinion says, "This is the right way to think and talk about this case, and others like it."[175] The goal is to nourish consistency from case to case, or even to prevent litigation in the first place because precedent shows a clear resolution.[176] Opinions guide litigation, showing future litigants what matters to the court,[177] which is true for SIACs just as it is true for courts of last resort and federal intermediate appellate courts. Arguably, federalism renders SIAC writing more necessary than writing in federal intermediate appellate courts. First, "when both state and federal constitutional questions are raised, [state] intermediate appellate courts usually have the first opportunity to declare whether the outcome rests on independent and adequate state grounds."[178] Second, robust state law is needed when state matters are litigated in federal courts. Otherwise, federal courts may be tempted to encroach on state sovereignty.[179]

Finally, consider the benefits of writing for the writer. In 1961, Robert Leflar suggested that an appellate judge who works with "meticulous effort" will have "a sense of satisfaction of work well done" and "a proper sense of pride."[180] Writers will better understand legal concepts and practice integrating ideas across different schemes.[181] They even may achieve a new level of clarity, simplifying legal principles or synthesizing muddled precedent. Returning to drafts and checking for soundness, writers also are more likely to confront bias.[182] Indeed, writing opinions is a practice of civic integrity. In an opinion, the writer may demonstrate that they listened to the parties, including vulnerable people. They may write genuinely, even gracefully, about our shared human condition.[183]

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174. *See* Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 819 (1961) ("Opinions are the public voice of appellate courts, and so represent the judiciary to the public, but they are not voices merely. They are what courts do, not just what they say.").

175. James Boyd White, *What's an Opinion For?*, 62 U. CHICAGO L. REV. 1363, 1366 (1995). Compare Professor White's sentiment with Judge Arnold's quip about non-precedential opinions: "We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday." Anastasoff v. United States, 223 F.3d 898, 904 (8th Cir. 2000), *opinion vacated on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000).

176. *See* Aldisert et al., *supra* note 114, at 5.

177. *See, e.g.*, McAlister, *supra* note 40, at 590; Leen, *supra* note 130, at 320.

178. *See* Najam, *supra* note 2, at 332.

179. *See, e.g.*, Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2176 (2019); Laura E. Little, *Erie's Unintended Consequence: Federal Courts Creating State Law*, 52 AKRON L. REV. 275, 286 (2018).

180. Leflar, *supra* note 174, at 813; *see also* Lebovits et al., *supra* note 7, at 245 ("Ultimately, a judge must always be happy with an opinion. A judge who is not happy with an opinion is a judge who has not taken seriously the responsibility to ensure that an opinion is correct.").

181. *See* Oates, *supra* note 162, at 4.

182. *See, e.g.*, David M. McGowan, *Judicial Writing and the Ethics of Judicial Office*, 14 GEO. L. J. LEGAL ETHICS 509, 514 (2001) (referencing George Orwell's example of "a biased writer honestly fighting his biases."); Varsava, *supra* note 170, at 145 (suggesting that "formal constraints on judicial writing" might alleviate implicit bias).

183. *See, e.g.*, White, *supra* note 175, at 1368 ("If [an opinion] is open and generous, . . . it will dignify the

Judith Kaye, Chief Judge of the New York Court of Appeals wrote, "As wordsmiths, judges engage in an intensely human endeavor. And indeed, it is only through such a human process that true justice emerges."[184]

The scale, then, weighs in favor of writing for reasoned decision-making, for "[w]riting can take the sloppy stream of consciousness and give it form and purpose," giving "shape" to what is "vague and empty."[185] That might be a sobering conclusion for the nine states[186] that allow SIACs to reach decisions without writing. Even the states, however, that require SIAC writing, thirty-three in total,[187] should review their writing rules to assess if they capture the benefits of writing. They should ask if the rules reflect the science of writing, including the recursive steps of writing, executive function, and working memory. They should ask if the rules promote a writing culture, *stare decisis*, and the development of opinion-writers as fair decision-makers.

Arguably, no rule could capture all these benefits because they reflect values and commitments, rather than itemized to-do lists. Perhaps the mistake is in states trying to codify rules of writing in the first place. At least five states would seem to have reached this conclusion as they do not prescribe the format for SIAC opinions.[188] This is the best method for quality appellate opinions because it lets courts develop a writing culture that fits their jurisdiction and encourages them to write what needs to be written irrespective of form. Several more states continue to recognize discretion in opinion-writing even though they have writing rules.[189] I support this discretion, as well.

On the other hand, twenty-nine states specify two or three forms of opinion writing,[190] and twenty-two states set criteria for SIACs to choose between these forms.[191] These rules direct judges to select and justify a format and then write within its constraints. They risk prioritizing the form of the opinion over the substance of its reasoning and imposing a technical, bureaucratic routine for opinion-writing that forecloses the benefits that writing offers. Also, the criteria are subject to interpretation, in which case, they may not meaningfully change how judges write. For example, in one survey of California appellate judges, twenty

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experience of those it talks of, and in so doing it will dignify the law itself."); McAlister, *supra* note 40, at 562 ("Reason-giving . . . is one way to create a fairer, more humanizing process, even if it will not address structural inequities or change outcomes."); Beverly B. Martin, *Another Judge's Views on Writing Judicial Opinions*, 51 DUQ. L. REV. 41, 43–44 (2013) (noting that in most cases, an opinion is the only communication an appellate judge has with the parties).

184. Judith S. Kaye, *Judges as Wordsmiths*, 69 N.Y. STATE BAR J. 10, 11 (1997).

185. MARK EDMUNDSON, WHY WRITE 70 (2016).

186. *See supra* note 68.

187. *See supra* note 67.

188. *See supra* notes 108–09.

189. *See supra* notes 110–12.

190. *See supra* notes 70–71.

191. *See supra* note 72.

percent conceded that factors other than the state's publication rules affected publication.[192]

Emphatically, though, I do not endorse longer opinions. We should not confuse the benefit of writing with the length of writing. An opinion can be long and inadequate, just as it can be short and helpful.[193] An inadequate opinion usually has elements of vagueness, repetition, and conclusory statements. It reads as if "anonymous bureaucrats" wrote it, who were "indifferent" to the result.[194] A helpful opinion, on the other hand, explains the result to the parties and future readers. It prioritizes explanation and application of the law over illustration and repetition. A helpful opinion avoids "rote recitations of established legal principles, forgo[es] superfluous citations, and work[s] consciously toward economies of phrase."[195] It is accurate and clear, showing "clean lines of legal reasoning" that are "crisply stated."[196] If we are lucky, an opinion even evinces the "intensely human endeavor" summoned by Judge Kaye. The science and scholarship discussed in this section supports writing, but only the writing of quality opinions.

C. LAW CLERKS WRITE MOST SIAC OPINIONS

When people think about writing in appellate chambers, they may imagine a judge as the author. Today, however, most of the time, someone other than a judge drafted the opinions issued in state and federal courts.[197] Typically, the person writing is a law clerk, hired by the judge and working in chambers, or a staff attorney, hired by the court and working for a larger bench of judges. SIACs, like all appellate courts, are not obligated to reveal the authors of their opinions. Further, it remains taboo for judicial staff to identify opinions they wrote under a judge's name.[198] Law clerk drafting is a known secret, sometimes ignored, sometimes maligned, and increasingly tolerated as a fact of chamber life.[199]

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192. *See* Mead, *supra* note 126, at 255.

193. *See* McAlister, *supra* note 40, at 571–72 (offering a "good example" of a short but effective decision); Vickrey et al., *supra* note 24, at 76 (discussing the increase in length for state court opinions, particularly in California); Rafi Moghadam, *Judge Nullification: A Perception of Unpublished Opinions*, 62 HASTINGS L.J. 1397, 1432 (2011) (noting that "[g]reat opinions can be short"); McGowan, *supra* note 182, at 566 (encouraging judges, not law clerks, to write opinions even if that means the opinions are "shorter and more concise").

194. McAlister, *supra* note 40, at 575; *see also* POSNER, *supra* note 159, at 237 (listing his "reservations about the quality of judicial opinion writing").

195. Lebovits et al., *supra* note 7, at 253.

196. ALDISERT, *supra* note 158, at 117.

197. *See* Rick A. Swanson & Stephen L. Wasby, *Good Stewards: Law Clerk Influence in State High Courts*, 29 JUST. SYS. J. 24, 38 (2008); David Lat, *How Should A Judge Be: In Defense of the Judge as CEO*, 69 VAND. L. REV. EN BANC 151, 158 (2016); JONATHAN MATTHEW COHEN, INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURT OF APPEALS 112 (2002); DOMNARSKI, *supra* note 14, at 43.

198. *See* Perry Dane, *Law Clerks: A Jurisprudential Lens*, 88 GEO. WASH. L. REV. ARGUENDO 54, 57 (2020).

199. *See id.* at 70–71 (exploring the uneasiness about law clerks "ghostwriting" opinions); Donald W. Molloy, *Designated Hitters, Pinch Hitters, and Bat Boys: Judges Dealing with Judgment and Inexperience, Career Clerks or Term Clerks*, 82 LAW & CONTEMP. PROBS. 133 (2019) (examining the law clerk role in federal

This veiled division of labor between judges and law clerks is another quiet justification for SIACs writing less. If judges are not writing opinions, the argument goes, little is lost in limiting writing altogether. However, the justification is weak because it presumes that explanatory writing was not necessary in the first place. Writing science disputes this presumption, as the previous section explained. The law clerk justification for less writing also stumbles because it presumes that only judges will contribute meaningful thought to a written opinion. Writing science may dispute this assumption, as well. Presumably, law clerks who regularly draft opinions will experience the same benefits of writing as judges who write regularly, including clarity of thought, confrontation of bias, and civic engagement. Perhaps, over time, law clerks become as good as judges in writing opinions. Indeed, a career clerk at least will have greater opinion-writing experience than a newly appointed judge.[200] Perhaps the significance is in having *someone* carefully write a decision—that could be a judge or a law clerk.

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We cannot say for certain, though, because law clerk writing remains largely unexplored. We know even less about law clerk writing in state courts, as compared to federal courts.[201] Mostly, relevant literature offers interview and survey responses from judges about how they supervise law clerks in the process of writing opinions. Variations show in whether the judge or the law clerk is first to review the appellate record, how much freedom the law clerk has in drafting an opinion, and the judge's method for editing law clerks' drafts.[202] Regardless, clearly law clerks today contribute substantially to the drafting process.[203]

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Survey responses and observations are educational, but they should not dictate rules about when and how SIACs write. There simply is not enough information to discern if law clerk writing helps or hinders SIAC decision-making. Nor is it clear that the benefits of writing emerge only when judges write. What might fairly be surmised is that the reality of law clerk writing changes how chambers operate. If law clerks are drafting opinions, judges may review and edit just as

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district court); McGowan, *supra* note 182, at 556 (criticizing law clerks writing opinions); POSNER, *supra* note 159, at 46 (lamenting the "loss when opinions are ghostwritten"); Chad Oldfather & Todd C. Peppers, *Judicial Assistants or Junior Judges: The Hiring, Utilization, and Influence of Law Clerks*, 98 MARQ. L. REV. 1, 1 (2014) (summarizing the history of the "institution of the law clerk" in federal court).

200. *See* Swanson & Wasby, *supra* note 197, at 37 ("As clerks gain considerable legal experience and expertise, the asymmetry of expertise between the clerk and the judge lessens."); Harry Lee Anstead et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. 431, 468–69 (2005); Daniel J. Bussel, *Opinions First-Argument Afterwards*, 61 UCLA L. REV. 1194, 1236 (2014) (noting California's reliance on "permanent professional staff").

201. For a discussion of law clerk writing in state courts of last resort, see Swanson & Wasby, *supra* note 197, and Peverall, *supra* note 61, at 323. For a discussion of law clerks and staff attorneys in Texas intermediate appellate courts, see Worthen, *supra* note 56, at 51–52. More has been written about law clerks in federal court. *See, e.g.*, Molloy, *supra* note 199, at 147; Mitu Gulati & Richard A. Posner, *The Management of Staff by Federal Court of Appeals Judges*, 69 VAND. L. REV. 479, 481 (2016); Neal Devins & David Klein, *The Vanishing Common Law Judge*, 165 U. PA. L. REV. 595, 622 (2017); DOMNARSKI, *supra* note 14, at 42–44.

202. *See* COHEN, *supra* note 197, at 112–17; Swanson & Wasby, *supra* note 197, at 34.

203. *See* COHEN, *supra* note 197, at 11.

Fn204 often, or even more often, than they write from scratch.[204] These judges might be inclined to create sample opinions for new law clerks to follow, especially if they work for SIACs that have prescribed forms of opinions. Noteworthy is that legal writing with AI is more likely to succeed with sharp skills of reviewing, editing, and sampling, as explained in section III. So, while law clerk writing does not justify less writing for SIACs, the conditions it has fostered in chambers likely will align with our AI future.

D. WRITING HAMPERS EFFICIENCY AND PRODUCTIVITY

The two final reasons for limiting SIAC writing are efficiency and productivity. Efficiency measures the length of time a case is in an appellate court from the filFn205 ing of the notice of appeal to the final disposition.[205] Productivity measures howFn206 many cases an appellate court processes.[206] The argument is that judicial writing is time-consuming, so courts must limit writing to be efficient and productive. Fundamentally, we should ask why the metrics to study speed and quantity for Fn207 SIAC decision-making are prioritized over studies of decisional quality.[207] The unsatisfactory answer may be only that dates and numbers are tangible and easy to track, whereas, quality decision-making is largely intangible and fraught with distinctions. In the end, efficiency and productivity do not justify less explanatory writing in SIACs because they fail to account for the real work of appellate courts. Moreover, they may lead courts to sacrifice one appellate process for another and to devote more attention to certain types of cases.

At least a handful of SIACs have established guidelines for the timing of appellate decisions. California, Florida, Minnesota, New Mexico, and Ohio set this Fn208 timing by statute or rule.[208] Pennsylvania, Tennessee, and Wisconsin, on the other Fn209 hand, include timing as part of internal operating procedures.[209] Generally, the deadline speaks to the amount of time between oral argument and issuance of the final decision. Across these SIACs, the timing ranges considerably. California Fn210 and Minnesota have ninety-day deadlines,[210] whereas Florida and New Mexico

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204. *See* Swanson & Wasby, *supra* note 197, at 38; Gulati & Posner, *supra* note 201, at 484.

205. Binford et al., *supra* note 55, at 41.

206. *Id.*; *see also* William G. Young & Jordan M. Singer, *Bench Presence: Toward a More Complete Model of Federal District Court Productivity*, 118 PENN. STATE L. REV. 55, 60, 65 (2013); Stephen J. Choi, Mitu Gulati & Eric Posner, *Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges*, 58 DUKE L. J. 1313, 1320 (2009).

207. *See* Young & Singer, *supra* note 206, at 67.

208. *See* CAL. CONST. art. VI, § 19; FL. GEN. PRAC. & J. ADMIN R. 2.250(a)(2); MINN. STAT. § 480.08 (2024); N.M. R. APP. P. 12-406; OHIO SUP. R. 39; *see also* Richard B. Hoffman & Barry Mahoney, *Managing Caseflow in State Intermediate Appellate Courts: What Mechanisms, Practices, and Procedures Can Work to Reduce Delay*, 35 IND. L. REV. 467, 470 (2002).

209. *See* 210 PA. CODE § 69.252 (2024); TENN. CT. APP. INTERNAL OPERATING PROC. 9; WIS. CT. APP. INTERNAL OPERATING PROC. VI.(4)(h).

210. *See* CAL. CONST. art. VI, § 19; MINN. STAT. § 480A.08 (2024); *see also* Joshua Stein, *Tentative Oral Opinions: Improving Oral Argument Without Spending a Dime*, 14 J. APP. PRAC. & PROCESS 159, 161 (2013).

Fn211 have 180-day deadlines.[211] On the more generous end, Ohio and Tennessee have
Fn212 deadlines of just over 200 days.[212] Less generous, Pennsylvania has a deadline of
Fn213 eighty days.[213] And Wisconsin expects forty days for an "average" case and sev-
Fn214 enty days for a case of "extraordinary complexity."[214] Some courts establish
Fn215 shorter timelines for expedited appeals.[215] Other SIACs may have guidelines for
Fn216 timeliness that are shared with their judges but not publicly available.[216] And beyond formal rules, certainly courts, panels, and individual chambers will have
Fn217 customs of their own.[217]

Efficiency goals, however, cannot eclipse other goals that SIACs pursue in their daily work, namely accuracy and integrity. That likely explains why most SIACs operate without explicit deadlines. Instead, the courts are expected to police themselves in issuing decisions that serve the ends of justice. That also explains why states that explicitly set time limits allow for exceptions. Wisconsin, for example, which allows the least amount of time for SIACs issuing decisions, also permits "[v]ariation . . . to accommodate special problems in indi-
Fn218 vidual cases and fluctuations in the flow of the panel's work."[218] Likewise,
Fn219 Minnesota allows for waiver of its ninety-day deadline for good cause,[219] and Tennessee recognizes "that circumstances unique to the case, the judge, or the
Fn220 workload" may extend issuance of an opinion past the six-month limit.[220] New
Fn221 Mexico's six-month deadline is only "aspirational."[221]

California stands alone in its strict treatment of deadlines for issuance of SIAC decisions. The California Constitution mandates that all its judges act within ninety days of a matter being submitted for decision; otherwise, the judges are
Fn222-223 not paid.[222] The ninety-day period begins after oral argument.[223] However, the

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211. *See* FL. GEN. PRAC. & J. ADMIN R. 2.250; N.M. R. APP. P. 12-405.

212. Ohio has a deadline of 210 days. *See* Hoffman & Mahoney, *supra* note 208, at 500 (relying on documentation not readily available to the public). For civil appeals in Tennessee, the authoring judge has six months to share a draft opinion with the panel. The panel then has fourteen days to respond with comments, and a dissenting or concurring judge has twenty-eight days to share the minority opinion with the panel. *See* TENN. CT. APP. INTERNAL OPERATING PROC. 9.

213. *See* 210 PA. CODE § 69.252 (2024).

214. *See* WIS. CT. APP. INTERNAL OPERATING PROC. VI.(4)(h). Distinguishing average from extraordinary cases mirrors the American Bar Association's Standards Relating to Appellate Courts. *See* Carl West Anderson, *An Appeal for Practical Appellate Reform,* 37 JUDGES J. 28, 29 (Spring 1998).

215. Florida, for example, has a sixty-day deadline for juvenile and termination of parental rights cases. *See* FLA. GEN. PRAC. & JUD. ADMIN. R. 2.250(a)(2).

216. *See* COUNCIL OF CHIEF JUDGES OF THE STATE CTS. OF APPEAL, *supra* note 43, at 21–22.

217. *See* Hoffman & Mahoney, *supra* note 208, at 474 (quoting a judge's recognition that "'[e]very court has its own culture'").

218. WIS. CT. APP. INTERNAL OPERATING PROC. VI.(4)(h).

219. MINN. STAT. § 480.08 (2024).

220. TENN. CT. APP. INTERNAL OPERATING PROC. 9.

221. N.M. R. APP. P. 12-406 cmt.; *see also* COUNCIL OF CHIEF JUDGES OF THE STATE CTS. OF APPEAL, *supra* note 43, at 21.

222. CAL. CONST. art. VI, § 19.

223. Bussel, *supra* note 200, at 1197.

appellate courts do not follow the letter of this law. Instead, the Supreme Court of California and the California Court of Appeals have worked around the mandate by drafting opinions and voting *before* oral argument.[224] So while the ninety-day rule dictates appellate process, it acts more as an obstacle to be maneuvered than as a strict mandate. Like other states, California's experience shows why fixed deadlines for processing SIAC appeals have not worked.

Another example is the American Bar Association's Standards Relating to Appellate Courts. In 1976, these standards stated that appellate courts should issue most decisions within thirty days of oral argument while reserving sixty days for the most complex appeals.[225] By 1994, however, the standards were relaxed, suggesting instead that seventy-five percent of all appeals be resolved within 290 days and ninety-five percent be resolved within a year.[226] Timeliness is an important tenet for just resolution, but the experience with the ABA standards, like the experience with deadlines in SIACs, shows that strict delineations are ineffective. SIAC workflow is dynamic and should be adjustable.

As with efficiency standards, productivity metrics produce their own delusions. The trouble begins with defining court productivity because courts provide services whose benefits are often intangible and difficult to measure.[227] Of course, service industries abound in the private and public sectors, and research for these industries has evolved to measure the quality of services provided.[228] Court productivity, research, on the other hand, "has not kept pace," sticking instead to objective measures that do not capture the full meaning of judicial work.[229] An appellate court, for example, could be highly productive in resolving most appeals without opinions. It would rank higher for productivity as compared to a court that issued written decisions for all its appeals. However, productivity numbers alone would not explain whether the courts met their responsibility for accurate and fair decisions, especially because appeals present questions of varying complexity. "[Q]uantitative measures" do not necessarily relate to "qualitative inferences."[230]

Plus, as charted above in Figure 1, when SIACs write, they issue opinions with different formats and lengths, which stymies comparisons for productivity.[231] It is difficult to reach firm conclusions when reading these productivity studies. Nor is it faster, necessarily, to write one kind of decision as compared to another. An unpublished opinion, for example, could take just as long to write as a published

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224. *Id.* at 1196; *see also* Stein, *supra* note 210, at 161–62.

225. *See* Anderson, *supra* note 214, at 28, 29.

226. *Id.*

227. Young & Singer, *supra* note 206, at 60–61.

228. *Id.* at 61.

229. *Id.* at 62–65.

230. Laura Denvir Stith, *Just Because You Can Measure Something, Does It Really Count?*, 58 DUKE L.J. 1743, 1744 (2009); *see also* Malia Reddick, *Evaluating the Written Opinions of Appellate Judges: Toward a More Qualitative Measure of Judicial Productivity*, 48 NEW ENG. L. REV. 547, 554 (2014) (advocating for the evaluation of opinion quality in assessing appellate judges' performance).

231. *See* Binford et al., *supra* note 55, at 40–41, 53.

Fn232 decision.[232] And even if a court does not write an opinion, it could spend appreciable time on briefing, oral argument, and deliberation. One study found "no correlation (positive or negative) between court efficiency and the number or percentage of Fn233 unpublished opinions."[233] Other scholars report a positive correlation between speed of processing appeals and lack of publication, but again, not always. Sometimes the Fn234 courts that publish the most are also the most efficient.[234]

Perhaps we should question the desire for a simple correlation between writing opinions and productivity, given the nature of appellate work. Not writing opin- Fn235 ions for easier cases on an appellate docket still leaves writing for harder cases.[235] Those opinions may demand disproportionately greater amounts of time. Moreover, studying productivity in an intermediate appellate court alone does not tell the full story. A SIAC that issues respected decisions should limit the Fn236 number of certioraris sought and granted in its state's court of last resort.[236] When that happens, the SIAC serves the judicial system, holistically, which may be a more important measure of productivity than a simple count of SIAC decisions.

Proposing, then, that courts write less to become more efficient and productive denies the nuanced reality of appellate decision-making and even empirical data. The real danger is that courts will find ways to meet efficiency and productivity standards by doing less judging and offering less process. Judges will be forced to choose where they direct their attention. Already SIACs screen cases for different Fn237 levels of treatment, resolving some appeals more summarily than others.[237] Case screening and differentiation starts early in the appellate process. For example, Fn238 SIACs have tracks for appeals with appellant briefs, but no respondent briefs,[238] Fn239 appeals without oral argument,[239] and appeals that are sent to staff attorneys, not Fn240 judges, first.[240] Criminal cases are sent to summary tracks more often than civil Fn241 cases. [241]

It stands to reason that deadlines and productivity quotas will force courts to track more cases for summary dispositions, not because they deserve less process, but simply in service to dates and numbers. Illinois's experience in the 1990s is instructive. In 1994, the Illinois Supreme Court limited the number of opinions that Illinois intermediate appellate courts could publish by at least one-third of

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232. *See id.* at 85.

233. *See id.* at 86.

234. *See* McAlister, *supra* note 40, at 560 (reviewing publication and timing rates for federal appellate courts).

235. *See* Binford et al., *supra* note 55, at 75.

236. *See* Stith, *supra* note 230, at 1748.

237. *See* COUNCIL OF CHIEF JUDGES OF THE STATE CTS. OF APPEAL, *supra* note 43, at 14–19; Binford et al., *supra* note 55, at 74–75.

238. *See* Binford et al., *supra* note 55, at 74.

239. *See* Ehrenberg, *supra* note 6, at 1165; Thomas E. Hollenhorst, *Tentative Opinions: An Analysis of Their Benefit in the Appellate Court of California*, 36 SANTA CLARA L. REV. 1, 8–9 (1995); Binford et al., *supra* note 55, at 74, 76; Martin, *supra* note 183, at 43 (noting rates of oral argument in federal courts of appeals).

240. Binford et al., *supra* note 55, at 74; McAlister, supra note 40, at 567.

241. *See* Huang & Narechania, *supra* note 97, at 1741–42.

what the appellate courts had published the year before.[242] Publication mattered because Illinois limited citation to published opinions only.[243] Forced to choose cases for publication, the Illinois appellate courts heavily favored civil cases over criminal cases.[244] Importantly, the appellate courts also sought to balance published affirmances and reversals because they did not want to signal that the trial courts were judging poorly. They artificially inflated the number of published affirmances.[245] That meant that publication came to depend "not only on the qualities of [a] case alone, but also on which other case had already been published and, specifically, on how many were reversals and how many were affirmances."[246] In other words, numbers, not need, controlled publication and precedent. Illinois vacated the limit in 2006,[247] but the experience remains a cautionary tale.

Moreover, to achieve efficiency and productivity, most appellate courts already limit oral argument, either by tracking appeals to a docket with briefing but no argument, or by limiting the time for argument.[248] Arizona and California maintain programs that allow SIACs to share "tentative" opinions with litigants after reading the parties' briefs and ahead of oral argument.[249] District Two of California's Fourth Appellate Division attaches a notice to the tentative opinion explaining whether the court is prepared to decide the case without oral argument.[250] Counsel may request oral argument even if the court is ready to decide the case without it.[251] But practically, tentative opinions are meant to limit oral argument.[252]

While an exploration of oral argument is beyond the scope of this article, it is noteworthy that a popular justification for limiting oral arguments is to give courts more time to research and write decisions. [253] From this perspective, oral argument and writing compete for the court's attention, so that any time not spent on oral argument will be time spent on writing.[254] The rivalry is unfounded because oral argument and writing complement each other. Of course, courts should spend time wisely and respond to the needs of the legal system, changing and updating processes as needed. But they should not be asked to pit against each other types of cases—criminal and civil appeals—or steps in the appellate process—oral argument and opinion-writing—to meet numerical benchmarks.

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242. *Id*. at 1732.
243. *Id*. at 1729.
244. *Id*. at 1741.
245. *Id*. at 1746.
246. *Id*. at 1760.
247. *See In re* Admin. Ord. No. M.R. 10343, Ill. Sup. Ct. (2006).
248. *See* Pierre H. Bergeron, *Covid-19, Zoom, and Appellate Oral Argument: Is the Future Virtual?*, 21 J. APP. PRAC. & PROCESS 193, 196–97 (2021); Ehrenberg, *supra* note 6, at 1162; Hollenhorst, *supra* note 239, at 9.
249. *See* Stein, *supra* note 210, at 163–70; Hollenhorst, *supra* note 239, at 4–5.
250. *See* CAL. CT. APP. FOURTH DIST. DIV. TWO, INTERNAL OPERATING PROC. VIII.
251. *See id*.; People v. Pena, 83 P.3d 506, 514 (Cal. 2004); Stein, *supra* note 210, at 163–64.
252. Hollenhorst, *supra* note 239, at 18.
253. *See* Kravitz, *supra* note 7, at 256.
254. *See* Ehrenberg, *supra* note 6, at n.8; Bergeron, *supra* note 248, at 197.

Efficiency and productivity arguments do not reflect the real work of SIACs, and they may lead courts to sacrifice appellate process. At bottom, these arguments assume that the time for writing opinions is limited because there are too few writers and too many cases, and that appellate courts are stretched thin and underfunded. Sadly, these assumptions are reliable. Without question, state courts, including appellate courts, face budget crises.[255] They need more judges and court personnel. Yet budgets reflect values. When courts are valued, they will have budgets that let them complete their work expertly and with integrity. They will be held to high standards of reasoning and process. If courts are not valued, no amount of lip service will compensate for underfunding them. In the end, quantitative measurements cannot hide qualitative flaws.

III. SIAC WRITING IN THE AI FUTURE

AI is changing legal writing. No longer must a writer face an empty page when they begin to write. No longer must they write a first draft at all. Instead, legal writers may direct AI to draft and then review what it produces. Presently, AI drafting for law does not match quality human work, especially for legal analyses of nuance, discernment, and ethics.[256] But AI can do some of the basic tasks in legal writing like summarizing facts or setting out principles of law.[257] It can redraft paragraphs for improved organization and tone. It corrects grammatical mistakes. Writing opinions, of course, includes all these tasks. So, we should expect on the horizon that courts, like all legal writers, will incorporate AI when they write.[258] Specifically important for this article, are the ways that AI drafting aligns with the current landscape of SIAC writing and its justifications for less explanatory writing. This section explores that alignment, including the benefits and risks that AI offer for SIAC writing. The AI horizon confirms that writing is important for SIACs and that rules limiting their writing are detrimental.

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255. *See* Binford et al., *supra* note 55, at 94.; COUNCIL OF CHIEF JUDGES OF THE STATE CTS. OF APPEAL, *supra* note 43, at 9; Erwin Chemerinsky, *Symposium on State Court Funding: Keynote Address*, 100 KY. L. REV. 743, 744–45 (2012).

256. *See* Choi et al., *supra* note 1, at 44 (noting that "providing humans with AI produced significant gains in accuracy with respect to simple multiple choice questions, limited quality gains for straight-forward legal essays, and no average gains in quality with respect to student answers to complex and advanced legal essay questions"); Ellie Margolis, *Doing Less—Reflections on Cognitive Load and Hard Choices in Teaching First-Year Legal Writing*, 68 ST. LOUIS UNIV. L.J. 399, 413 (2024) (concluding that lawyers cannot rely on AI "for content and analysis").

257. *See* Choi, et al., *supra* note 1, at 45.

258. *See, e.g.*, Snell v. United Specialty Ins. Co., 102 F.4th 1208, 1221 (11th Cir. 2024) (Newsom, J., concurring) (exemplifying an appellate judge explaining his use of AI to determine the ordinary meaning of a contractual term). Of course, courts may use AI for other purposes, too, like assessing risks in criminal cases or creating online dispute resolution. *See* Cary Coglianese & Lavi M. Ben Dor, *AI in Adjudication and Administration*, 86 BROOK. L. REV. 791, 801–03, 811–12 (2021). These uses are beyond the scope of this article, which focuses on using AI for SIAC writing.

A. AI AND THE CORRECTING ERROR JUSTIFICATION

As explored in this article, the first justification for SIACs writing less is the dichotomy between correcting error and developing law. The dichotomy treats error correction like a mathematical equation and assumes that judging is mechanical. However, misleading the dichotomy, when SIACs perceive themselves as merely correcting mistakes, they are apt to issue monotonous opinions with summaries of the law and oft-repeated phrasing. Originality of thought and expression may seem out of place for these courts, reserved instead for courts of last resort. AI excels at summarizing ideas from a large expanse of words. It also excels at rehearsing common phrases because those are the most predictable. In that light, AI aligns with the error-correcting justification.

Unfortunately, AI also can exacerbate the illusions and abuses that the justification produces. First, AI will make it easier to issue the formal, mechanical opinions preferred for correcting error. Second, AI may conceal when SIACs are developing law if it adds stock phrases and simple deductions in the style of error-correction writing. The AI product may read as a simple analysis, masking the nuance and law development at play. Or, worse, AI may attempt to turn hard questions into easy ones, diminishing inquiry and appellate thought.[259] It is not certain who will be responsible to challenge AI's treatment of an appeal as correcting error rather than developing law, especially if courts use AI in the first place to categorize appeals. Nor is it clear who will challenge AI's confidence that it can produce uniform, mechanical analysis when human experience suggests otherwise.

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B. AI AND THE WRITING IS UNNECESSARY JUSTIFICATION

The second justification for SIACs writing less, that writing is not necessary for appellate review, speaks more directly to the AI future. Recall that writing science recognizes the steps of planning, translation, and reviewing in the writing process.[260] With AI, writers in chambers are less likely to write first drafts, which is when planning what to say and translating those plans into words happens. Chamber staff will instead edit what AI has produced. That is a significant change in the process. But the writing steps are recursive, so it remains likely that writers will incorporate planning and translation even as they edit AI text. More concerning is AI's effect on the cognition of writing in chambers. Reviewing text with *occasional* planning and translation differs greatly from exercising executive function and working memory for the full writing process. If opinion writers rely on AI for first drafts, they will not be as knowledgeable of the law about which they write or as invested in the final product. Nor will they receive the benefits of

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259. *See* Joshua P. Davis, *Of Robolawyers and Robojudges*, 73 HASTINGS L.J. 1173, 1199 (2022) ("A robojudge, however, will lack the capacity to distinguish sound arguments from manipulative or dangerous ones.").

260. *See supra* notes 137–38.

Fn261 writing like confronting bias and cultivating civic compassion.[261] Those are deep losses.

Moreover, AI is changing the culture of legal writing, which will include the culture of writing in SIACs. According to Kirsten Davis, "Generative AI represents the kind of revolutionary innovation that marks the beginning of a paradigm shift because it is destined to change the thinking about (at least) some of the legal
Fn262 writing field's fundamental concepts and practices." [262] Though these changes are not definitive, it is safe to predict that expectations around writing will change. Perhaps legal writers will become less skillful and less disciplined. Or perhaps, AI will release us from tedious writing and preserve more time for complexity and human judgment. The former change, of course, will produce inferior opinions, but the latter could mean more meaningful opinions. SIACs have an opportunity now to cultivate the second alternative. They should educate chamber writers about the writing process and the cognition of writing alongside education about AI. They should set high expectations for written opinions, focusing on logic, responsiveness, and meaning, rather than templates for opinions or the length of opinions.

While, possibly, American courts could abandon the written tradition and revert to an oral tradition, that is not likely anytime soon. Even with AI, then, written decisions will continue to serve as a primary way that SIACs show their work to the public. SIACs, like all courts, are obligated to meet their civic purpose. If SIACs use AI reflexively, their opinions are likely to read as mechanical and bureaucratic. They will not be held in higher esteem and might only contribute to the demise of writing cultures within their courts. If, hopefully, SIACs use AI skillfully, they could improve their written decisions and their writing culture. Specifically, SIAC writers are likely to read in AI drafts verbose summaries and rehearsed phrasing. They should be encouraged to delete them, preserving instead meaningful passages of analysis and lu-
Fn263 cidity.[263] The opinions will be better in substance and perhaps shorter, too.

C. AI AND THE LAW CLERK JUSTIFICATION

That brings us to the third justification, closely related to the second justification, namely that writing must not be important because SIACs delegate the responsibility to law clerks. The argument, again, is that if judges have abandoned writing opinions, no one will notice if their court produces fewer law-clerk-written decisions. The justification is unsupported, resting on assumptions and impressions, rather than clear empirical knowledge. At the same time,

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261. Another concern is that AI may "inherit the biases and prejudices of the data creators, curators, and fine-tuners." ETHAN MOLLICK, CO-INTELLIGENCE 94 (2024).

262. *See* Kirsten K. Davis, *A New Parlor is Open: Legal Writing Faculty Must Develop Scholarship on Generative AI and Legal Writing*, 7 STETSON L. REV. F. 1, 5 (2024).

263. *See* Bryan Garner, *Lawyers as Explainers*, ABA J., Aug.–Sept. 2024, at 21 ("Because expert explainers are exceedingly aware of their audience, they recognize they must pace their ideas, defend their point of view, head off objections, admit and overcome potential weaknesses, explain counter-examples, and exemplify their strengths. This type of paced lucidity is a habit of mind that's gradually acquired through constant practice.")

though, this justification reflects many of the same considerations for AI writing in SIACs. And the writing relationship between judges and law clerks in chambers offers clues about AI writing in the future.

Today, when law clerks write and judges review, law clerks engage in the writing process, exercise the muscles of cognition, and reap the personal benefits of writing. Judges experience less of all these conditions, even though they, not the law clerks, remain responsible for the opinion and its mandate. This is the "manager model" of appellate judging, which delegates the writing process to law clerks.[264] Indeed, as Judge Posner explained, some appellate chambers have layers of management with a judge delegating work to a senior clerk, who in turn delegates to a junior clerk. As written work moves through these layers of hierarchy, the judge is "further distance[d] from the essential inputs" of "the decisional process."[265] Judges may "fool themselves when they think that by careful editing they can make a judicial opinion their own."[266] Quantifying the point, Judge Posner notes that "[i]f an editor changes thirty words on a page that contains three hundred words, . . . only [ten] percent of the words will have been changed and many of the changes will have been inconsequential."[267]

Judge Posner's description of the judge/law clerk relationship resembles what we know of the human writer/AI relationship. With AI, the writer is also a manager, delegating writing and reviewing. Similarly, AI will distance the writer from some aspects of the writing process like research and writing first drafts. Finally, review of AI drafts may well resemble the editing quotient that Posner describes. "Even if we rewrite the drafts completely, they will still be tainted by the AI's influence."[268] We have some idea, then, for what AI will mean for SIAC writing. Judge Posner's concerns for law clerk drafting are likely to surface as SIACs use AI in chambers. The antidote is attentiveness and skill. Philosophically, appellate courts must dedicate themselves to maintaining excellent standards of analysis. Practically, they should plan now for training judges and law clerks in using AI, including its benefits and risks for research, drafting, and editing. Courts also should plan now for providing ongoing support as judges and law clerks navigate transitions in the writing process.

D. AI AND THE EFFICIENCY AND PRODUCTIVITY JUSTIFICATION

Finally, consider the fourth justification for SIACs writing less, that writing less often and within prescribed limits improves efficiency and productivity. The argument selectively focuses on easily measured items like the length of time for an appeal or the number of cases on a docket. It ignores the real work of appellate

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264. POSNER, *supra* note 159, at 239.
265. *Id*. at 245.
266. *Id*. at 46.
267. *Id*.
268. MOLLICK, *supra* note 261, at 94.

courts, prioritizing speed over deliberation and production over thought. It also is dangerous in assuming that courts cannot have the resources they need to meet their civic charge. So, too, AI may unduly prioritize easily measured factors in decision-making.[269] It may produce legal analysis quickly but only by muting nuanced questions and masking variegated patterns of values and ethics. Similarly, AI could become dangerous if administrators rely on it as a cheaper alternative to human work, if, for example, they replace law clerks and staff attorneys with AI.[270]

For now, such a replacement would be a mistake because AI cannot provide what humans do. But even in the future, if AI improves, costs should be measured honestly. Yes, salaries for judges and law clerks are costs. But there also are costs for inaccuracy, which will materialize when people must correct AI mistakes. Consider what may happen if the public loses trust in SIACs because their use of AI produces decisions of lesser quality. The loss of trust is a serious cost, one not easily measured and not easily fixed. Arguably, though, loss of trust will not lead to greater public support for SIAC budgets. In the end, as with efficiency and productivity, we must question the value of AI in chambers if it brings speed and high yield at the expense of meaning and respectability.

Together, the justifications for less explanatory writing are unconvincing in the AI future, just as they are today. But that does not mean AI is entirely harmful for SIAC writing. Instead, AI offers a fresh opportunity to reconsider SIAC writing rules. This is a timely consideration, given our present absorption with AI in every facet of the legal profession. In the current landscape, thirty-three out of the forty-two SIACs require some degree of written decision. With proper training, those thirty-three SIACs could use AI to improve their decisions. They could, as noted earlier, train judges and law clerks to read AI drafts critically to delete unnecessary words, especially phrasing that is wordy and formalistic, but generally unhelpful to readers.

Moreover, this moment offers an opportunity to reconsider the SIAC writing rules that distinguish between forms of writing. Recall that twenty-nine states have two or three categories for the form of SIAC writing, with twenty-two states setting criteria for distinguishing between forms.[271] As explained above, the categories and distinctions are ambiguous and even unhelpful in streamlining SIAC writing. An AI future will only exacerbate these weaknesses. While AI can be trained to follow a template and reproduce patterned language, paint-by-number decisions will lack meaning and responsiveness.

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269. *See* Richard M. Re & Alicia Solow-Niederman, *Developing Artificially Intelligent Justice*, 22 STAN. TECH. L. REV. 242, 270 (2019).

270. *See* Volokh, *supra* note 1, at 1149 (suggesting that judges use AI instead of law clerks to draft opinions). Perhaps courts will retain judges but stop hiring law clerks. That would be an interesting return to the judicial workflow of the 1800s, before courts developed the law clerk position.

271. *See supra* notes 70–73.

Instead, states should take this opportunity to abandon the categories and focus on decisional quality. States have revisited their writing rules before. Arkansas, for example, requires more conventional opinions, as compared to memorandum opinions, than it did in the past.[272] Illinois abandoned exacting publication rules.[273] SIACs can take the opportunity that AI affords to revise expectations for shorter and more meaningful opinions. Similarly, for the nine states that allow SIACs to decide at least certain appeals without explanatory writing, this is an opportunity to reevaluate. Science, theory, and experience confirm that writing is important for appellate decision-making. With AI, these courts can develop expectations to write short and effective opinions rather than no opinion at all.

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CONCLUSION

For a long time, SIACs have operated in the shadow of courts of last resort and federal courts. They deserve our attention, especially now with the AI horizon close and affecting. To approach that future sensibly, we should understand the history and current landscape of SIAC writing. From the start, SIACs have served mixed and even contradictory purposes. We expect them to answer appeals sufficiently to discourage further certiorari in courts of last resort. We expect them to issue decisions that parties accept and respect. We also expect them to process appeals more quickly than courts of last resort, to filter the docket, and handle simpler appeals expeditiously.

There is complexity in these expectations, which states have approached differently. Some states respect the complexity by letting SIACs determine how much to write. Others try to manage the complexity with categories and criteria that restrict when and what SIACs write. Unfortunately, these efforts do more harm than good. They may conceal the complexity of SIAC decision-making, but they cannot eliminate it. The paradox of SIAC writing, to decide appeals well but quickly, lives on.

Moreover, common justifications for the current landscape of SIAC writing are unpersuasive. The distinction between correcting an error and developing law is feeble. It reflects a formal, mathematical notion of legal analysis. It may also reflect an aspiration to simplify appellate process and systemize judicial decision-making. But it does not reflect reality. Nor does the second justification that writing is not necessary for SIAC decision-making. Science explains the significance of writing for analysis, and it confirms the value of writing for improved thinking. Judicial writing is important for gaining public trust, and SIAC writing is particularly important for the balance of state and federal powers. Plus, this article explored how writing benefits the writer; it develops attention and empathy.

The third and fourth justifications are also unavailing. Law clerk drafting is not a reason for encouraging SIACs to write less. Rather, it may be a symptom of a

272. *See* ARK. SUP. CT. R. 5-2; *supra* note 111.
273. *See supra* notes 242–47.

strained system that pressures judges to accomplish more than is reasonable, or that fails to train them in writing effective legal analysis while meeting other judicial responsibilities. Certainly, the pressure on SIACs to do more with less reflects the fourth justification grounded in efficiency and productivity. But judging courts on how quickly they work says nothing about the quality of their work. Judging them on how much they produce—or avoid producing—similarly misses the mark for measuring quality. Indeed, a focus on efficiency and productivity is yet another way to conceal the complexity of SIAC work.

SIACs will bring their pasts and presents to the AI future. They will carry forward the paradoxical purposes of their creation for accuracy and speed, as well as writing rules that rest on faulty justifications. AI could exacerbate the problems of SIAC writing if courts use it to produce opinions that are more rote, formulaic, and superficial. Decisional quality will decline if judges distance themselves further from the writing process and if they spend more time on the form of opinions, rather than substance. What a shame for SIACs to fail their mission and for SIAC judges to lose meaning in their work. That is not the only option, though. SIACs should take this moment with AI on the horizon to clarify their standards for decisional quality. Judges and law clerks need training for skillful use of AI. But equally important, judges and law clerks need support and confirmation to reserve for human judgment ethics, nuance, and thoughtful applications of law to fact, for that discernment is the heart of appellate judging.