**GOOD JUDGMENT PODCAST SCRIPT**

**JUDICIAL WRITING**

* **Hello and welcome everyone to another installment of the Good Judge-ment Podcast**
* *We ask you to please write us at* *goodjudgepod@gmail.com* *to suggest any topics you would like to hear on this podcast and give feedback or ask questions.*
* **That’s right, and one of the questions we have been asked recently is “could you please do something that does not mention pandemics or COVID-19?”**
* *And boy, we have delivered today, haven’t we?*
* **That’s right. In fact, we are discussing a topic today that NO ONE has ever asked us to discuss and probably never would!**
* *Yes, today’s topic is one that only my mother the English teacher would ever ask for, but let’s be honest, it’s one that many of our judges and quite a few lawyers could use some help with if they just took an honest look at their own work.*
* **Today’s topic is… drumroll please… Judicial Writing!!!**
* **Now before you yank out your Airpods and throw them into the woods or drive your car into the next telephone pole or bridge or something, let me promise you that we will only spend a short time on this topic and we will try to give you a few simple tips to improve your writing.**
* *Let’s start with some real basics. First, there are two books that we would recommend to anyone who is interested in improving their writing. Neither one is boring and they are both relatively short. The first is The Elements of Style by Strunk and White. It’s only seventy-five pages and is, for an instructional manual, mildly entertaining. The second is a book by the man I consider one of the best American contemporary writers, Stephen King. His book is simply called On Writing. It is 285 pages in paperback, but it focuses on writing fiction, has a lot of funny passages, and strays into autobiography at times. It also contains some of King’s trademark salty language.*
* **So there’s something for everyone!**
* *We’ll get to some quotes from these two books later, but first let’s start with some simple rules-*
* **Aren’t they really more guidelines?**
* *Guidelines for judicial writing. Now let me stop here and tell you that these rules- I mean guidelines- are not located anywhere in any manual or book. They should be, but they aren’t.*
* **They’re more like “Tain’s Guidelines to Good Writing”.**
* **This is also the place at which several people lose their freaking minds when we teach our new judge orientation, because we are asking you to “unlearn” some bad habits that you were taught in law school and have reinforced for 10, 20, or however many years you have been practicing. But here goes:**
* *I like to start with what I call the ABCs of judicial writing. That’s easy enough to remember.*
* **Wow, this is like Sesame Street!**
* *TAIN: Elmo says “A is for AUDIENCE”*
* **WADE: Dude, that’s just scary…**
* *Seriously, the first “guideline” is REMEMBER YOUR AUDIENCES!*
* **Right. What are some of the audiences we write for when we write a judicial order?**
* *The PARTIES?*
* **Right. These audiences are important. The parties have to follow your order. How many times has a party in a case ended up in a subsequent contempt because of their misunderstanding of one of your orders? Let’s be honest, it may not always be their fault.**
* *Oops…*
* **Who else?**
* *The LAWYERS?*
* **Right, the lawyers have to explain our orders to their clients. And their clients don’t always want to hear what the lawyers have to say. They will argue about any ambiguities or unclear language. Help them do their job. Be clear.**
* **Who else?**
* *Maybe the APPELLATE COURTS?*
* **You mean those folks who grade our papers? They are definitely in our audience. The appellate courts need to understand what you did and why you did it. I think a lot of reversals might have been avoided by a simple explanation of facts or law that influenced the decision. The appellate courts will always be a part of our audience and we need to keep them in mind when we write.**
* **Who else?**
* *The PUBLIC?*
* **Exactly! Think about that difficult or controversial case- that difficult ruling- that has maybe been in the public spotlight- or might become something in the spotlight. The Judicial canons don’t allow us to go out in front of the tv cameras and explain why we did something. But your judicial order can- and probably should- explain it.**
* *That’s a valuable tip for us as elected officials, too!*
* **The next guideline is the “B” of our ABCs.**
* **Wade: Cue the creepy Elmo voice:**
* *Tain: Elmo says “B is for BREVITY”.*
* **Wade: DUDE…**
* *In all writing, BE BRIEF. Oscar Wilde said: “brevity is the soul of wit”. What he would have said if he hadn’t been trying to be so legalistically pithy would have been “You are a bunch of the most verbose jackwagons I have ever encountered who will use eighteen words when**one will do and your paragraphs go on so long I need a roadmap to follow your train of thought so why don’t you just write shorter?”*
* **Oscar Wilde seems a little angry…**
* *Tain: My high school English teacher, Roger Hines, once suggested that taking the time to edit was the key to a successful composition. He said that your motto should always be “If I had had more time, I would have written less.”*
* **In his book, Stephen King says his formula for editing- gleaned from a book publisher who once rejected one of his works- is “second draft equals first draft minus ten percent”. It’s not a bad formula, really.**
* *As judges we are often guilty of verbosity for verbosity’s sake. And that’s a sin.*
* **Don’t you think that’s a product of the volume of writing we do and the time constraints under which we write?**
* *Sure, and I am guilty of a bit of laziness at times, too. If someone hands me a draft, and it looks pretty good, I’m apt to overlook a few run-on sentences and marathon paragraphs in favor of getting the work done. We all are, and that’s understandable.*
* **Hey, these are just guidelines after all, right?**
* *Right!*
* **So what can we do to achieve brevity?**
* *Simple things like:*
	+ *Shorter sentences*
	+ *Shorter paragraphs*
	+ *Fewer adjectives and adverbs*
* **Wade: Tain, you come from a journalism background, right?**
* *Tain: Yes, and in journalism classes they taught us that a long sentence or paragraph is “scary” to the reader. It frightens them off before they even begin to trudge through the verbiage. Shorter paragraphs are more visually appealing.* **[RESIST THE TEMPTATION TO SAY “LIKE SHORTER SKIRTS”! THIS IS THE “ME TOO” GENERATION; YOU JUST CAN’T GET AWAY WITH THAT KIND OF HUMOR ANY MORE]**
* **Wade: Our next guideline is: CLARITY! Oh, sorry Elmo…**
* *Tain: Elmo says C stands for CLARITY.*
* **Write in a way that you can be understood by anyone who reads your order. In a way, this goes back to remembering your multiple audiences.**
* *We were taught in law school that everything we write should sound like it came out of the King James Bible or something. Is that not so?*
* **Surprisingly not. As I said a minute ago with Rule- I mean guideline- A, you’re writing for different audiences at the same time. All those audiences might not be legal scholars.**
* *That makes sense. Think about it, most of what we write as judges is meant to instruct, guide, order, and/or persuade an audience. In order to do that, we must be clear.*
* **I hate to say it but one of the real problems we have with our legal writing is “legalese”.**
* *You mean we try to sound too “judge-y”?*
* **Exactly! All that stuff they teach us in law school that they say makes our writing sound really important really just makes it harder to understand.**
* *True, but it just makes us sound so doggone judicial, right?*
* **Well, that kind of leads us right into the next and most controversial part of our discussion.**
* *Here is the point at which, when we say the topic, you may once again be tempted to swerve into a fixed object or hurl your ear buds into the woods, but stick with us.*
* **Wade: Maybe it will help if we tell them first that this section includes quotes from Stephen King and a protracted discussion of zombies…?**
* *Tain: “Oooooh, Elmo likes zombies…” Oh, sorry.*
* **I’m just going to rip the Band Aid off right here: we’re about to discuss “ACTIVE AND PASSIVE VERBS”**
* *-And Stephen King and zombies!*
* **Now we know everyone just had a collective flashback to their seventh grade grammar teacher, and we also know that for 99% of you that flashback was painful. Hang with me here.**
* *Passive voice weakens writing. No doubt about it. It stems from the use of passive verbs. Here’s a little refresher: with active verbs, the subject of the sentence is doing something. For example, “Bill burglarized the house.” Bill, the subject of our sentence, did something. He burglarized the house.*
* **Passive verbs see the subject of the sentence having something done to it. For example, “The house was burglarized.”**
* *In that example it may not be readily apparent why the sentence is weaker when we say, “The house was burglarized,” but think about it. In that sentence, who did what to whom? The house didn’t do a doggone thing. It just sat there and “was burglarized”.*
* **And what did we learn? We sure as heck didn’t learn who burglarized it. And you know why? Because with passive voice the true subject of the sentence is OMITTED!**
* *Stephen King gives a great example:*
	+ *“My first kiss will always be recalled by me as how my romance with Shayna was begun.” Seriously? Or as King says, “Oh man, who farted- right?”*
	+ *How about: “My romance with Shayna began with our first kiss. I will never forget it.” That’s better right?*
* **We often use the passive voice without knowing it for a multitude of reasons. But the most common reason, I think, is we’re being timid. We don’t want to come straight out and say hard things.**
* *King puts it this way:*
	+ *“I think timid writers like [passive verbs] for the same reason timid lovers like passive partners. The passive voice is safe. There is no troublesome action to contend with; the subject just has to close its eyes and think of England, to paraphrase Queen Victoria.”*
* **Well, whether you’re closing your eyes and thinking of England or writing a particularly important order, the passive voice makes you a weaker writer.**
* **Wade: But Tain, all this talk of active voice and passive verbs and England and Queen Victoria is really too hard to remember sometimes. Isn’t there a better way to remember it?**
* *Of course there is Wade! Let’s say it together:*
* **ZOMBIES!!!**
* *Now you’re thinking these dudes are definitely crazy, right?*
* *But no, if you want to identify the passive voice rule in your writing, you only have to remember the ZOMBIE RULE.*
* **It’s simple. When you write a sentence, if you’re wondering whether it is in the passive voice, if you can put the words “by zombies” at the end of the sentence, and the sentence still makes sense, it is a PASSIVE VOICE sentence.**
* *In our previous example: “Bill burglarized the house.” Active or passive? Let’s apply the zombie rule:*
* *“Bill burglarized the house- BY ZOMBIES.” Makes no sense, right?*
* *But let’s use our other example: “The house was burglarized-BY ZOMBIES.” That’s clearly a passive voice sentence.*
* **Let’s try another one:**
	+ **The meeting is at seven o’clock**
	+ **OR: “The meeting will be held at seven o’clock.”**
* **Which one is passive? “The meeting will be held at seven o’clock- BY ZOMBIES.” Not “The meeting is at seven o’clock- BY ZOMBIES.”**
* ***This is King’s example. He explains it this way:***
	+ ***The timid fellow writes “The meeting will be held at seven o’clock” because that somehow says to him, “Put it this way and people will believe you really know.” Purge this quisling thought! Don’t be a muggle! Throw back your shoulders, stick out your chin and put that meeting in charge! Write, “The meeting’s at seven.” There, by God! Don’t you feel better?***
* ***But them King has an unabashed hatred of passive verbs.***
* *Tain: Wade, what’s your experience with zombies?*
* **[Wade prattles on about how I ruined his life with zombies…]**
* *Now, at this point, I will confess that this is definitely a “do as I say, not as I do” situation. I stray into the passive voice. We all do.*
* *Even King admits to it.*
	+ *He says: I won’t say there’s no place for the passive tense. Suppose, for instance, a fellow dies in the kitchen but ends up somewhere else. “the body was carried from the kitchen and placed on the parlor sofa” is a fair way to put this, although “was carried” and “was placed” still [aggravate] me. (King used much saltier language here)*
	+ *What I would embrace is “Freddy and Myra carried the body out of the kitchen and laid it on the parlor sofa”. Why does the body have to be the subject of the sentence anyway? It’s dead, for Christ’s sake!*
* **The point is that you need to be aware of the passive voice and use that knowledge to strengthen your writing whenever possible!**
* *OK, now that we’ve all taken that painful trip down the grammatical memory lane, let’s move to some less painful tips for better writing.*
* **The next idea for you is the “inverted pyramid”.**
* **Journalists use the idea of an inverted pyramid to emphasize the need to put things of most importance first. This makes writing stronger and- let’s be honest- makes sure that even the laziest reader will get the important ideas. I mean, they’re right there at the top.**
* *Journalists say that the inverted pyramid style means putting the WHO, WHAT, WHEN, WHERE, WHY, AND HOW in the beginning. So whether you’re structuring a paragraph or an entire order, important items should often go first.*
* **This seems like a simple concept, but as judges we often get caught up in building drama before we write the words “SO ORDERED” or whatever other magic phrase we might utter to bring the genie out of the bottle.**
* *It’s really unnecessary.*
* **In the final section of this podcast, we’ll just suggest a sort of “checklist” for good orders.**
* *Many thanks to Professors Dr. Elizabeth Francis and Hon. Karen Hunt, retired judge, for their course at the National Judicial College for an expanded course on these elements we’re about to give you.*
* **There are seven or eight key elements that should probably appear in just about every order of substance that you write. By no means do all of them have to appear in lengthy paragraphs, and some may even be combined to make sense-**
* *-Or for BREVITY-*
* **Right! But these elements make a good checklist to see if your work is cohesive, clear and comprehensive.**
* *That’s right. You know, sometimes we know what we mean when we write something, but it is not as clear to others when they read it.*
* **The first element is STATEMENT OF THE CASE**
* *This element is intended to set the scene of whatever order you’re writing.*
* *It’s kind of the WHO, WHAT, WHEN, WHY, and HOW of the inverted pyramid.*
* **The statement of the case is where you identify the court, the parties and the type of case.**
* **The good news is that this information is usually included in the caption and the first paragraph of what you write.**
* *The second element is THE ISSUES.*
* *This one is simple enough. It sets out the parties’ contentions and the issues arising from the contentions.*
* **Isn’t this sometimes stated as a series of questions to be answered by the court?**
* *Right, you will often see that technique in appellate opinions.*
* **The third element is SUMMARY OF DECISION.**
* **This section is really optional. It is essentially for the lazy reader. It’s the judicial equivalent to turning to the last page of the book and telling the ending. It’s a spoiler with no alert.**
* **This section essentially a summary of the Court’s ruling in the final section of the Order.**
* *Next is the FINDINGS OF FACT. These would include a recitation of the Standard of Proof and the facts.*
* *The standard of proof is simple enough. It’s usually a case or cases on point guiding the court in its decision. This is not the place for the lengthy analysis that will come later, just a recitation of the standard.*
* *The facts will include both evidentiary facts and factual conclusions made by the Court. It also includes any credibility determinations made in hearing the evidence.*
* **The next section is PRINCIPLES OF LAW. This is an important section because if you get these wrong, there is a potential for reversal.**
* *And we dislike reversals.*
* **Be sure to state your principles of law correctly and quote them and their sources where applicable. Remember that appellate court audience as well as the parties and lawyers- and maybe the public, too.**
* *In the PRINCIPLES OF LAW section, you want to include such things as:*
	+ *Elements of a crime- what has to be proved*
	+ *Choices between factors/criteria; for example, factors to be considered in custody cases under O.C.G.A. §19-6-9*
	+ *Factors or considerations used to arrive at a decision*
* **The next section would be the ANALYSIS section. This is where the rubber really meets the road. This is where you look at the relationship between the Findings of Fact and the Principles of Law.**
* *Here is where you apply the law to the evidentiary facts and to the factual conclusions and credibility findings discussed earlier.*
* **The goal of all analysis should be to demonstrate to all the audiences that the ruling is correct, fair and well-reasoned.**
* *The next element is CONCLUSIONS OF LAW.*
* *This section answers the questions outlined in the previous ISSUES section. If the issues were stated as questions, CONCLUSIONS turns those questions into statements.*
* **The final element of any good Order is the ORDER section. This is where you tell someone to do or stop doing something. Here is where you sentence or exercise mercy.**
* **In short, this is the section that commands the parties.**
* *Here is where you earn the big money.*
* **Well, folks, those are the basic tips for good judicial writing.**
* *Remember your ABCs:*
	+ *Audience*
	+ *Brevity, and*
	+ *Clarity*
* **Stay away from those abhorrent passive verbs-**
* *-Or the zombies will eat your brains*
* **Put the important stuff first**
* *-INVERT YOUR PYRAMIDS!*
* **And remember the seven or eight elements of good orders!**
* **Thanks folks! I’m Wade Padgett**
* *And I’m Tain Kell, thanks for listening.*
* *Elmo says wash your hands!*