

# JUDICIAL OPINION WRITING

A Panel Discussion



# JUSTICE KEM THOMPSON FROST

Texas Fourteenth Court of Appeals



# JUSTICE MICHAEL B. HYMAN

Illinois Appellate Court  
First District, 2nd Division



**DEAN VALERIE COUCH**

Oklahoma City University School of Law



# JUDGE KEVIN ROSS

Minnesota Court of Appeals



*What is it that I do when I  
decide a case?*

*~Benjamin N. Cardozo*



# WHAT IS THE PURPOSE OF AN OPINION?

“An Opinion. . . . is an essay in persuasion.”

~ *James D. Hawkins*

# Judicial Opinions: Big Picture Purpose

What is the place and value of the judicial opinion in the case, in the legal landscape, and in society at large?

# THREE MAIN PURPOSES

- 1) to help the writing judge think through the problems raised by the case
- 2) to justify the outcome of a case
- 3) to serve a precedent

# OTHER PURPOSES

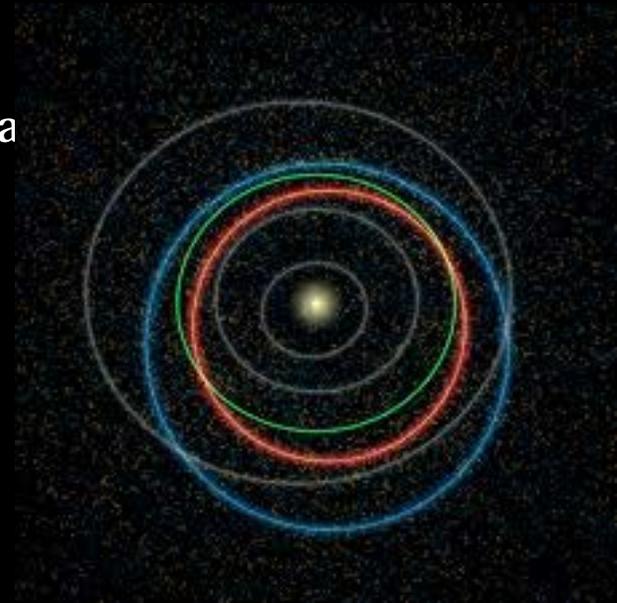
- 1) persuade other judges on the court to join in your ruling
- 2) alert the legislature to inadequacies in statutory law
- 3) publish the law and make sure society accepts it

# Judicial Opinions Mechanics

What are the steps in your opinion-writing process?

# WHO IS THE AUDIENCE?

- **Judicial Opinion Readers revolve around the courts like planets around the sun.**
  - **Closest to the court most immediately concerned with the decision:**
    - writing judge, other judges on the panel, the parties to the suit and their lawyers
  - **Next Orbit:**
    - court whose judgment was affirmed or reversed, or a higher court to whom the present opinion might be appealed
  - **Penultimate Orbit:**
    - news reporters, the bar, other judges, scholars, law students, public officials
  - **Outermost Orbit:**
    - General Public and Posterity



# IS THERE A SPECIFIC PERSON A JUDICIAL-OPINION WRITER SHOULD KEEP IN MIND TO MAKE WRITING FOR A BROAD AUDIENCE AN EASIER TASK?

- Yes. A person of average intelligence and average education.
  - Justice Breyer once said he wanted high school students to be able to understand his opinions.



# HOW TO SATISFY THE BROAD AUDIENCE

- Simplify
- Treat the reader like an equal, with respect.
- Use clear, concise language
  - No legalese
- Do not write “wordy and windy paragraphs.”
- Educate the bench, the bar, and the general public through your writing.
- “Don’t be so damned profound. Write so city editors and street car motormen can understand.” - Boyd F. Carrol

# EFFORT IN DRAFTING AN OPINION



# MAIN PARTS OF AN OPINION



1. **Introduction/Opener.**
2. Statement of Facts.
3. Issues/Questions to be Decided
4. Determination of the Issues.
5. Disposition and Mandate.

# APPROACHES TO INTRODUCTIONS

1.

**Thesis/Roadmap/Orientation/Preview**

- Name the type of action.
- State the procedural posture.
- Introduce the litigants.
- Identify the issues (although you may set them out as fact).
- Conclude.

2.

**All the News That's Printed to Fit**

- Who? Who are the parties?
- What? What are the claims and issues?
- When? When was the purported error committed?
- Where? If this is an appeal, where did it come from? A trial court? An administrative agency?
- How? If an appeal, how did the judgement or order appealed from arise?

# APPROACHES TO INTRODUCTIONS

This case begins with what we suspect, and hope, is a rare event in Iowa: the aerial bombing of a small business.

*United States v. Edmiston*, 46 F.3d 786, 787 (8th Cir. 1995)



**WHAT DO YOU HOPE TO ACCOMPLISH IN  
THE INTRODUCTION OF YOUR OPINIONS?**

# MAIN PARTS OF AN OPINION



1. Introduction/Opener.
2. **Statement of Facts.**
3. Issues/Questions to be Decided
4. Determination of the Issues.
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**WHAT SHOULD AN  
OPINION DRAFTER  
INCLUDE IN THE  
STATEMENT OF FACTS?**



- **Specific findings of fact or credibility determinations are necessary to explain the factual basis of a court's decision.**

- Only include facts that are legally significant or necessary to establish the context of the events described.
- should be obtained from the record, not briefs or other statements of counsel.
- Should not be copied and pasted from the record.
- Should be stated as a chronological narrative past tense.
- Only include dates when they help the reader understand the flow of events or some other purpose.
- Must be precise and stated favorably to the losing side.
- Do not include legal conclusions.



**HOW DO YOU ORGANIZE  
THE FACTS OR EMPLOY  
STYLISTIC FEATURES TO  
HELP THE READER  
FOLLOW THE STORY IN  
YOUR FACT SECTIONS?**



VOICE

# VOICE: UNIQUE

How distinctive is your own writing as a matter of language and style and tone; what, if any, are the distinguishing features of your writing that would cause you or some other reader to recognize that you were the opinion's author?

# VOICE: NEUTRAL

Are there any stylistic techniques you use in your writing to convey a perspective that is intentionally more neutral or objective than an advocate would employ?

# VOICE: DISSENTING

Do your dissenting opinions differ in terms of tone or style from your majority opinions? Are you more or less expressive? Capture more of your own voice?

**Dissents “seek to sow seeds for future harvest.”**

~ Justice J. William Brennan Jr.

- Dissents have different a purpose than the majority opinion including:
  - Setting forth the arguments that convinced a minority, not a majority of the court.
  - Attract the attention of a higher court
- Dissents can be more passionate, rather than only interpreting the law objectively like majority opinions.

## WHOSE VOICE IS THIS? (A)

When an individual files for bankruptcy, she may exempt particular categories of assets from the bankruptcy estate. One such category includes certain “retirement funds.” . . . The question presented is whether funds contained in an inherited individual retirement account (IRA) qualify as “retirement funds” within the meaning of this bankruptcy exemption. We hold that they do not.

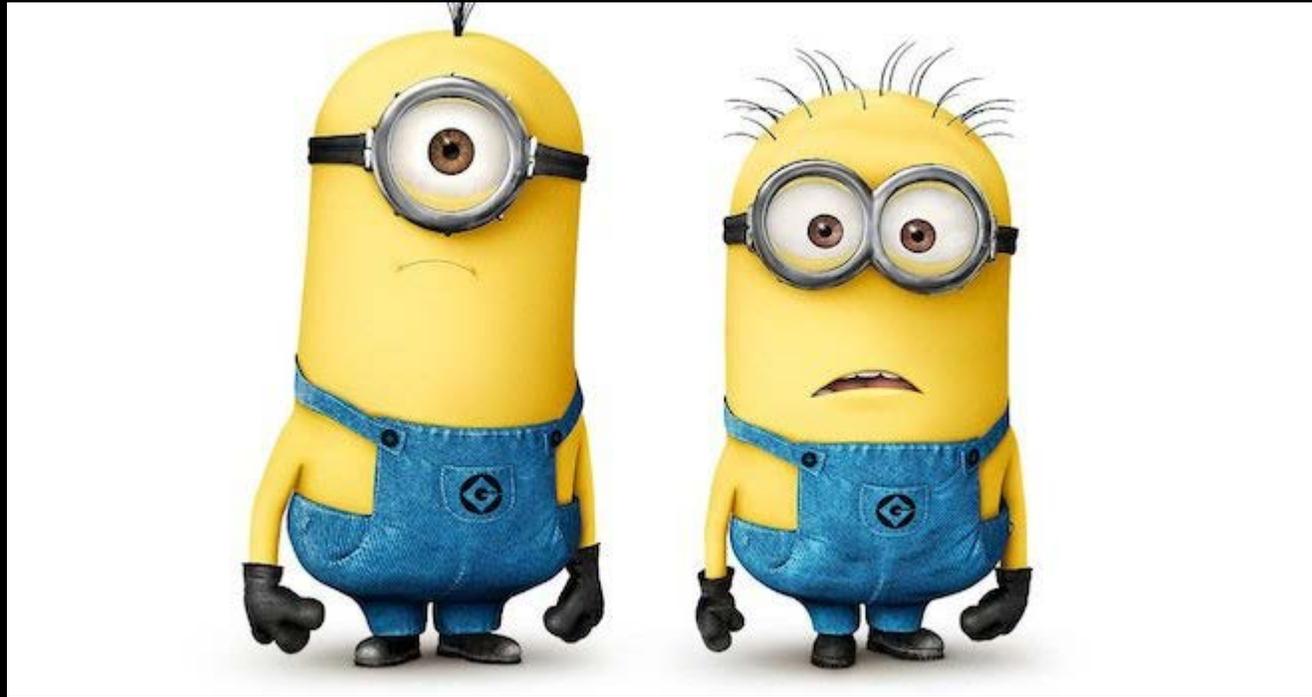
## WHOSE VOICE IS THIS? (B)

We must decide whether the Foreign Sovereign Immunities Act of 1976 (FSIA or Act) . . . limits the scope of discovery available to a judgment creditor in a federal postjudgment execution proceeding against a foreign sovereign.

## WHOSE VOICE IS THIS? (C)

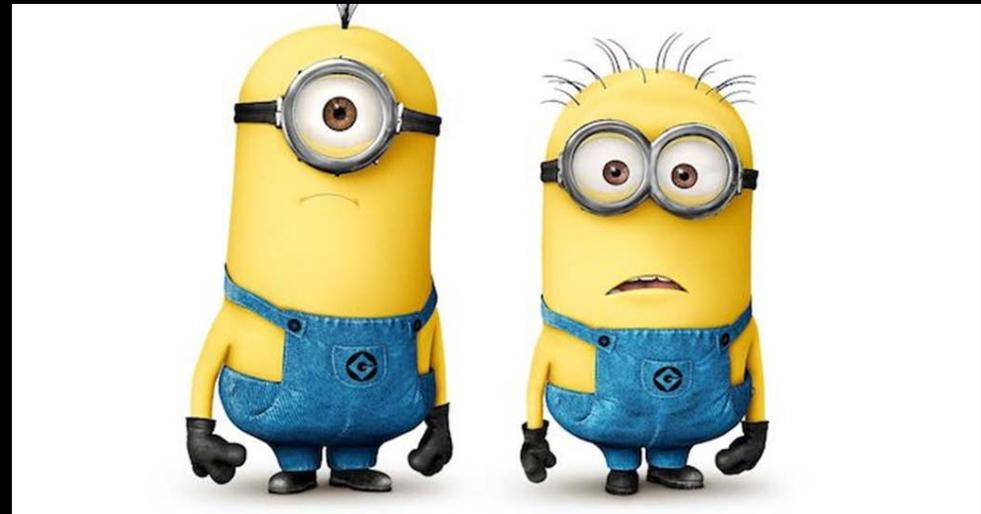
The Patent Act of 1952 . . . grants a patent applicant whose claims are denied by the Patent and Trademark Office (PTO) the opportunity to challenge the PTO's decision by filing a civil action against the Director of the PTO in federal district court. In such a proceeding, the applicant may present evidence to the district court that he did not present to the PTO. This case requires us to consider two questions. First, we must decide whether there are any limitations on the applicant's ability to introduce new evidence before the district court. For the reasons set forth below, we conclude that there are no evidentiary restrictions beyond those already imposed by the Federal Rules of Evidence and the Federal Rules of Civil Procedure. Second, we must determine what standard of review the district court should apply when considering new evidence. On this question, we hold that the district court must make a *de novo* finding when new evidence is presented on a disputed question of fact.

# LAW CLERKS



# LAW CLERKS

How do you get your law clerks to write in a style that captures your voice?



# COLOR ME BORING?

Say something about the use of humor, metaphors, and figurative language in a judicial opinion.



# COLOR: CULTURAL REFERENCE

“In an oft-repeated statement from the Vietnam War, an unidentified American military officer reputedly said that Awe had to destroy the village to save it. That oxymoronic explanation may be apocryphal, but the debt collection agency in this case offers up much the same logic to explain why it violated the Fair Debt Collection Practices Act: it was necessary to violate the Act in order to comply with the Act.”

*Edwards v. Niagara Credit Solutions, Inc.*, 584 F.3d 1350, 1351  
(11th Cir. 2009).

# COLOR: BIBLICAL REFERENCE

“If, as the Bible says, ‘[a]n honest answer is like a kiss on the lips,’ *Proverbs 24:26* (N.I.V.), a pleading founded on a lie is like a kick in the gut. The question this appeal presents is whether a district court can dismiss a case with prejudice because the plaintiff filed and litigated his complaint under a false name.”

*Zocaras v. Castro*, 465 F.3d 479, 481 (11th Cir. 2006).

# COLOR: LITERARY REFERENCE

“One day Dr. Jorge J. Leal, a urological clinician and surgeon, was waiting for the operating room . . . to become available. It was, as the doctor would later describe it, “a very long day.” And not a good one for him. Instead, it appears that, like Alexander in the classic children's story, Dr. Leal was having “a terrible, horrible, no good, very bad day.”

*Leal v. U.S. Dep't of Health & Human Servs.*, 620 F.3d 1280, 1281 (11th Cir. 2010)

# COLOR: COLLOQUIALISM

“When a boy was asked how many legs his calf would have if he called its tail a leg, the boy replied, ‘five.’ The correct answer is ‘four’ because *calling* the tail a leg does not *make* it a leg. . . . The appellant concedes it is a limited liability company but argues that it should be treated as a partnership under this statute because it is treated as a partnership for the purpose of calculating its tax liability.

*SJ Med. Ctr., L.L.C. v. Estahbanati*, 418 S.W.3d 867, 869

(Tex. App.—Houston [14th Dist.] 2013, no pet.).



# PEEVES AND PREFERENCES



Identify one or two of your most significant peeves or preferences in your own writing.

# SUPER JUDGE





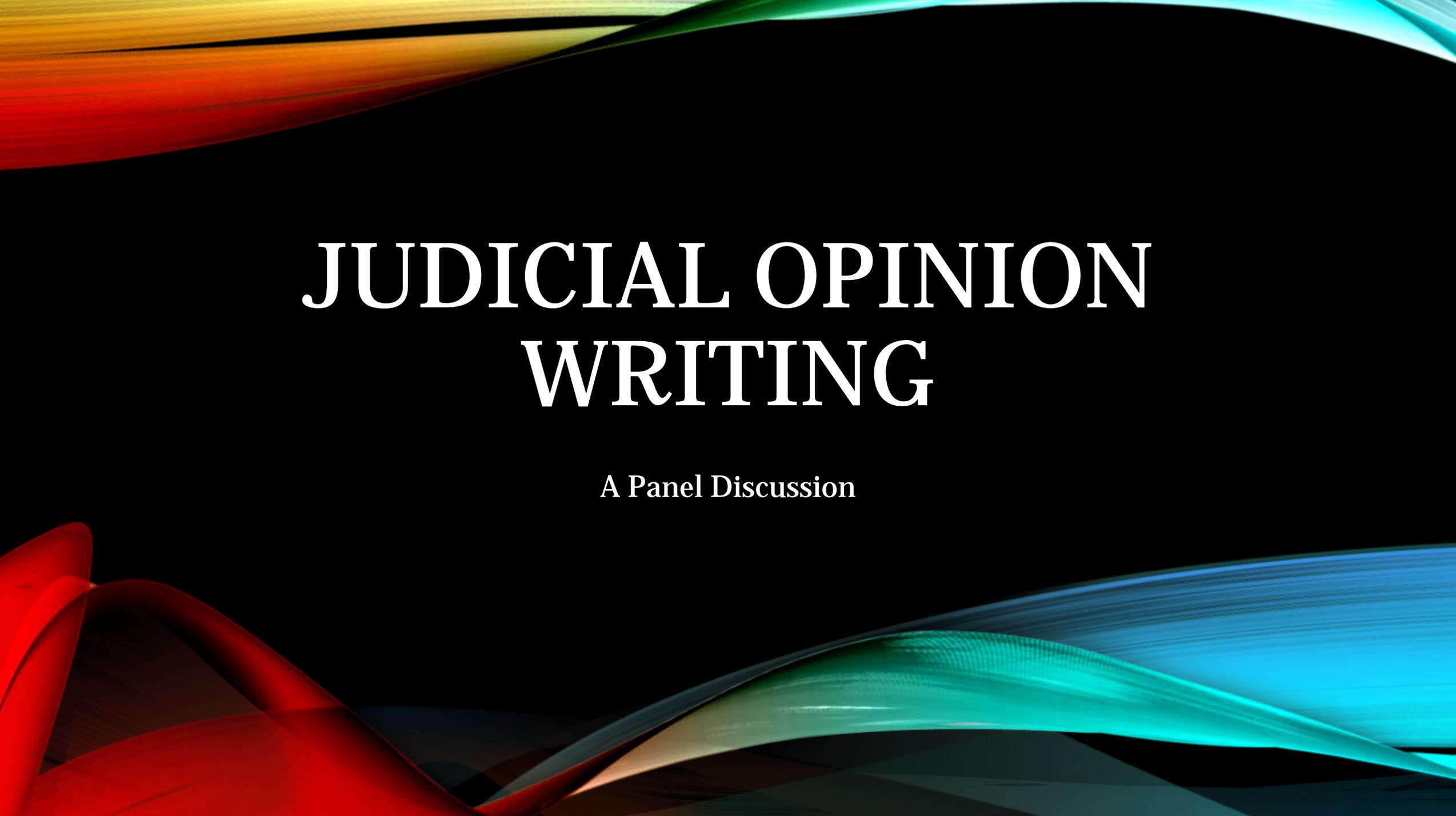
**SUPER JUDGE**

**... NOT SO SUPER JUDGE**

Which judge or justice wrote (or writes) in a style and tone that you would most (or least) like to emulate?

# ADVICE?

What pithy advice would you offer judicial writers, including judges, potential law clerks, or academics as they training future judicial writers?



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# FOR MORE INFORMATION SEE

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- Richard B. Cappalli, *Improving Appellate Opinions*, 83 *JUDICATURE* 286 (May/June 2000).
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- Joyce J. George, *JUDICIAL OPINION WRITING HANDBOOK* (5th ed. 2007).
- James D. Hopkins, *Notes on Style in Judicial Opinions*, 8 *TRIAL JUDGES J.* 49 (1969).
- Joseph Kimble, *The Straight and Skinny on Better Judicial Opinions*, 9 *SCRIBES J. LEGAL WRITING* 2 (2003-04).
- Richard B. Klein, *Opinion Writing Assistance involving Law Clerks: What I Tell Them*, 34 *JUDGES J.* 33 (Summer 1995).

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- Walker Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U. L. REV. 915 (1961).
- Richard A. Poser, *Judges Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421 (1995).
- Edward D. Re, *Appellate Opinion Writing* (Fed. Jud. Ctr. 1975), [http://www.fjc.gov/public/pdf.nsf/%20lookup/appellop.pdf/\\$file/appellop.pdf](http://www.fjc.gov/public/pdf.nsf/%20lookup/appellop.pdf/$file/appellop.pdf).
- George R. Smith, *A Primer of Opinion Writing for Four New Judges*, 21 ARK. L. REV. 197 (1967).
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- James Boyd White, *What's an Opinion For?*, 62 U. CHI. L. REV. 1363 (1995).
- Irving Younger, *On Judicial Opinions Considered as One of the Fine Arts*, 51 U. COLO. L. REV. 341 (1980).