California Lawyers Association

presents

Writing for Experienced Litigators

1.25 Hours MCLE

Saturday, September 23, 2023

3:00 PM - 4:15 PM

Speakers:

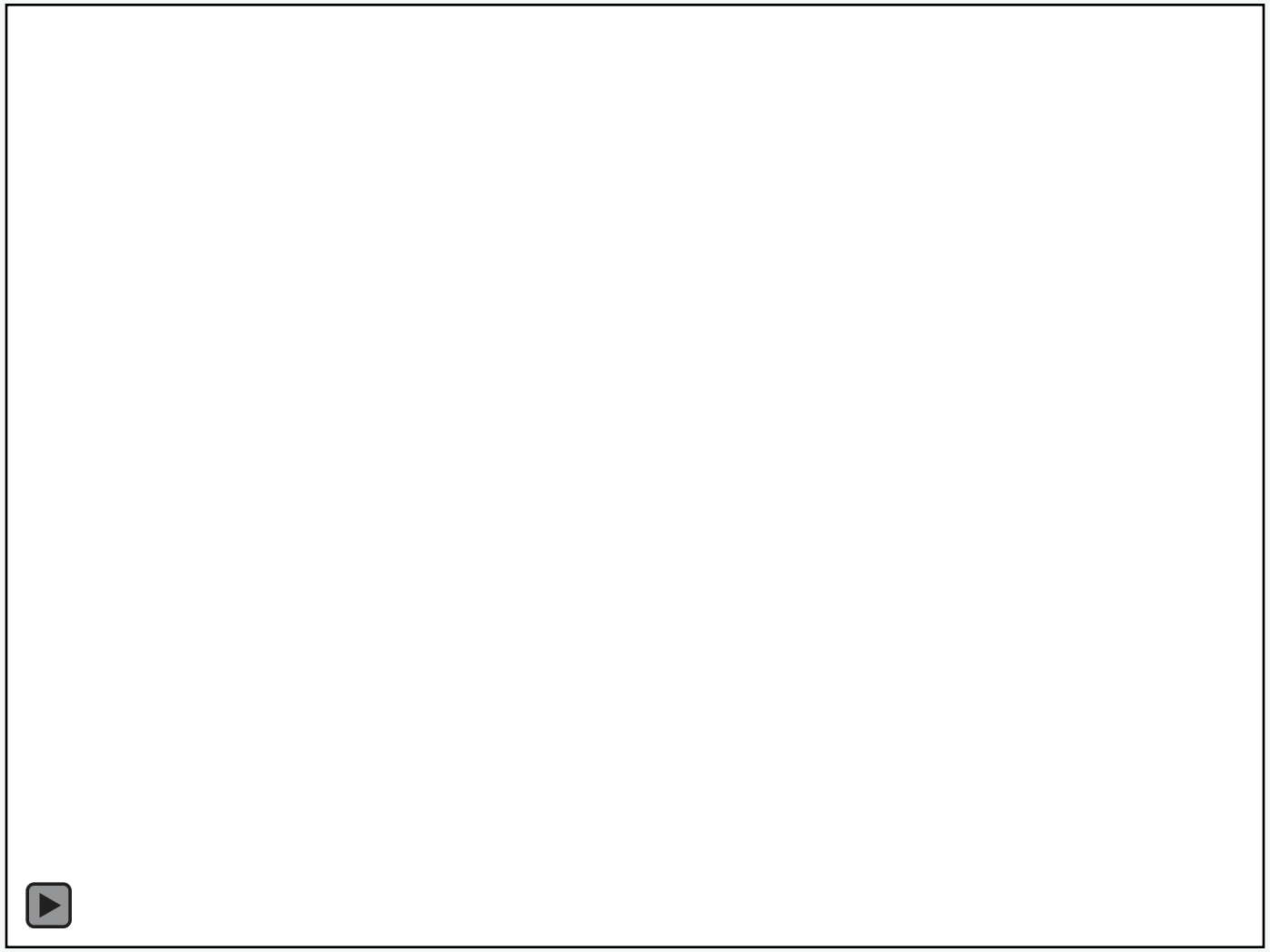
Steven Katz

Conference Reference Materials

Advanced Legal Writing

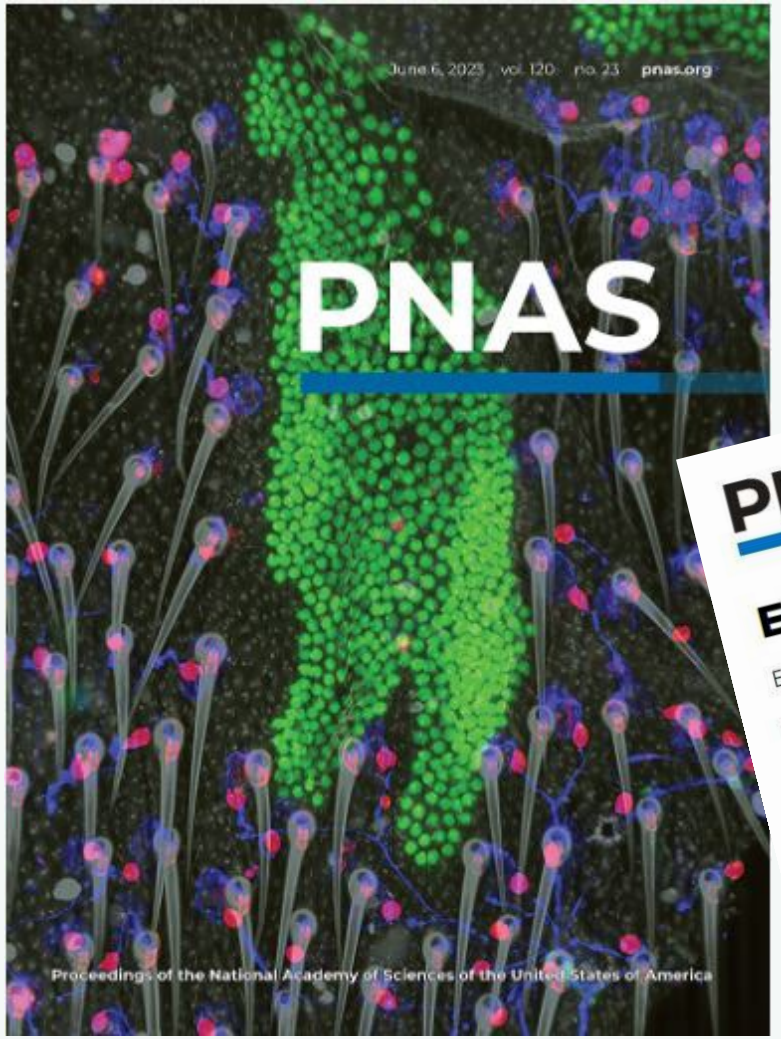
Steven B. Katz / Constangy, Brooks, Smith & Prophete LLP
September 23, 2023

CALIFORNIA LAWYERS ASSOCIATION



Legal Writing Is Special . . .

But Not Necessarily In A Good Way . . .



PNAS RESEARCH ARTICLE | PSYCHOLOGICAL AND COGNITIVE SCIENCES

Even lawyers do not like legalese

Eric Martínez[a,1], Francis Mollica[b], and Edward Gibson[a]

Edited by Susan Goldin-Meadow, University of Chicago, Chicago, IL; received February 17, 2023; accepted April 8, 2023

Across modern civilization, societal norms and rules are established and communicated largely in the form of written laws. Despite their prevalence and importance, legal documents have long been widely acknowledged to be difficult to understand for those who are required to comply with them (i.e., everyone). Why? Across two preregistered experiments, we evaluated five hypotheses for why lawyers write in a

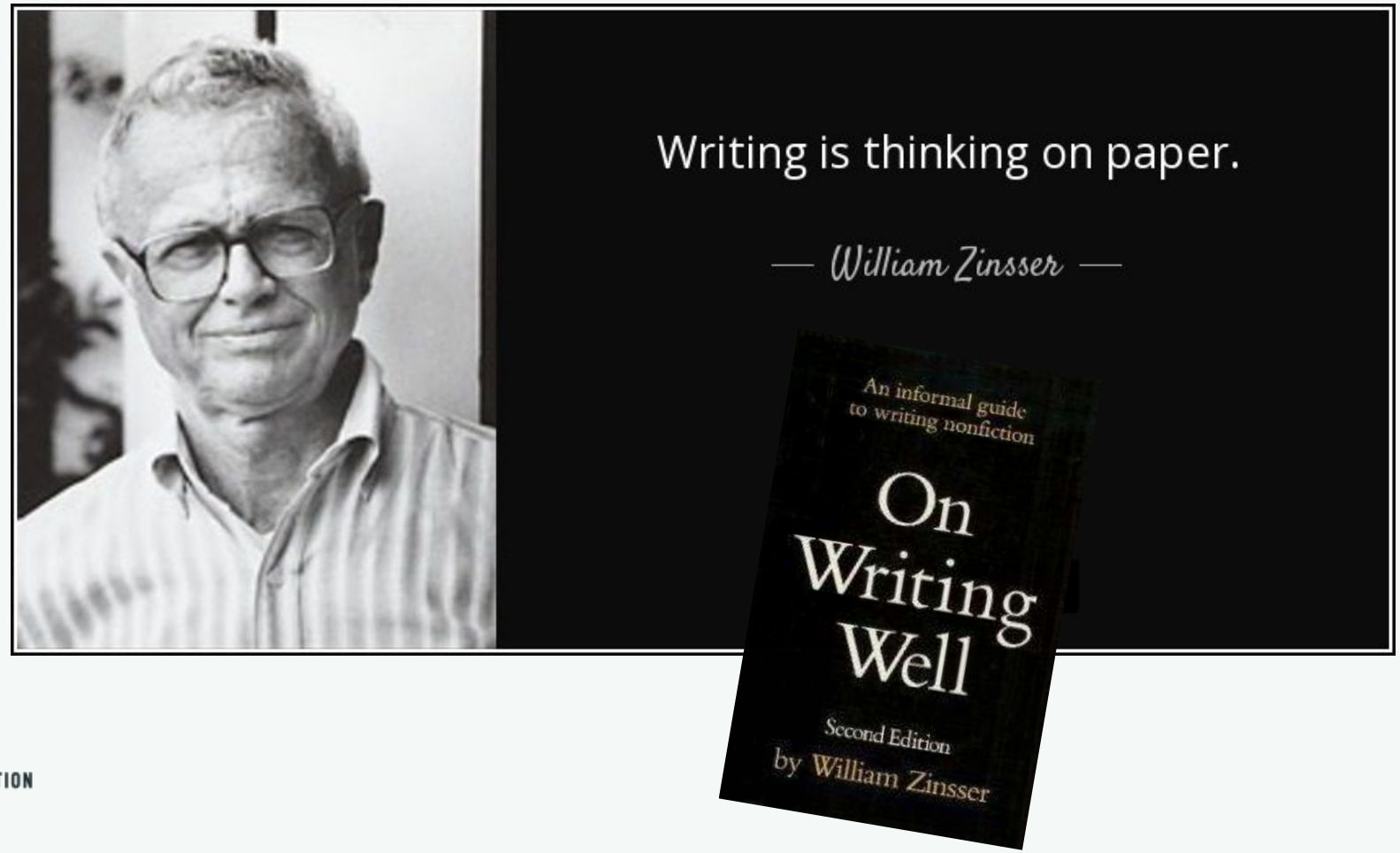
Significance

Why do lawyers write in such a convoluted manner? Across two

> [T]hese results suggest that lawyers who write in a convoluted manner do so as a matter of convenience and tradition as opposed to an outright preference and that simplifying legal documents would be beneficial for lawyers and nonlawyers alike.”

The Four Cardinal Rules Of Legal Writing

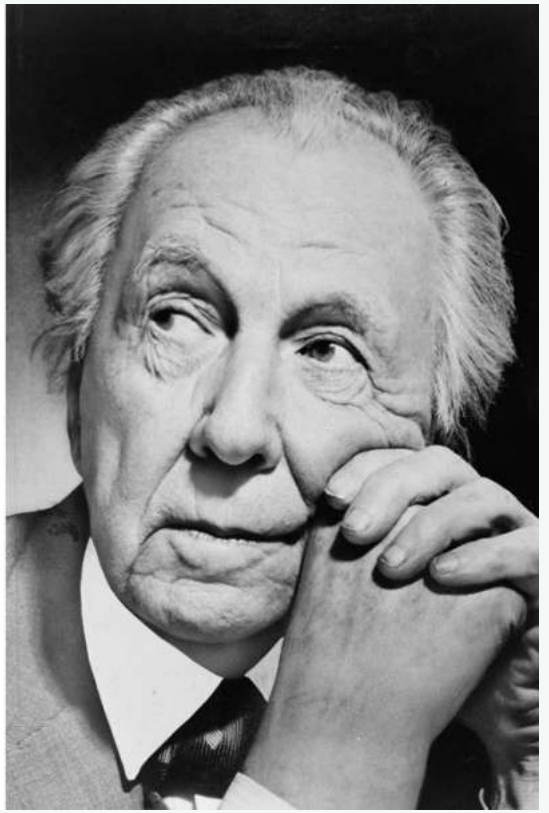
Legal Writing Is Legal Thinking

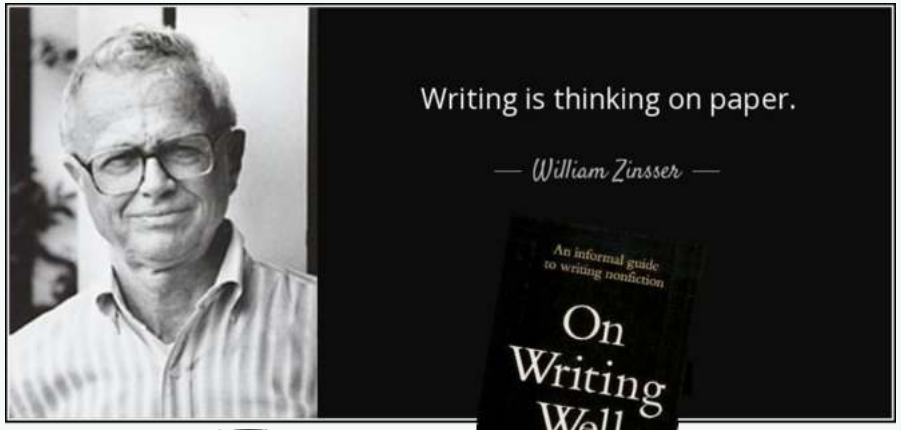


Write For The Chronically Late

Be A Lawyer, Not A Cop

Form Follows Function

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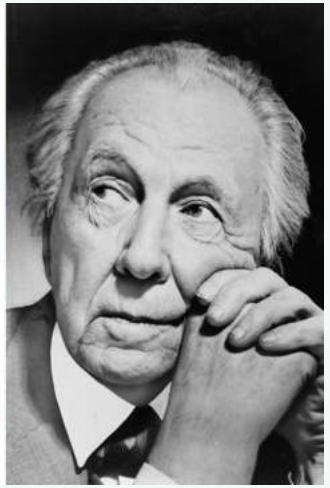


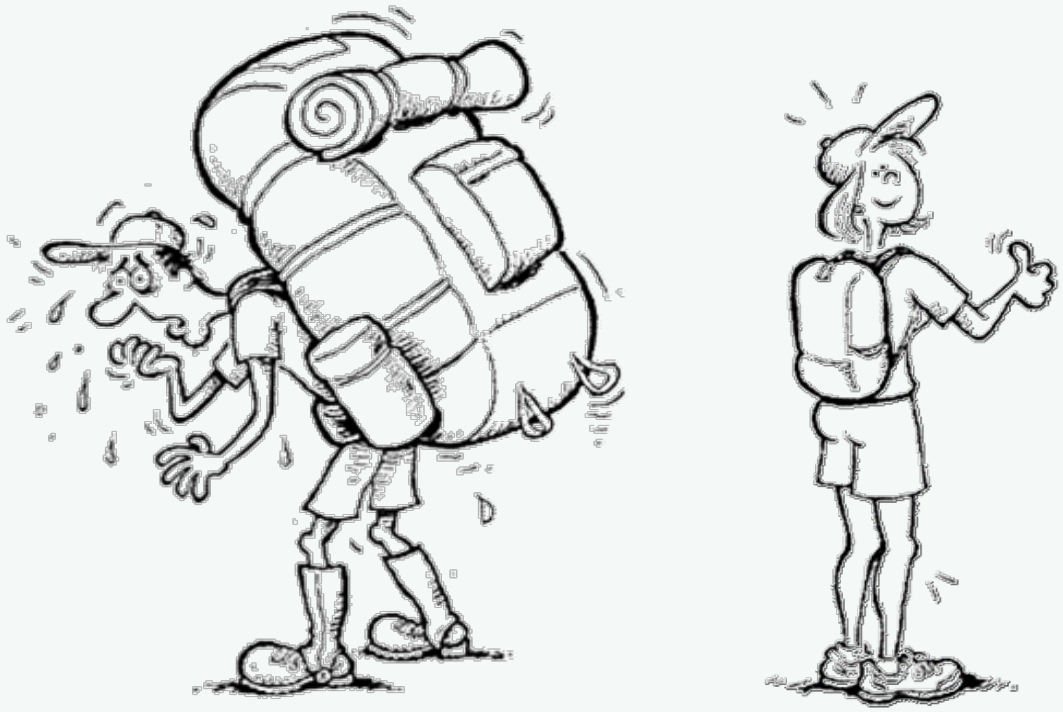
You Holding, Man?

> “[Precedent consists of] not only the rule announced, but also the facts giving rise to the dispute, other rules considered and rejected and the views expressed in response to any dissent or concurrence.”

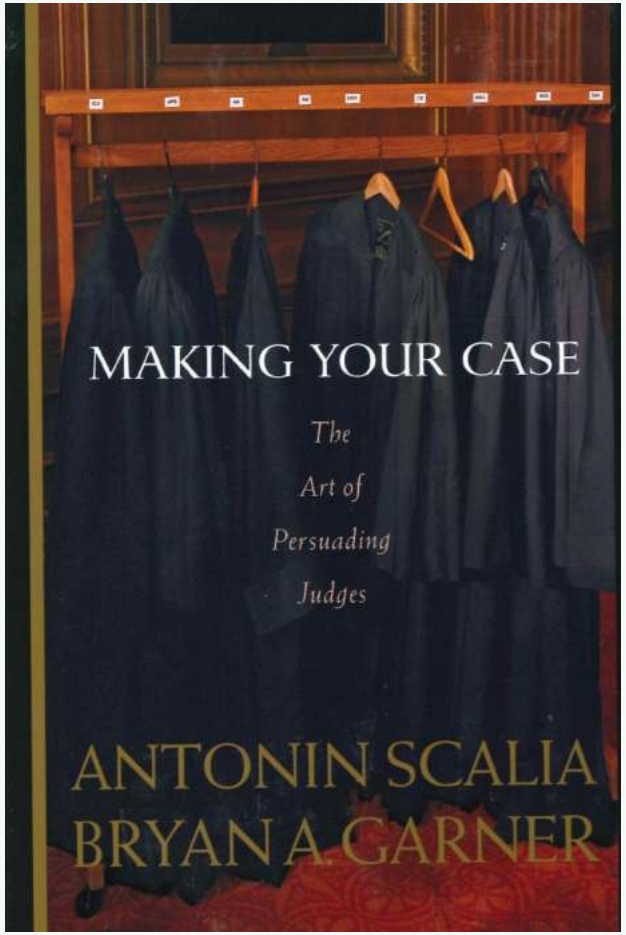
—*Hart v. Massanari,* 266 F.3d 1155, 1170 (9th Cir. 2001)

Be A Distinguished Advocate

Shoulder The Burden You Must—But Travel As Light As You Can



Shoulder The Burden You Must—But Travel As Light As You Can



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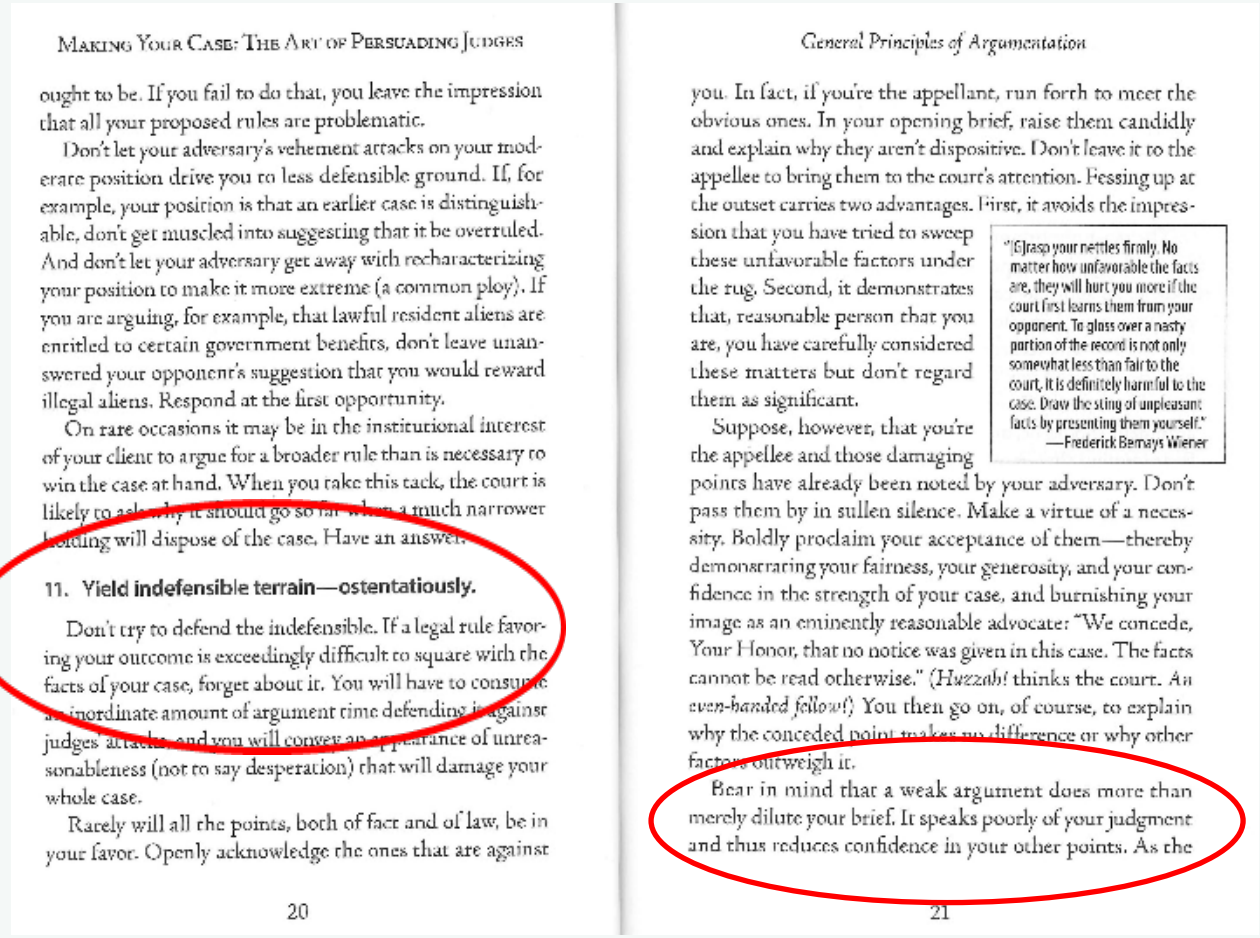


ought to be. If you fail to do that, you leave the impression that all your proposed rules are problematic.

Don't let your adversary's vehement attacks on your moderate position drive you to less defensible ground. If, for example, your position is that an earlier case is distinguishable, don't get muscled into suggesting that it be overruled. And don't let your adversary get away with recharacterizing your position to make it more extreme (a common ploy). If you are arguing, for example, that lawful resident aliens are entitled to certain government benefits, don't leave unanswered your opponent's suggestion that you would reward illegal aliens. Respond at the first opportunity.

On rare occasions it may be in the institutional interest of your client to argue for a broader rule than is necessary to win the case at hand. When you take this tack, the court is likely to ask why it should go so far when a much narrower holding will dispose of the case. Have an answer.

11. Yield indefensible terrain—ostentatiously.

Don't try to defend the indefensible. If a legal rule favoring your outcome is exceedingly difficult to square with the facts of your case, forget about it. You will have to consume an inordinate amount of argument time defending it against judges' attacks, and you will convey an appearance of unreasonableness (not to say desperation) that will damage your whole case.

Rarely will all the points, both of fact and of law, be in your favor. Openly acknowledge the ones that are against

you. In fact, if you're the appellant, run forth to meet the obvious ones. In your opening brief, raise them candidly and explain why they aren't dispositive. Don't leave it to the appellee to bring them to the court's attention. Fessing up at the outset carries two advantages. First, it avoids the impression that you have tried to sweep these unfavorable factors under the rug. Second, it demonstrates that, reasonable person that you are, you have carefully considered these matters but don't regard them as significant.

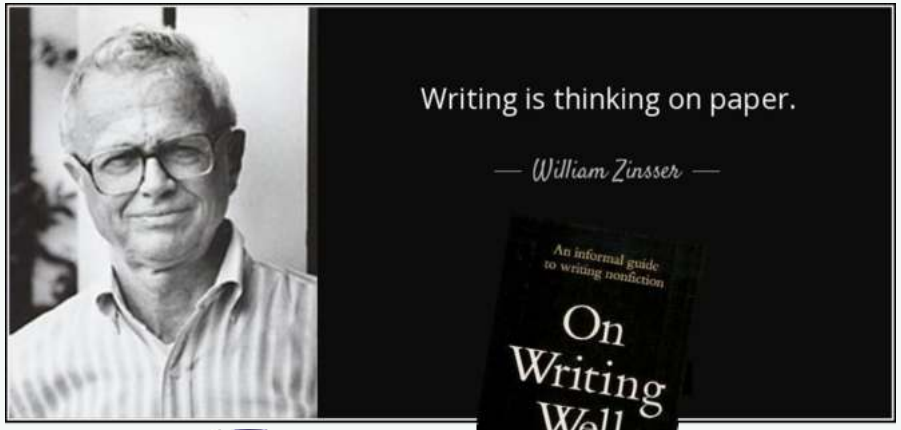
> "[G]rasp your nettles firmly. No matter how unfavorable the facts are, they will hurt you more if the court first learns them from your opponent. To gloss over a nasty portion of the record is not only somewhat less than fair to the court, it is definitely harmful to the case. Draw the sting of unpleasant facts by presenting them yourself."
> —Frederick Bernays Wiener

Suppose, however, that you're the appellee and those damaging points have already been noted by your adversary. Don't pass them by in sullen silence. Make a virtue of a necessity. Boldly proclaim your acceptance of them—thereby demonstrating your fairness, your generosity, and your confidence in the strength of your case, and burnishing your image as an eminently reasonable advocate: "We concede, Your Honor, that no notice was given in this case. The facts cannot be read otherwise." (*Huzzah!* thinks the court. *An even-handed fellow!*) You then go on, of course, to explain why the conceded point makes no difference or why other factors outweigh it.

Bear in mind that a weak argument does more than merely dilute your brief. It speaks poorly of your judgment and thus reduces confidence in your other points. As the

You’re Not Cooking Pasta

The Rules Of Court Are The Devil's Playground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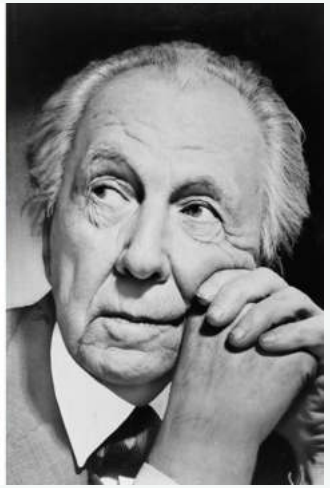

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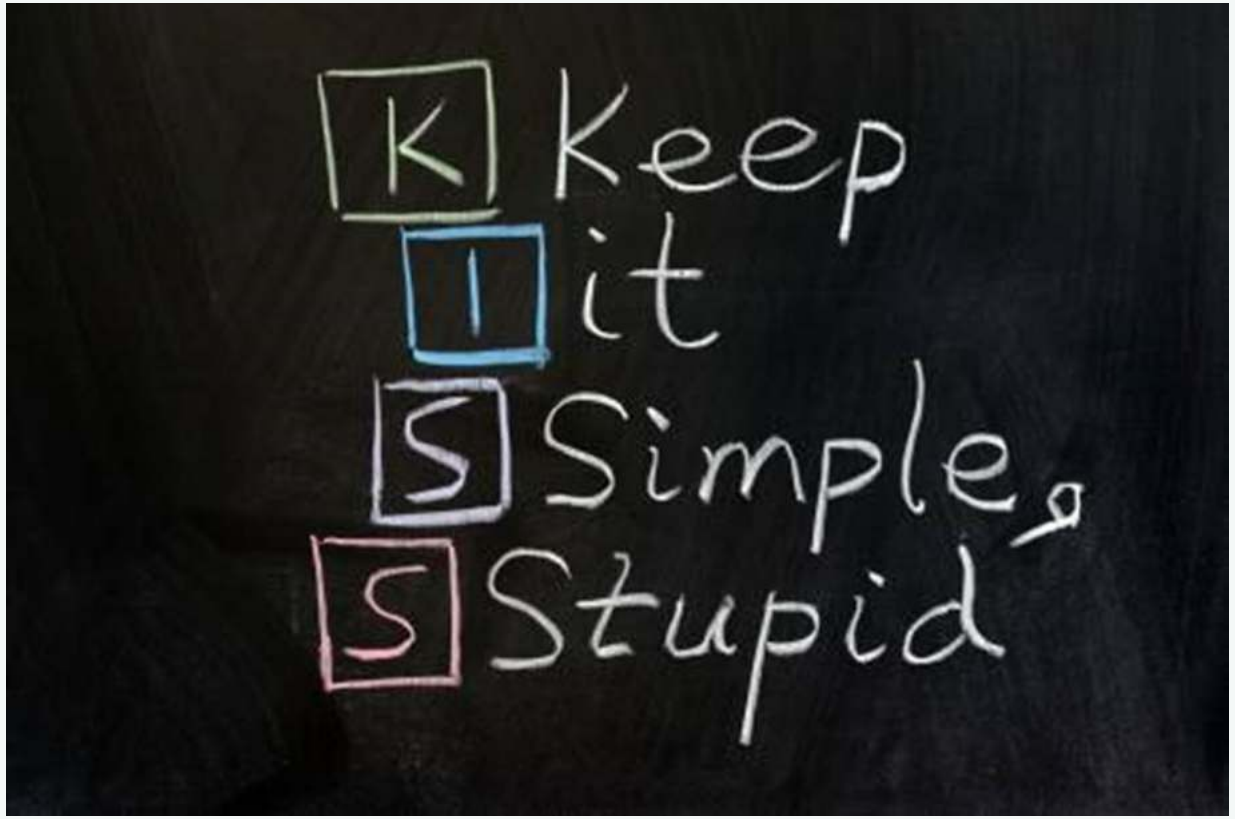
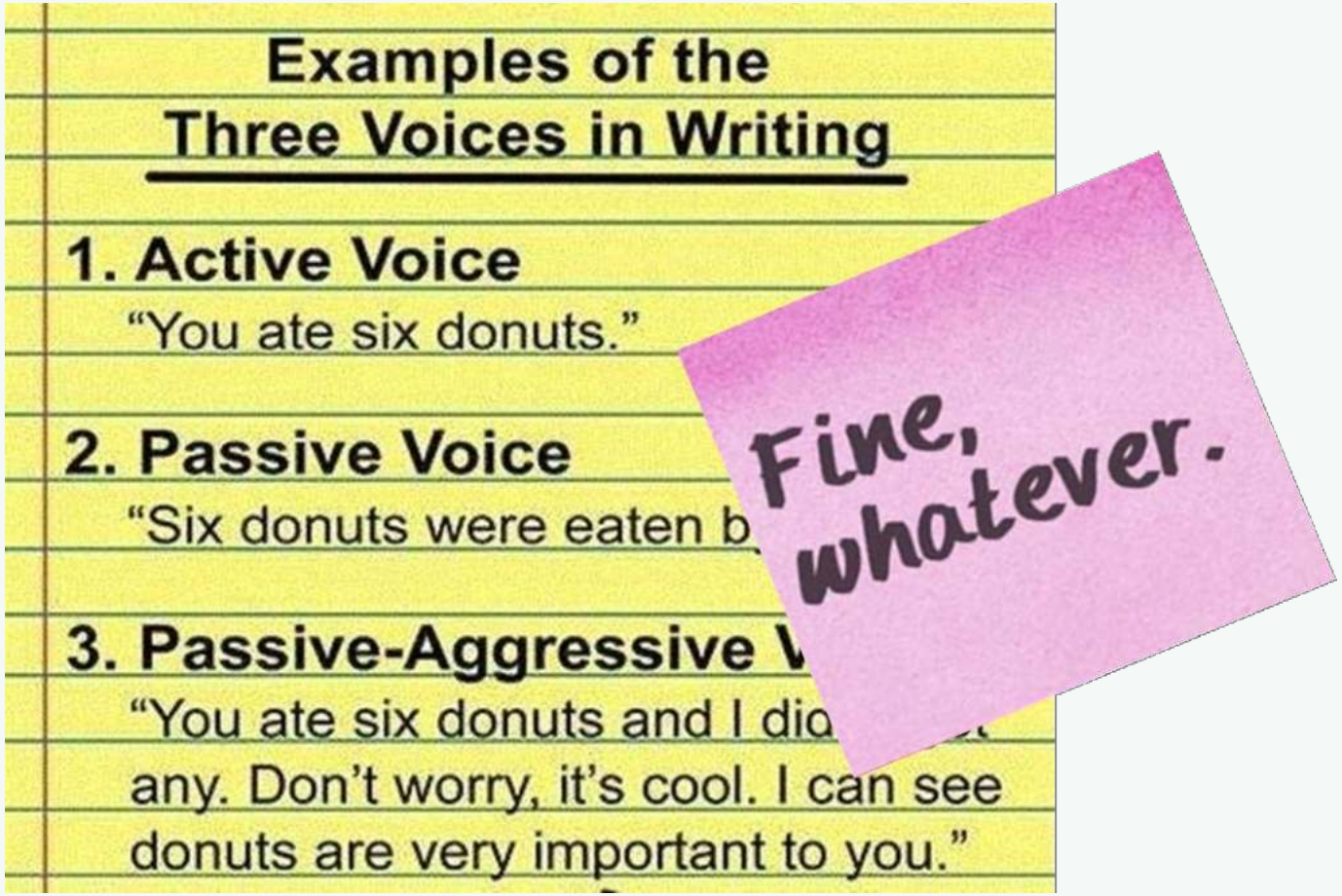
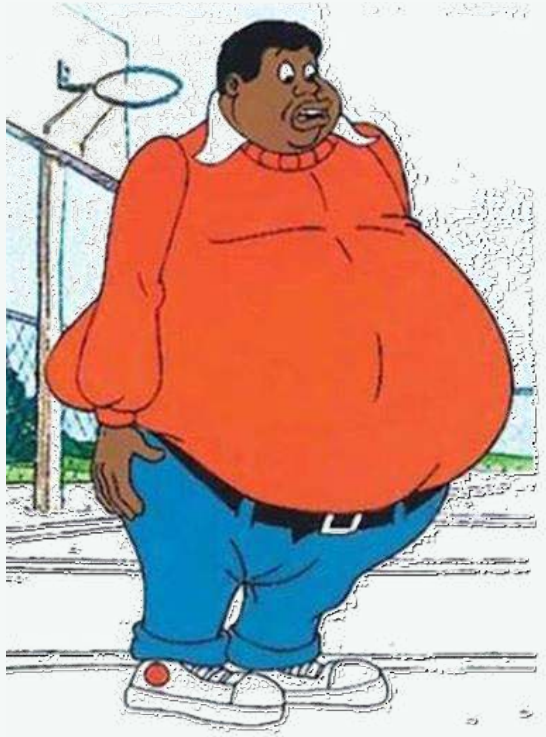


Don’t Be Passive-Aggressive



Context Is Everything

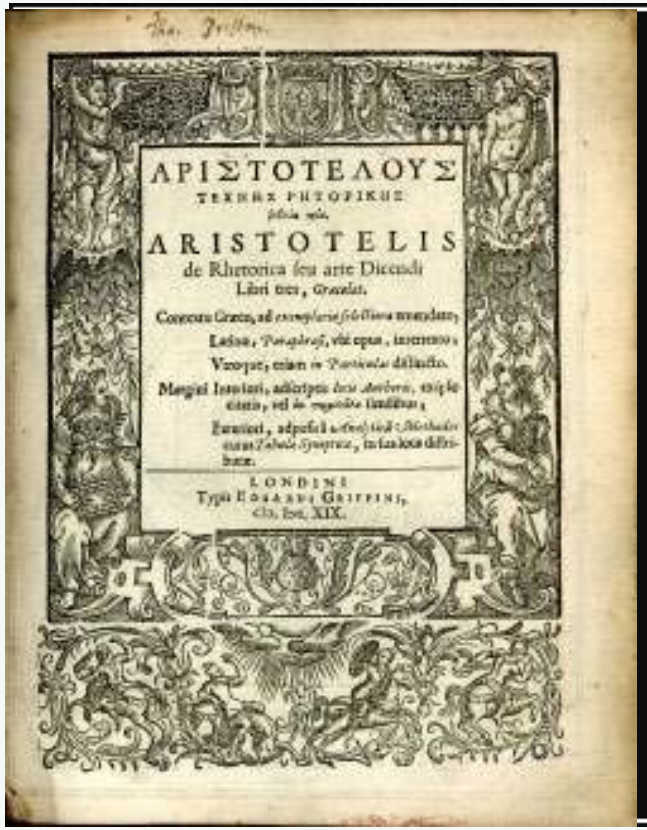


Fatalbert

Context Is Everything

Fatalbert

Tell 'Em What You're Going To Say, Say It, Then Tell 'Em What You Said


ΑΡΙΣΤΟΤΕΛΟΥΣ
ΤΕΧΝΗΣ ΡΗΤΟΡΙΚΗΣ
ARISTOTELIS
de Rhetorica seu arte Dicendi
Libri tres, Graecè.
LONDINI
Typis EDWARDI GRIFFINI,
CIↃ. IↃ. CC. XIX.

Tell the audience what you're going to say, say it; then tell them what you've said.

Structure Your Brief Like An Onion

Don’t Forget Your ABCs

Don’t Forget Your ABCs

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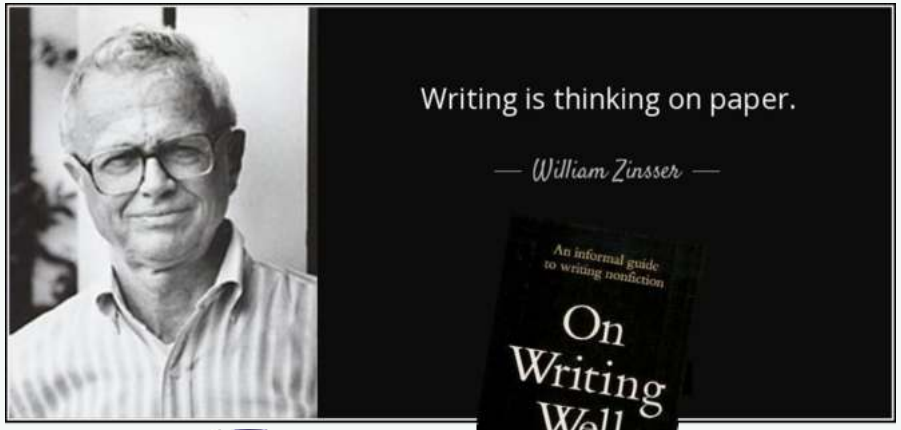
onnecting

Don't Be Joe Friday

Save The Introductions for Cocktail Parties

Write The Summary First. And Last.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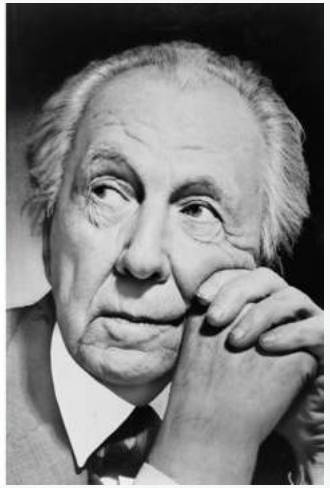


No Book Reports

Keep Your Eye On The Prize

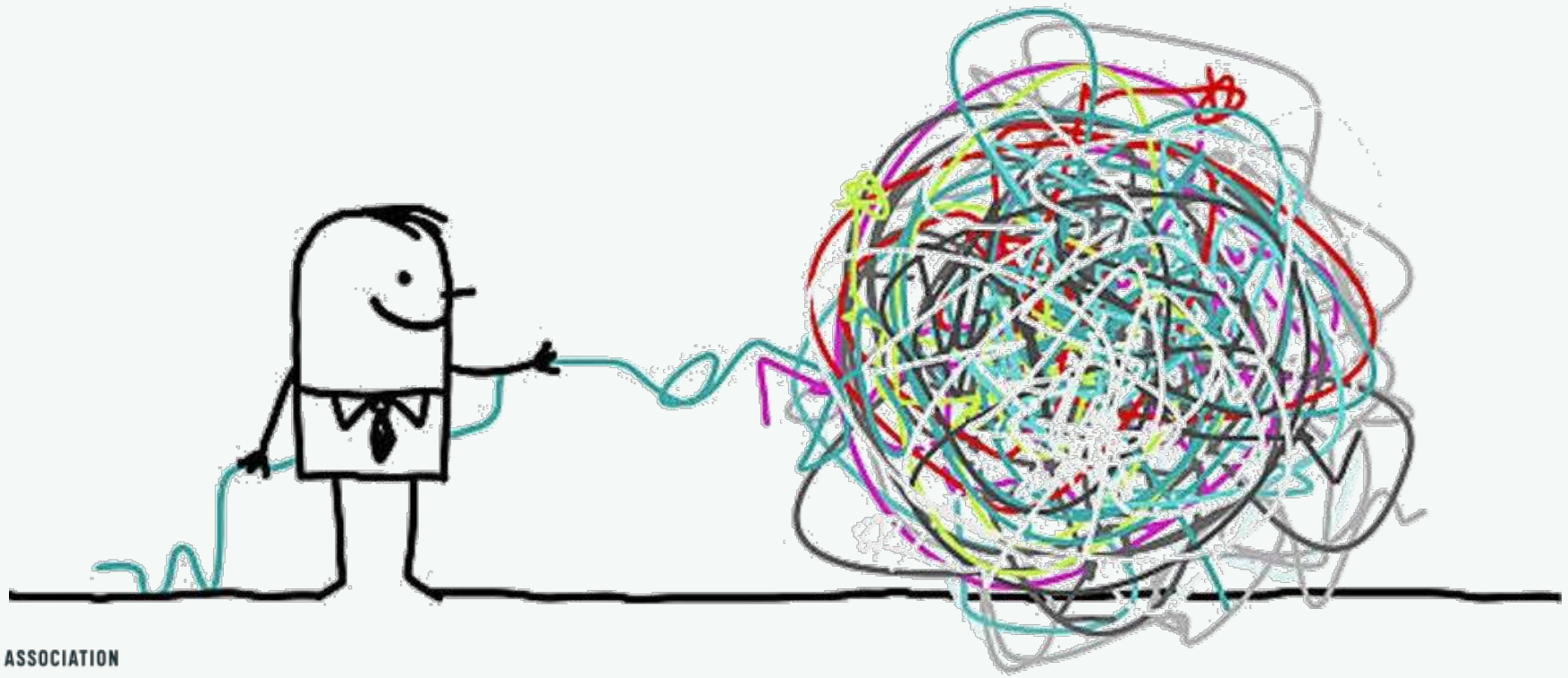
Keep Your Eye On The Prize

- The Universal Form Of Legal Argument:

Argument	Counter-Argument
You Must *X*	You Cannot *X*
You Should *X*	You Shouldn't *X*

- Mandatory Is Better Than Permissive
- Permissive Is The Spoonful Of Sugar That Helps The Mandatory Go Down.
- Always Aim At Your X.

Don't Commit Senseless Acts Of String-Citing



Don't Commit Senseless Acts Of String-Citing

Do string-cite when:

- You cannot cite adoption of the rule in a court whose precedent is mandatory to yours, so you need to show the rule adopted widely by courts whose holdings are merely persuasive to one another.
- You need to show the rule has been applied in varying factual settings.
- You need to chart the development of a rule.

IRACs Should Stick In Your CRA(w)

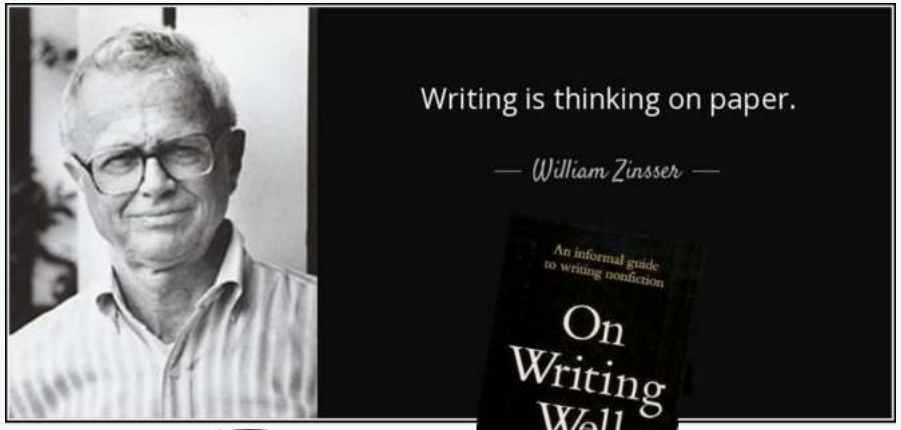
I - Issue

R - Rule

A - Application

C - Conclusion

Tell Your Story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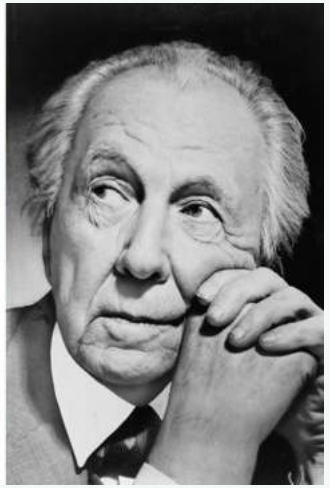
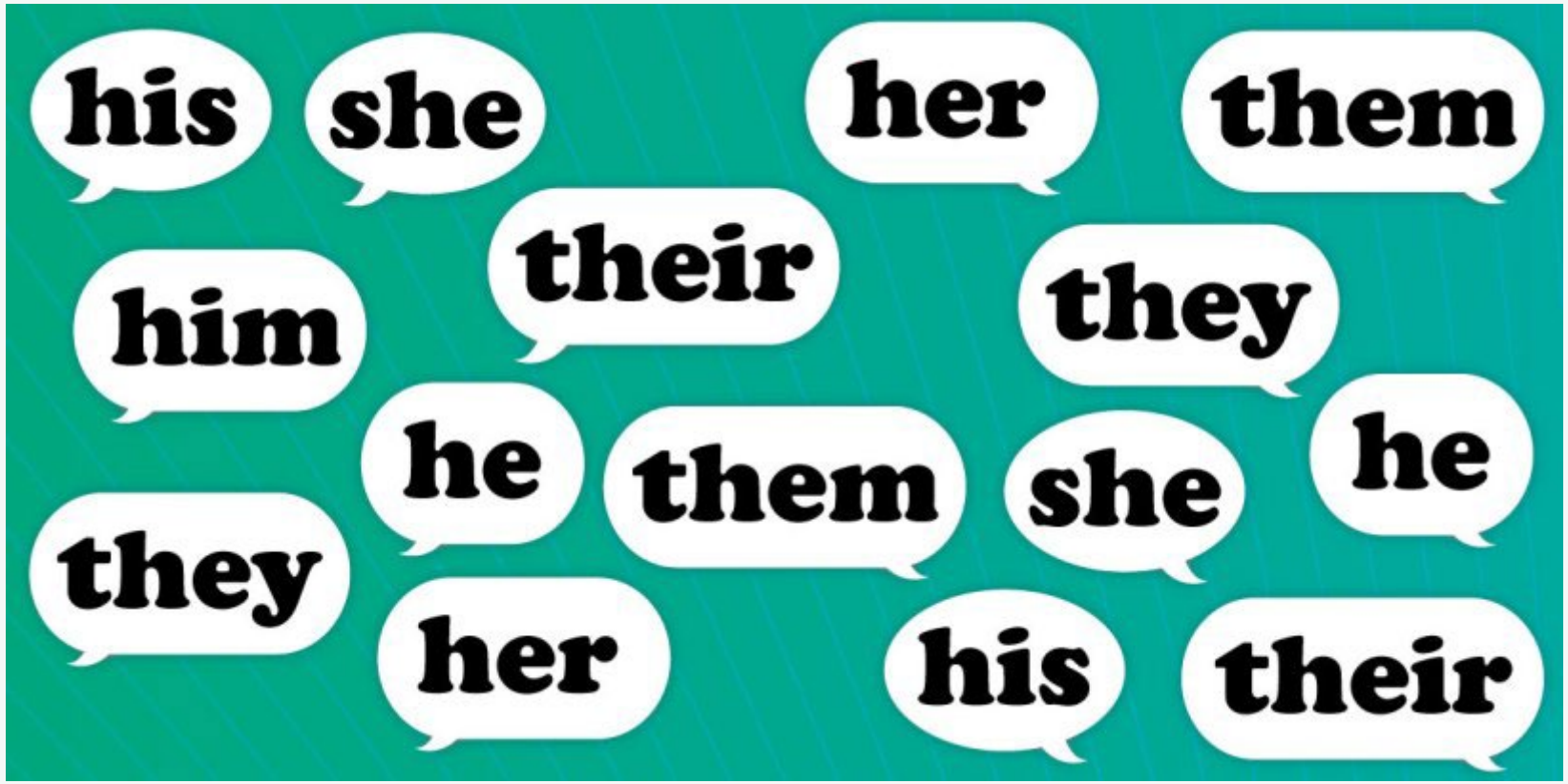


Pros Eschew Pronouns



Pros Eschew Pronouns

UNITED STATES of America,
Plaintiff - Appellee

v.

Norman VARNER, Defendant - Appellant

No. 19-40016
Summary Calendar

United States Court of Appeals,
Fifth Circuit.

FILED January 15, 2020

Background: Federal prisoner filed letter request to change the name on judgment of confinement, alleging that prisoner had

B.

We next consider Varner's motion for the "use [of] female pronouns when addressing [Varner]." We understand Varner's motion as seeking, at a minimum, to require the district court and the government to refer to Varner with female instead of male pronouns.[1] Varner cites no legal authority supporting this request. In-

Pros Eschew Pronouns

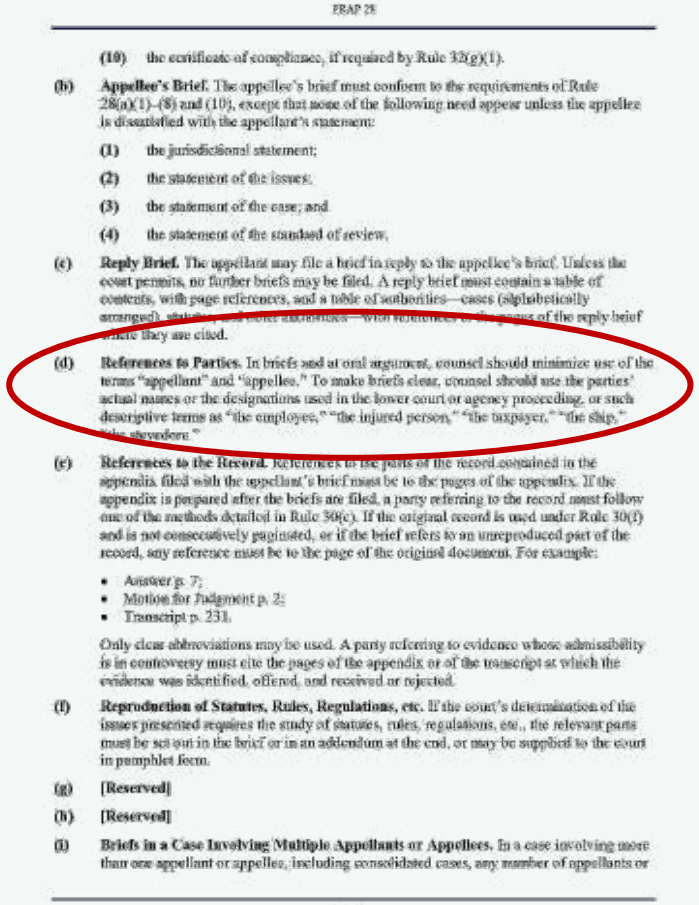
pronouns matching their subjective gender identity. Federal courts sometimes choose to refer to gender-dysphoric parties by their preferred pronouns.[3] On this issue, our court has gone both ways. *Compare Rush v. Parham*, 625 F.2d 1150, 1153 n.2 (5th Cir. 1980) (adopting "for this opinion" the "convention" in "medical literature" of using feminine pronouns . . . to describe a transsexual with a male biological gender *[illegible]*, 920 F.3d at 217 n.2 (using "pronouns" to refer to gender-dysphoric prisoner who was "born male" but lived as a female since the age of *[illegible]*; *also Praylor v. Tex. Dep't of Corrections*, 430 F.3d 1208, 1208–09 (5th Cir. 2005) (per curiam) (using male pronouns to refer to "transsexual[ ]" inmate who sought injunction requiring prison "to provide him with hormone therapy and breasieres"). But the courts that have followed this "convention," *Schwenk*, 204 F.3d at 1192, have done so purely as a courtesy to parties. *See, e.g., Farmer v. Haas*, 990 F.2d at 320 (using female pronouns to "respect [petitioner's] preference"). None has adopted the practice as a matter of binding precedent, and none has purported to obligate litigants or others to follow the practice.

Varner's motion in this case is particularly unfounded. While conceding that "biological[ly]" he is male, Varner argues female pronouns are nonetheless required to prevent "discriminat[ion]" based on his female "gender identity." But Varner identifies no federal statute or rule requiring courts or other parties to judicial proceedings to use pronouns according to a litigant's gender identity. Congress knows precisely how to legislate with respect to gender identity discrimination, because it has done so in specific statutes. *See Witt-*

Pros Eschew Pronouns

- Pronouns Avoid Repetition—But They Are Vague.
- Watch Out For:
  - Latter/Former
  - Him/Her
  - It/Them
  - This/That
- How To Stay Out Of Trouble:
  - One Noun Gets Pronounced At A Time
  - Don’t Connect Pronouns Across Paragraphs

Parties Have Names



FRAP 28

(10) the certificate of compliance, if required by Rule 32(g)(1).

(b) **Appellee's Brief.** The appellee's brief must conform to the requirements of Rule 28(a)(1)–(8) and (10), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case; and

(4) the statement of the standard of review.

(c) **Reply Brief.** The appellant may file a brief in reply to the appellee's brief. Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the reply brief where they are cited.

(d) **References to Parties.** In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore."

(e) **References to the Record.** References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f) and is not consecutively paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document. For example:

- Answer p. 7;
- Motion for Judgment p. 2;
- Transcript p. 231.

Only clear abbreviations may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(f) **Reproduction of Statutes, Rules, Regulations, etc.** If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form.

(g) **[Reserved]**

(h) **[Reserved]**

(i) **Briefs in a Case Involving Multiple Appellants or Appellees.** In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or

-iii-

Don’t Serve Up Alphabet Soup

Only Footnote What You Don’t Need Your Judge to Read

Only Footnote What You Don't Need Your Judge to Read

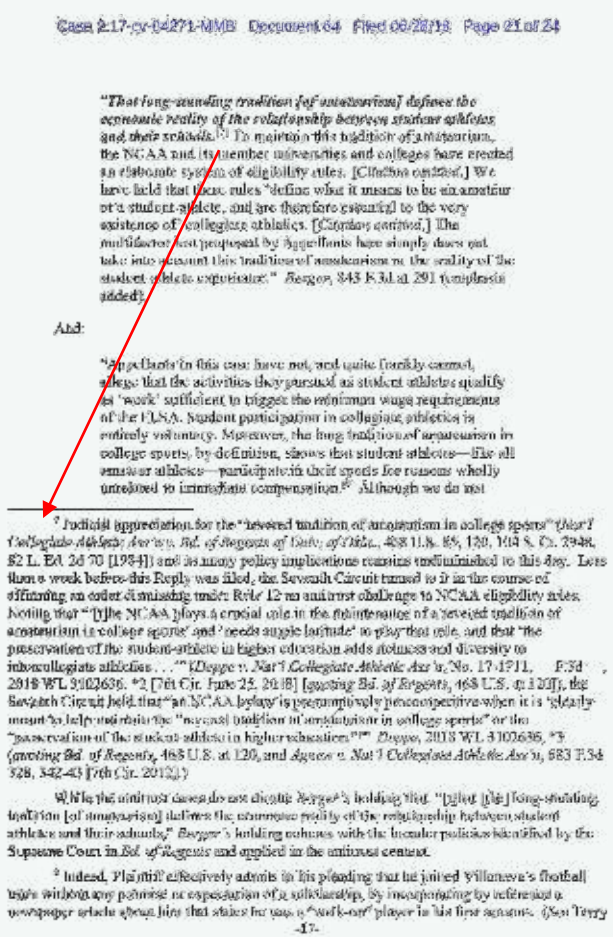
Never footnote:

- Critical parts of your argument;
- Necessary facts;
- Anything you want the judge to read.

You *may* footnote:

- Additional authority:
- Supplementary arguments;
- Stylistic asides or ephemera.
- Points you want to later show were addressed, but on which you don't want the judge to focus.

Only Footnote What You Don't Need Your Judge to Read



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"That long-standing tradition [of amateurism] defines the economic reality of the relationship between student athletes and their schools.[5] To maintain this tradition of amateurism, the NCAA and its member universities and colleges have created an elaborate system of eligibility rules. [Citation omitted.] We have held that these rules "define what it means to be an amateur or a student-athlete, and are therefore essential to the very existence of collegiate athletics. [Citation omitted.] The multifactor test proposed by Appellants here simply does not take into account this traditional mechanism or the reality of the student-athlete experience." *Berger*, 843 F.3d at 291 (emphasis added).

And:

"Appellants in this case have not, and quite frankly cannot, allege that the activities they pursued as student athletes qualify as 'work' sufficient to trigger the minimum wage requirements of the FLSA. Student participation in collegiate athletics is entirely voluntary. Moreover, the long tradition of amateurism in college sports, by definition, shows that student athletes—like all amateur athletes—participate in their sports for reasons wholly unrelated to immediate compensation.[6] Although we do not

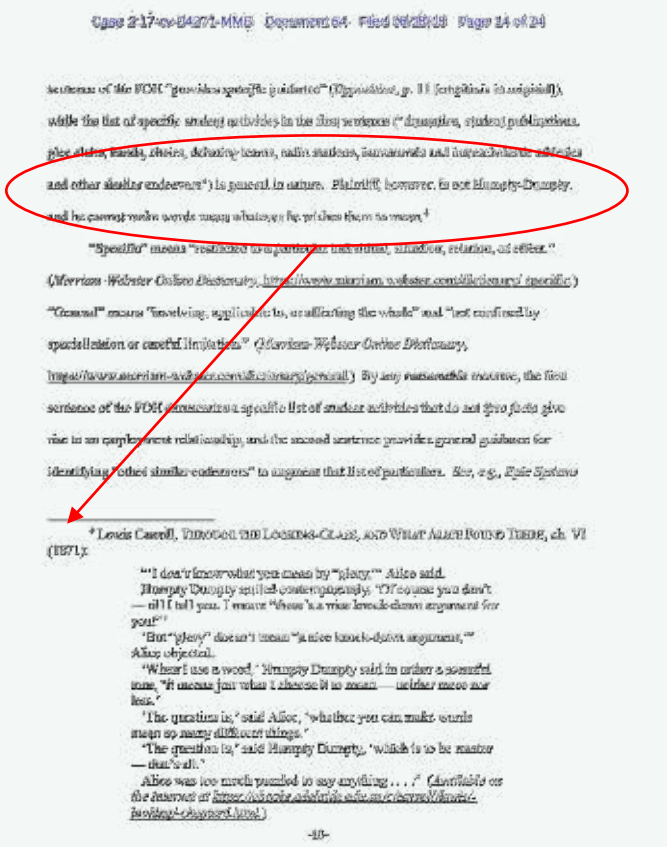
[5] Judicial appreciation for the "revered tradition of amateurism in college sports" (*Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120, 104 S. Ct. 2948, 82 L. Ed. 2d 70 [1984]) and its many policy implications remains undiminished to this day. Less than a week before this Reply was filed, the Seventh Circuit turned to it in the course of affirming an order dismissing under Rule 12 an antitrust challenge to NCAA eligibility rules. Noting that "[t]he NCAA plays a crucial role in the maintenance of a revered tradition of amateurism in college sports' and 'needs ample latitude' to play that role, and that 'the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics . . .'" *Deppe v. Nat'l Collegiate Athletic Ass'n*, No. 17-1711, F.3d , 2018 WL 3102636, *2 (7th Cir. June 25, 2018) (quoting *Bd. of Regents*, 468 U.S. at 120), the Seventh Circuit held that "an NCAA bylaw is presumptively procompetitive when it is 'clearly meant to help maintain the "revered tradition of amateurism in college sports" or the "preservation of the student-athlete in higher education."'" *Deppe*, 2018 WL 3102636, *3 (quoting *Bd. of Regents*, 468 U.S. at 120, and *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 342-43 [7th Cir. 2012].)

While the antitrust cases do not dictate *Berger*'s holding that "[t]he [the] long-standing tradition [of amateurism] defines the economic reality of the relationship between student athletes and their schools," *Berger*'s holding coheres with the broader policies identified by the Supreme Court in *Bd. of Regents* and applied in the antitrust context.

[6] Indeed, Plaintiff effectively admits in his pleading that he joined Villanova's football team without any promise or expectation of a scholarship, by recognizing by reference to a newspaper article about him that states he was a "walk-on" player in his first season. (*See* Terry

-17-

Only Footnote What You Don't Need Your Judge to Read



Case 2:17-cv-01427-MMD Document 64 Filed 08/28/18 Page 14 of 24

sentence of the FOH "provides specific guidance" (Opposition, p. 11 [emphasis in original]), while the list of specific student activities in the first sentence ("drumming, student publications, glee clubs, bands, choirs, debating teams, radio stations, fraternities and intramural athletics and other similar endeavors") is general in nature. Plaintiff, however, is not Humpty-Dumpty, and he cannot make words mean whatever he wishes them to mean.[4]

"Specific" means "restricted to a particular individual, situation, relation, or effect." (*Merriam-Webster Online Dictionary*, http://www.merriam-webster.com/dictionary/specific.) "General" means "involving, applicable to, or affecting the whole" and "not confined by specialization or careful limitation." (*Merriam-Webster Online Dictionary*, http://www.merriam-webster.com/dictionary/general.) By any reasonable measure, the first sentence of the FOH enumerates a specific list of student activities that do not give rise to an employment relationship, and the second sentence provides general guidance for identifying "other similar endeavors" to augment that list of particulars. *See, e.g., Epic Systems*

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[4] Lewis Carroll, THROUGH THE LOOKING-GLASS, AND WHAT ALICE FOUND THERE, ch. VI (1871):

> "'I don't know what you mean by "glory,"' Alice said.
> Humpty Dumpty smiled contemptuously. 'Of course you don't — till I tell you. I meant "there's a nice knock-down argument for you!"'
> 'But "glory" doesn't mean "a nice knock-down argument,"' Alice objected.
> 'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.'
> 'The question is,' said Alice, 'whether you can make words mean so many different things.'
> 'The question is,' said Humpty Dumpty, 'which is to be master — that's all.'
> Alice was too much puzzled to say anything . . . ." (Available on the Internet at https://www.adelaide.edu.au/etexts/carroll/carroll-looking-glass.html.)

-10-

Be Easy On The Eyes

Be Easy On The Eyes

Butterick's Laws of Typography:

- The more difficult a judgment on the contents of a writing, the more influence typography will have on the judgment.
- The more limited a reader's time or attention, the more influence typography will have on the reader's judgment

—Matthew Butterick, TYPOGRAPHY FOR LAWYERS 28 (2nd ed. 2010)

Justify Your Relief, Not Your Text

Fully Justify Your Relief, Not Your Text

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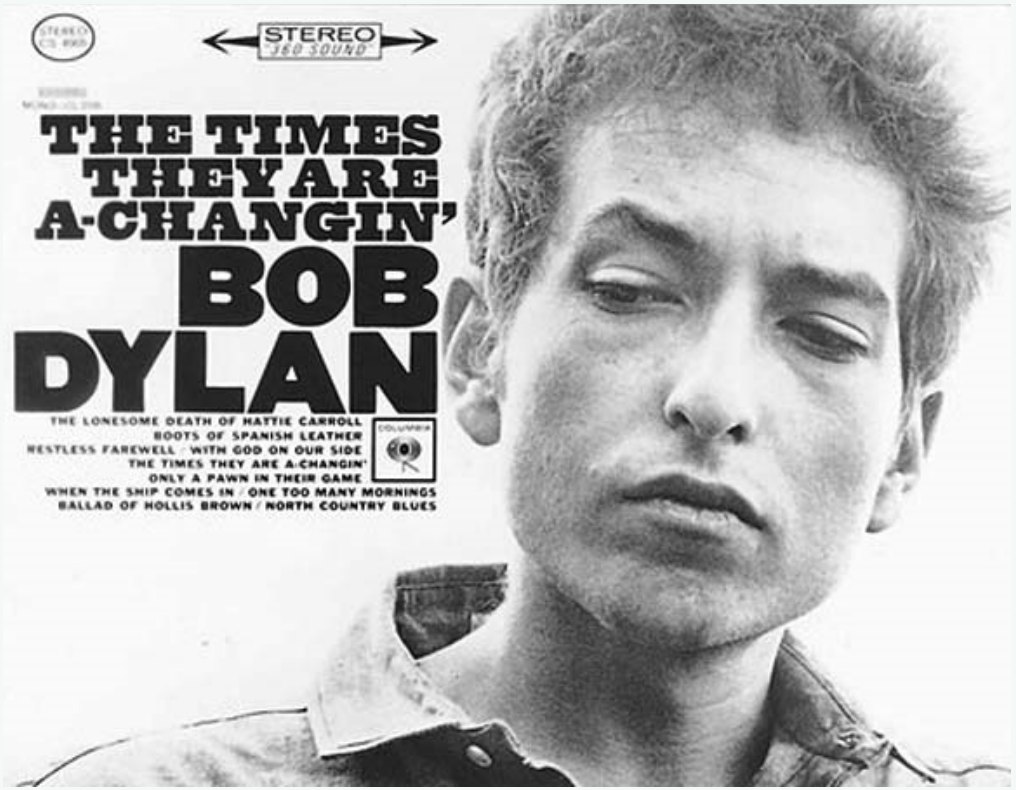
The Times (New Roman), They Are A-Changin’



> **Typographic decisions should be made for a purpose. The Times of London chose the typeface Times New Roman to serve an audience looking for a quick read. Lawyers don't want their audience to read fast and throw the document away; they want to maximize retention. Achieving that goal requires a different approach—different typefaces, different column widths, different writing conventions. Briefs are like books rather than newspapers. *The most important piece of advice we can offer is this: read some good books and try to make your briefs more like them.***
>
> **—Seventh Circuit, *Requirements and Suggestions For Typography In Briefs And Other Papers***

The Times (New Roman), They Are A-Changin’

Century Schoolbook

Aa Qq Rr
Aa Qq Rr

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Run, run, run!

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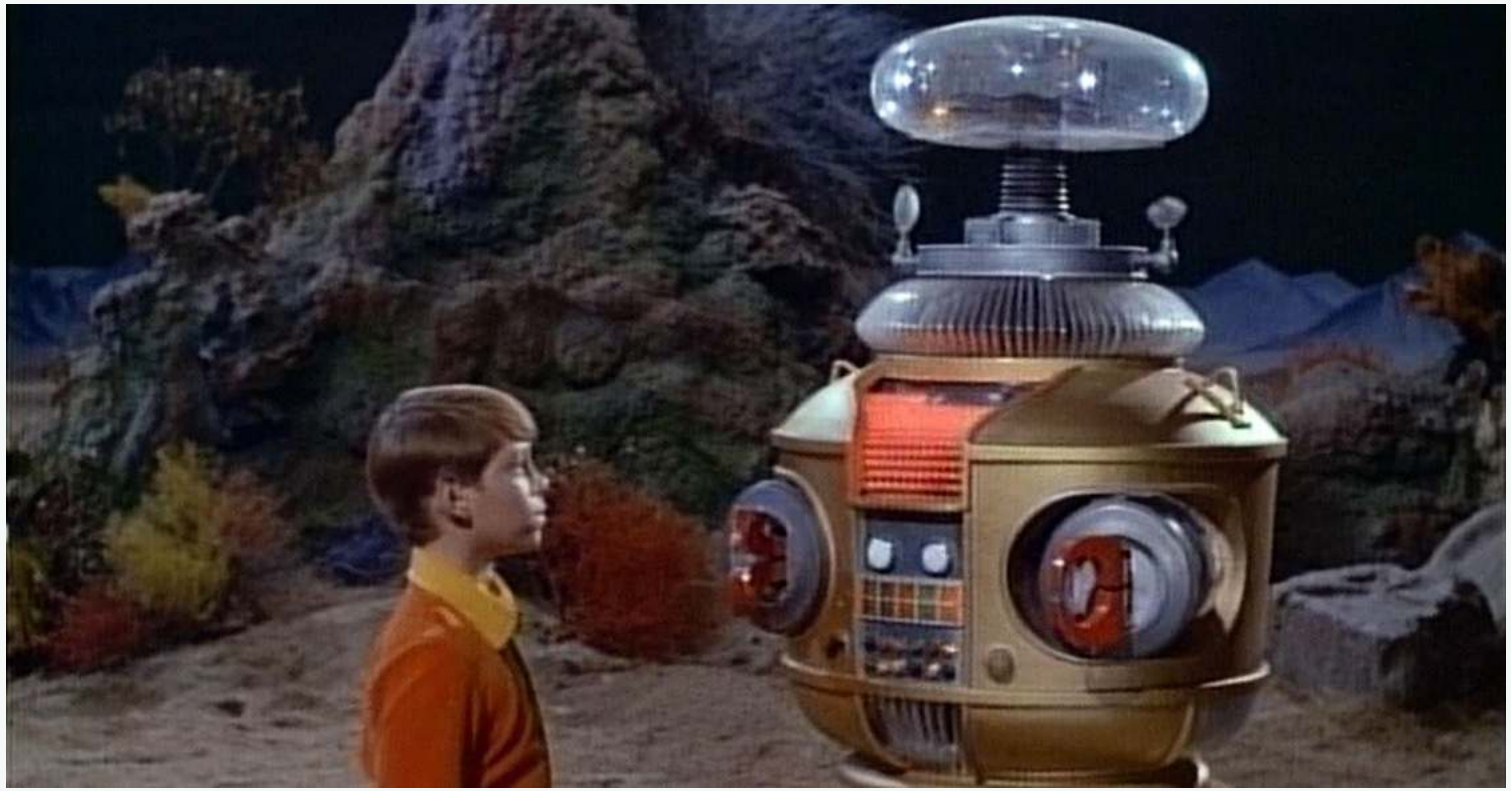
Don’t Get Lost In Space



Don’t Get Lost In Space

ARGUMENT

I.
HER CONTINUED EMPLOYMENT BINDS MS. GONZALEZ TO ANTHEM'S MANDATORY ARBITRATION POLICY.

"California law permits employers to implement policies that may become unilateral implied-in-fact contracts when employees accept them by continuing their employment." *Asmus v. Pacific Bell*, 23 Cal.4th 1, 11 (2000).

This principle applies as strongly to arbitration as any other contract. "A signed [arbitration] agreement is not necessary . . . and a party's acceptance may be implied in fact." *Pinnacle Museum Tower Ass'n v. Pinnacle Market Development (US), LLC*, 55 Cal.4th 223, 236 (2012). "[W]hen an employee continues his or her employment after notification that an agreement to arbitration is a condition of continued employment, that employee has impliedly consented to the arbitration agreement." *Diaz v. Sohnen Enterprises*, 34 Cal.App.5th 126, 130 (2019); *see also Craig v. Brown & Root, Inc.*, 84 Cal.App.4th 416, 422 (2000) (*cited with approval in Pinnacle Museum Tower*, 55 Cal.4th at 236) (employee's assent to arbitration agreement implied by continuing employment).[5] California courts regularly enforce such agreements.

[5] *Accord, e.g., Cooley v. The Servicemaster Company, LLC, et al.*, No. 2:20-CV-01382-MCE-DB, 2021 WL 3630489, at *6

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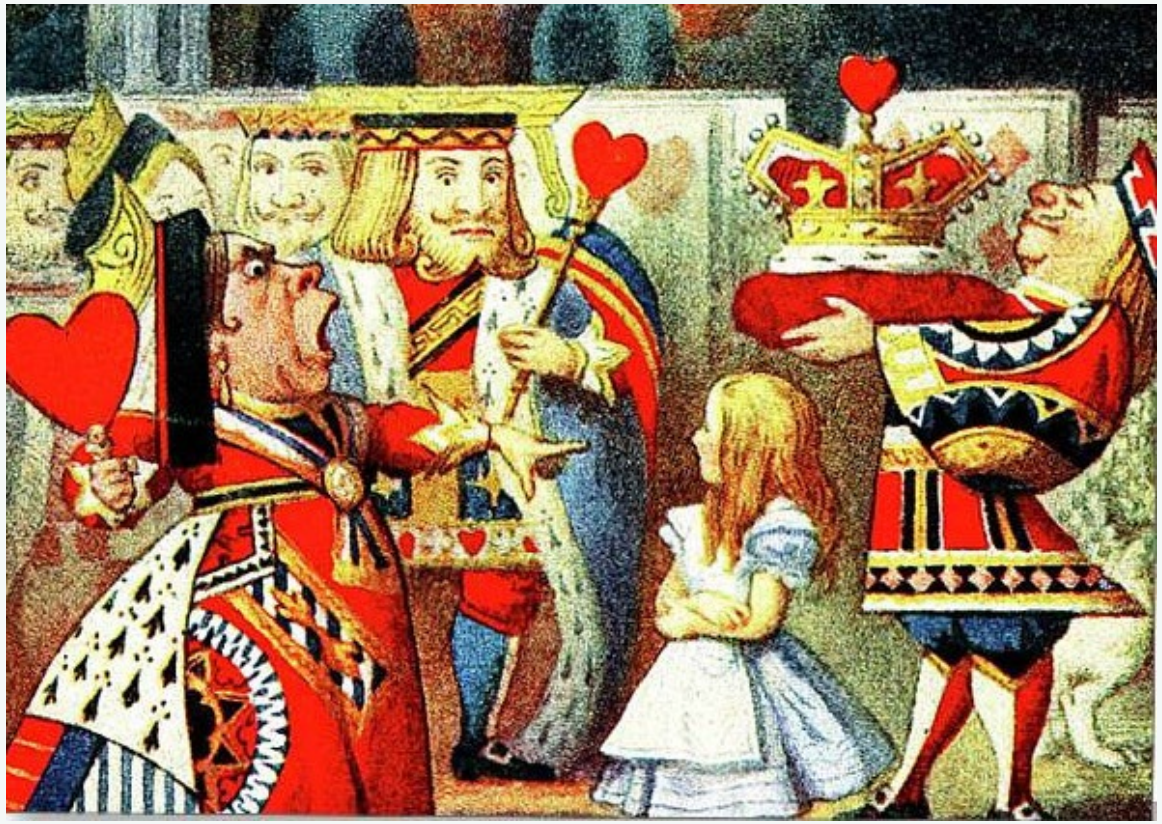
Don’t Lose Your Head(ing)



Don’t Lose Your Head(ing)

- No ALL CAPS. Try LARGE AND SMALL CAPS instead.
- No underlining. (Or *all italics*.) Try **Bold** instead.
- Don’t shove all of your headings to the left. Centered is better. Move to left three or four levels down.
- No run-on sentences. There is no reason why a heading cannot be two or three sentences.

Don’t Lose Your Head(ing)

ARGUMENT

I.
ACADEMY OF COUNTRY MUSIC CONTROLS HERE.
THE DISTRICT COURT COMMITTED PLAIN ERROR BY REFUSING ELEVANCE HEALTH AN OPPORTUNITY TO PRESENT EVIDENCE OF DIVERSITY.
IT DID NOT REMAND ON A *COLORABLE* 28 U.S.C. § 1447(C) GROUND.

The district court’s effectively-*sua sponte* remand order must be reversed because it violates *Academy of Country Music’s* prohibition on such orders. This Court should vacate the district court’s remand order and order it to recall the remand and reassume jurisdiction.

Dare To Be Different

Dare To Be Different

Vanskike has *two* key holdings: First, as a matter of general FLSA law, multi-factor tests are not always appropriate to capture economic reality; second, no multi-factor test adequately captures the economic reality of prison labor. *Berger* cites *Vanskike* for the first holding, ***not*** the second.

This is best illustrated by looking at what the Students cut out of their discussion of *Livers v. National Collegiate Athletic Ass'n*, No. CV 17-4271, 2018 WL 2291027 (E.D. Pa., May 17, 2018), a case which they claim "confirmed" their analysis and "soundly rejected" *Berger* "for relying heavily of *Vanskike*." (ANB, pp. 14, 21.) *Livers* does neither:

What the Students use:[2]	What they omit (highlighted):[3]
"Both *Berger* and *Dawson* [*v. NCAA*] relied heavily on *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992) as precedent for, and an example of, the rejection of a multifactor test to evaluate the 'economic reality' of alleged employment relationships in special circumstances. . .	"Both *Berger* and *Dawson* relied heavily on *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992) as precedent for, and an example of, the rejection of a multi-factor test to evaluate the 'economic reality' of alleged employment relationships in special circumstances. In Vanskike the Seventh Circuit rejected a multifactor test in favor of a holistic application of the

[2] ANB, p. 21 (*quoting Livers*, 2018 WL 2291027, at *15) (interpolation and emphasis as in brief).

[3] *Livers*, 2018 WL 2291027, at *15.

What the Students use:[2]	What they omit (highlighted):[3]
The [*Vanskike*] court observed that the **Thirteenth Amendment** excludes convicted criminals from the prohibition of involuntary servitude, so prisoners may be required to work. . .	'economic reality' test in evaluating whether Mr. Vanskike, who was assigned to work for the Department of Corrections within a DOC facility while incarcerated there, was an 'employee' under the FLSA. The court observed that 'the Thirteenth Amendment excludes convicted criminals from the prohibition of involuntary servitude, so prisoners may be required to work.' Vanskike, 974 F.2d at 809. The court indicated that the four factor test that had been applied in other cases evaluating whether prisoners engaging in different types of work were 'employees' under the FLSA was 'not the most helpful guide in the situation presented.' Id. Such a test, the court reasoned, is 'particularly appropriate where ... it is clear that some entity is an "employer" and the question is which one,' whereas the issue posed by Vanskike's complaint was 'a more fundamental one: Can this prisoner plausibly be said to be "employed" in the relevant sense at all?' *Id.* Ultimately the Seventh Circuit held that '[b]ecause Vanskike's allegations reveal that he worked in the

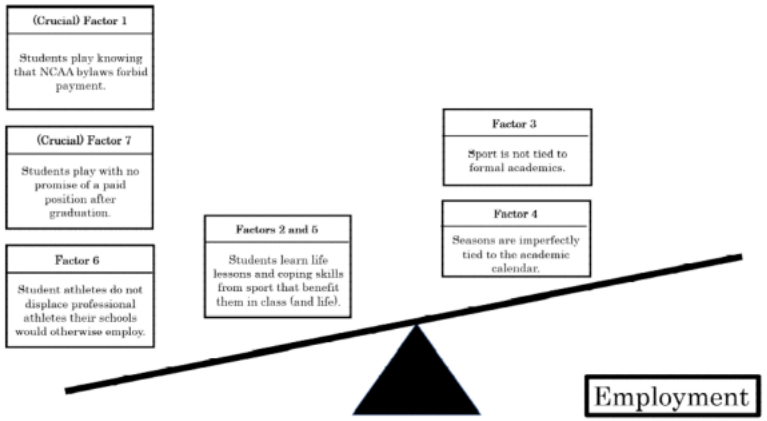
What the Students use:[2]	What they omit (highlighted):[3]
***Vanskike* is not controlling on this Court."**	prison and for the DOC pursuant to penological work assignments, the economic reality is that he was not an "employee" under the FLSA.' *Id.* at 810. "*Vanskike*, like *Tony & Susan Alamo Foundation*, suggests that in order to determine the 'economic reality' of an alleged employment relationship, courts need not rely on a formula in order to divine the true nature of that relationship. *Vanskike* is not controlling on this Court."

Berger cites *Vanskike* for the proposition "[w]e have declined to apply multifactor tests in the employment setting when they 'fail to capture the true nature of the relationship' between the alleged employee and the alleged employer." *Berger*, 843 F.2d at 291. *See also id.* at 291-92. *Berger* did not make a "comparison between student-athletes and prisoners" as the Students claim. (ANB, p. 42.) It cited *Vanskike* because multi-factor tests used in independent contractor

Dare To Be Different

Factors 3 and 4 point toward employment, they do so only modestly.

Shorn of the district court's application errors, the clear weight of the *Glatt* factors point away from finding an employment relationship:



The district court should not have applied *Glatt* at all. But when it did, it should have concluded that the Students fail plausibly to allege an employment relationship.

The Ninth Circuit's decision in *Benjamin* shows why *Berger* would

Dare To Be Different

reinstated and the stay of litigation be restored.

II.

THE TRIAL COURT DOES NOT HAVE THE DISCRETION TO IGNORE THE PLAIN LANGUAGE OF C.C.P. § 473(B). IT ERRED IN HOLDING THAT ITS MANDATORY RELIEF PROVISION DOES NOT APPLY TO A "DEFAULT OF THE ARBITRATION" UNDER § 1281.97.

C.C.P. § 473(b) makes relief from "default judgment or dismissal" *mandatory* upon the timely filing of an attorney

Dare To Be Different

The District Court correctly held that Ms. Cummings committed all four of the "sins" of shotgun pleadings, and twice declined to correct the deficiencies, "willfully" disregarding the Court's order she do so. Beyond rational dispute the District Court correctly exercised its discretion to dismiss Ms. Cummings' Second Amended Complaint with prejudice.

A.

MS. CUMMINGS COMMITTED ALL FOUR SINS OF SHOTGUN PLEADING.

In *Weiland*, this Circuit outlined the four "sins" of shotgun pleading:

1. The "mortal sin of realleging all preceding counts" (*Weiland*, 792 F.3d at 1322), "where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint." *Id.* at 1321.
2. The "venial sin of being replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action." *Id.* at 1322.
3. The "sin of not separating into a different count each cause of action or claim for relief." *Id.* at 1322-23.

leave to amend.

SIN #1: EACH COUNT OF MS. CUMMINGS' SECOND AMENDED COMPLAINT IMPERMISSIBLY ADOPTED PRECEDING COUNTS.

In its Order dismissing her First Amended Complaint with further leave to amend, the District Court noted that Ms. Cummings

combination of the entire complaint.").

SIN #2: HER SECOND AMENDED COMPLAINT WAS FILLED WITH CONCLUSORY, VAGUE, AND IMMATERIAL FACTS.

The District Court also warned Ms. Cummings that her First

Amended Complaint was "replete with facts not obviously connected to

not obviously connected to any particular cause of action." (*Id.*, p. 9).

SIN #3: HER SECOND AMENDED COMPLAINT DID NOT SEPARATE MS. CUMMINGS' CLAIMS INTO SEPARATE COUNTS.

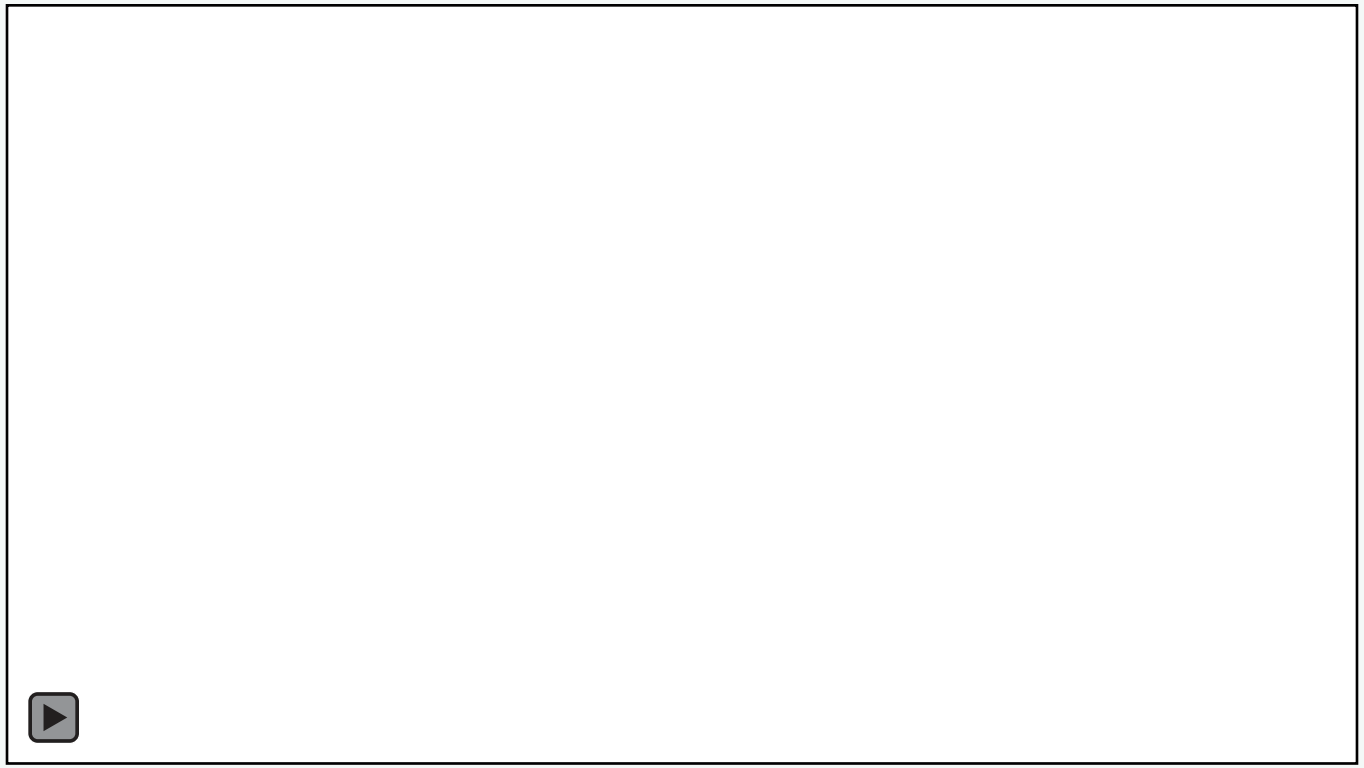
The District Court further warned Ms. Cummings that her First

had a causal relationship to the injury?).

SIN #4: THE SECOND AMENDED COMPLAINT DID NOT IDENTIFY THE ACTOR FOR MANY OF THE ALLEGED DISCRIMINATORY ACTS.

Finally, the District Court held that Ms. Cummings committed the fourth and "rarest sin" of shotgun pleading: she did not identify which

Don’t Get Mad; Get Even (Tempered)



Judges Have Computers, Too

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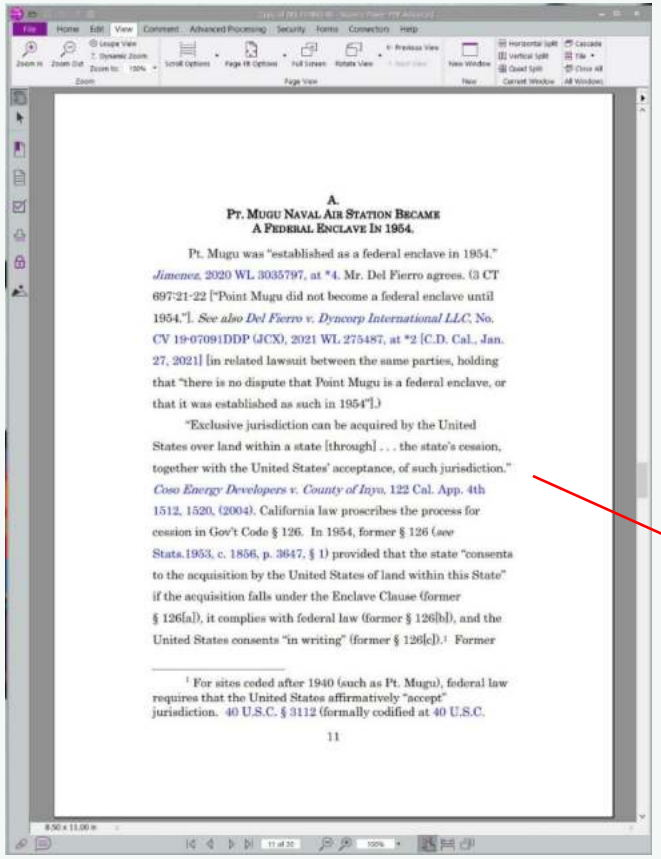

A.
PT. MUGU NAVAL AIR STATION BECAME
A FEDERAL ENCLAVE IN 1954.

Pt. Mugu was "established as a federal enclave in 1954." *Jimenez*, 2020 WL 3035797, at *4. Mr. Del Fierro agrees. (3 CT 697:21-22 ["Point Mugu did not become a federal enclave until 1954."]. *See also Del Fierro v. Dyncorp International LLC*, No. CV 19-07091DDP (JCX), 2021 WL 275487, at *2 [C.D. Cal., Jan. 27, 2021] [in related lawsuit between the same parties, holding that "there is no dispute that Point Mugu is a federal enclave, or that it was established as such in 1954"].)

"Exclusive jurisdiction can be acquired by the United States over land within a state [through] . . . the state's cession, together with the United States' acceptance, of such jurisdiction." *Coso Energy Developers v. County of Inyo*, 122 Cal. App. 4th 1512, 1520, (2004). California law proscribes the process for cession in Gov't Code § 126. In 1954, former § 126 (*see* Stats.1953, c. 1856, p. 3647, § 1) provided that the state "consents to the acquisition by the United States of land within this State" if the acquisition falls under the Enclave Clause (former § 126[a]), it complies with federal law (former § 126[b]), and the United States consents "in writing" (former § 126[c]).[1] Former

[1] For sites ceded after 1940 (such as Pt. Mugu), federal law requires that the United States affirmatively "accept" jurisdiction. 40 U.S.C. § 3112 (formally codified at 40 U.S.C.

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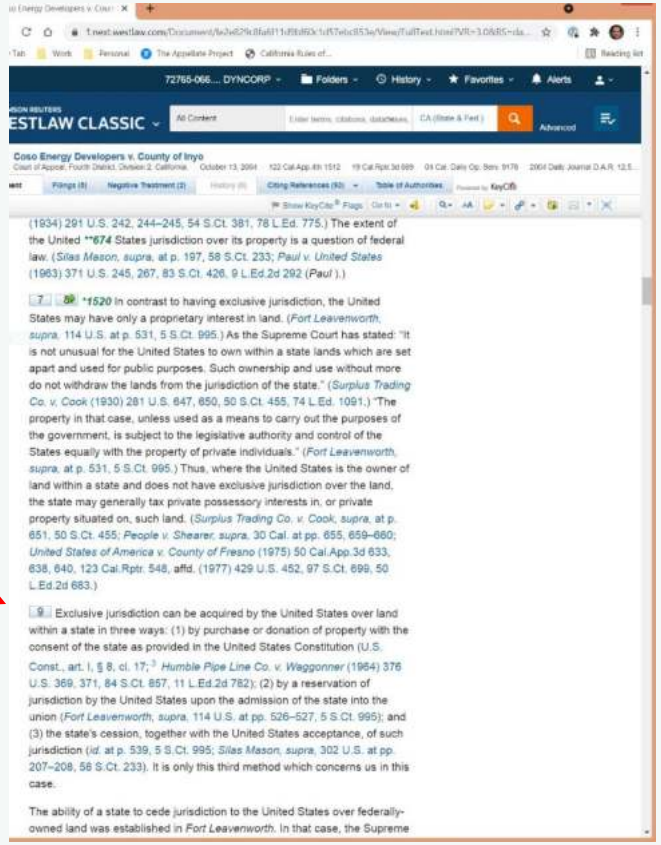


Coso Energy Developers v. County of Inyo

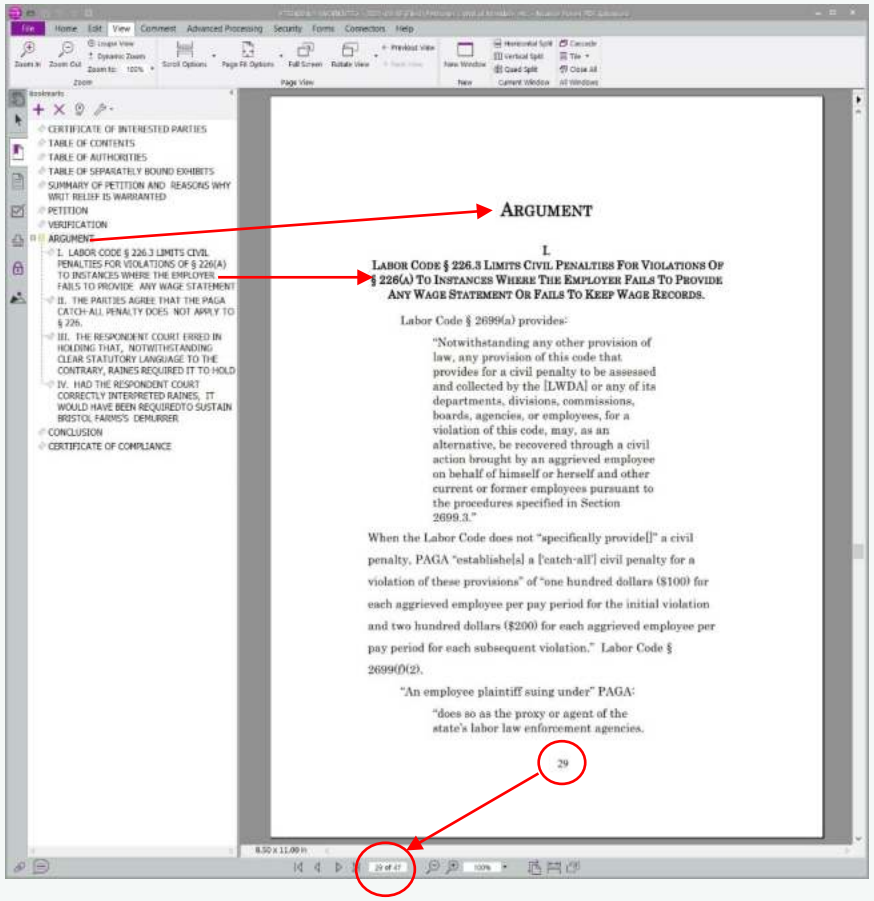
(1934) 291 U.S. 242, 244–245, 54 S.Ct. 381, 78 L.Ed. 775.) The extent of the United **674 States jurisdiction over its property is a question of federal law. (*Silas Mason, supra*, at p. 197, 58 S.Ct. 233; *Paul v. United States* (1963) 371 U.S. 245, 267, 83 S.Ct. 426, 9 L.Ed.2d 292 (*Paul*).)

7 *1520 In contrast to having exclusive jurisdiction, the United States may have only a proprietary interest in land. (*Fort Leavenworth, supra*, 114 U.S. at p. 531, 5 S.Ct. 995.) As the Supreme Court has stated: "It is not unusual for the United States to own within a state lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the state." (*Surplus Trading Co. v. Cook* (1930) 281 U.S. 647, 650, 50 S.Ct. 455, 74 L.Ed. 1091.) "The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the States equally with the property of private individuals." (*Fort Leavenworth, supra*, at p. 531, 5 S.Ct. 995.) Thus, where the United States is the owner of land within a state and does not have exclusive jurisdiction over the land, the state may generally tax private possessory interests in, or private property situated on, such land. (*Surplus Trading Co. v. Cook, supra*, at p. 651, 50 S.Ct. 455; *People v. Shearer, supra*, 30 Cal. at pp. 655, 659–660; *United States of America v. County of Fresno* (1975) 50 Cal.App.3d 633, 638, 640, 123 Cal.Rptr. 548, affd. (1977) 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683.)

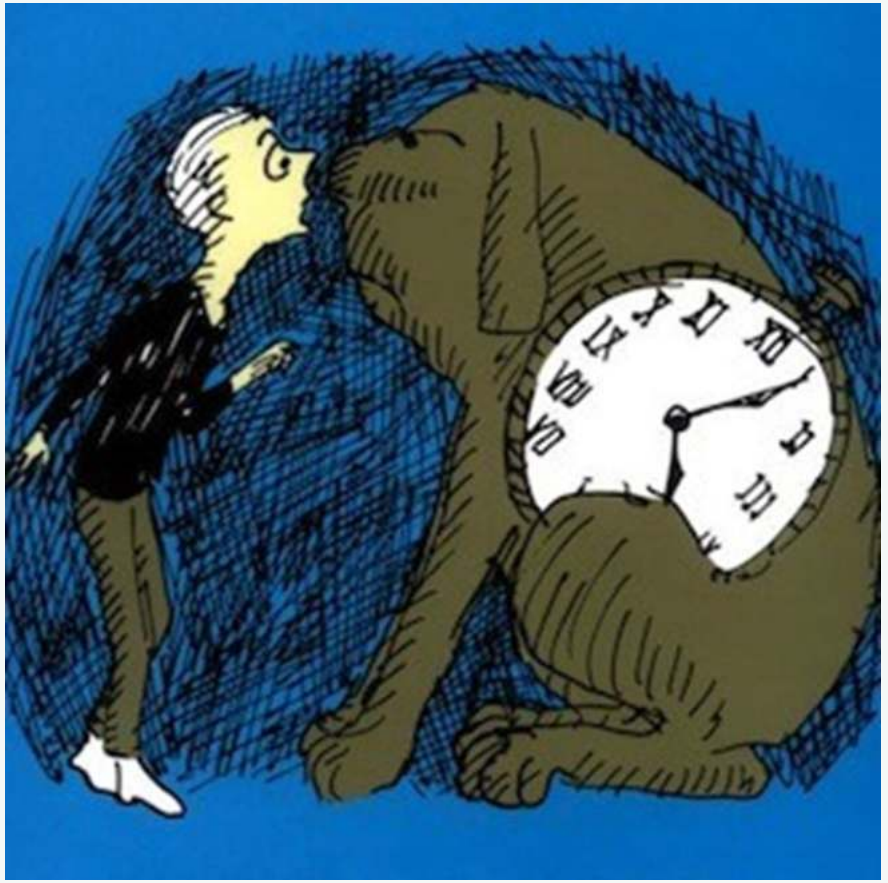
9 Exclusive jurisdiction can be acquired by the United States over land within a state in three ways: (1) by purchase or donation of property with the consent of the state as provided in the United States Constitution (U.S. Const., art. I, § 8, cl. 17;[3] *Humble Pipe Line Co. v. Waggonner* (1964) 376 U.S. 369, 371, 84 S.Ct. 857, 11 L.Ed.2d 782); (2) by a reservation of jurisdiction by the United States upon the admission of the state into the union (*Fort Leavenworth, supra*, 114 U.S. at pp. 526–527, 5 S.Ct. 995); and (3) the state's cession, together with the United States acceptance, of such jurisdiction (*id.* at p. 539, 5 S.Ct. 995; *Silas Mason, supra*, 302 U.S. at pp. 207–208, 58 S.Ct. 233). It is only this third method which concerns us in this case.

The ability of a state to cede jurisdiction to the United States over federally-owned land was established in *Fort Leavenworth*. In that case, the Supreme

Judges Have Computers, Too



Make Your TOC TIC



Make Your TOC TIC

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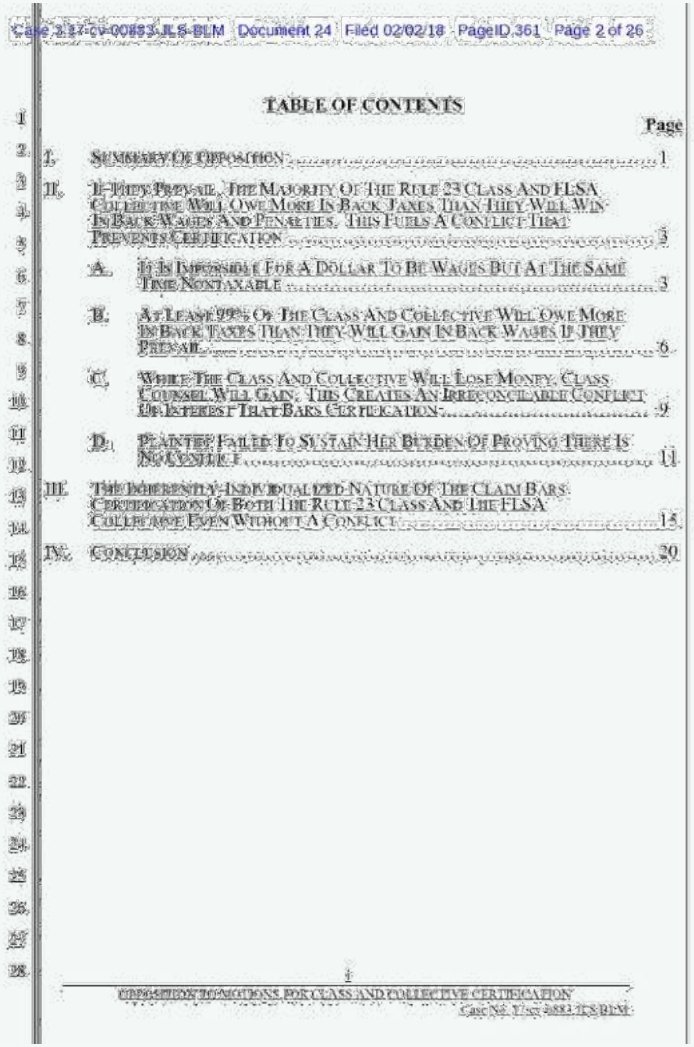

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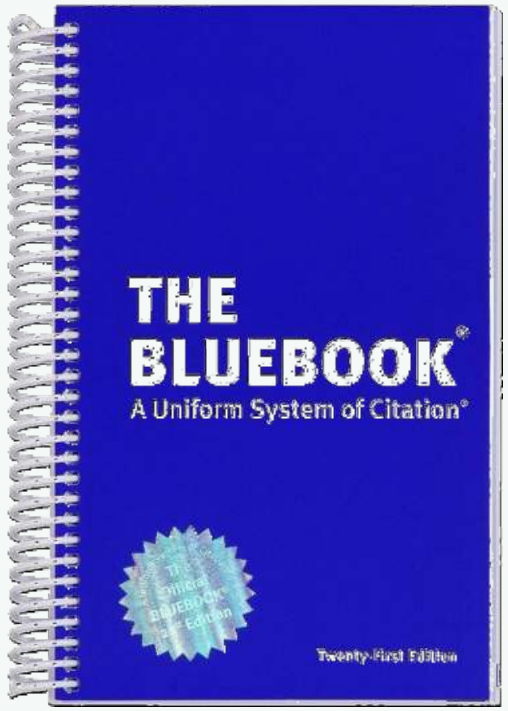
The Bluebook Is Not Scripture



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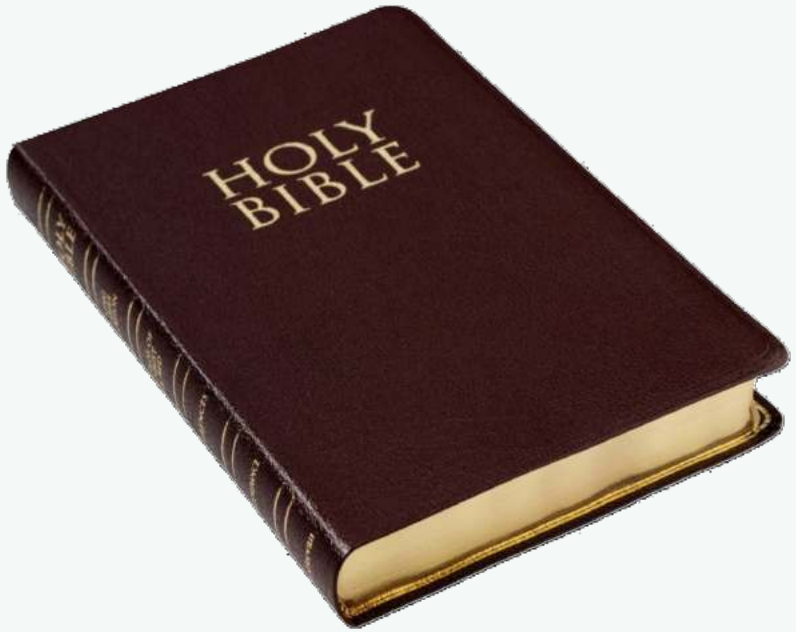
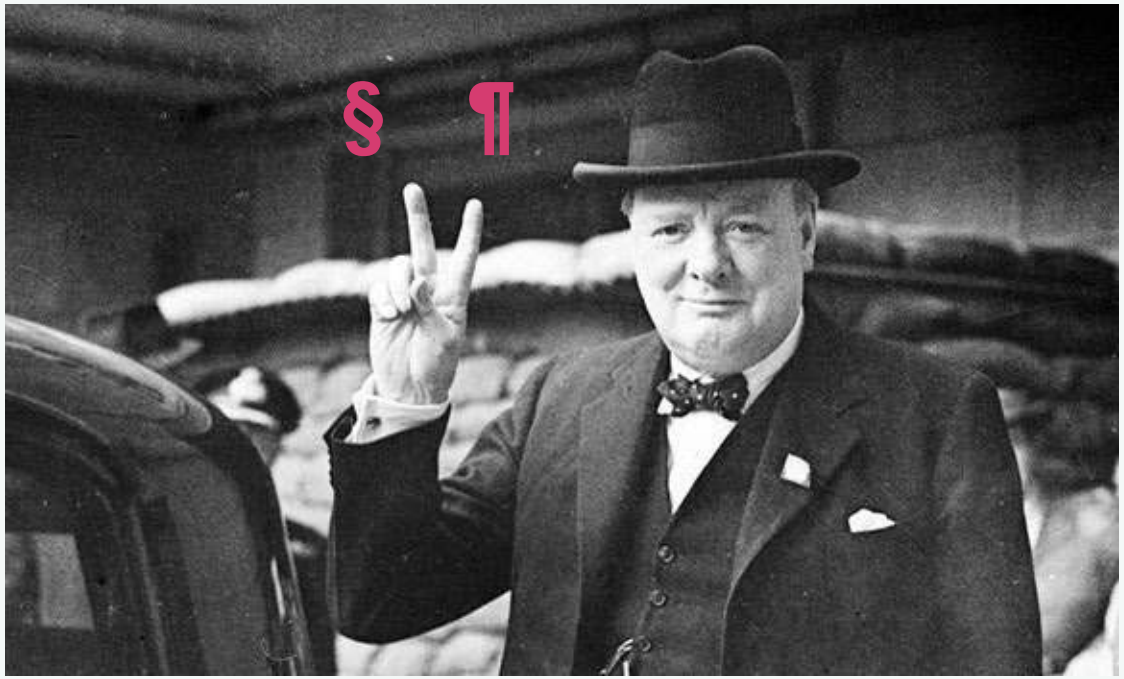


Score Symbolic Victories



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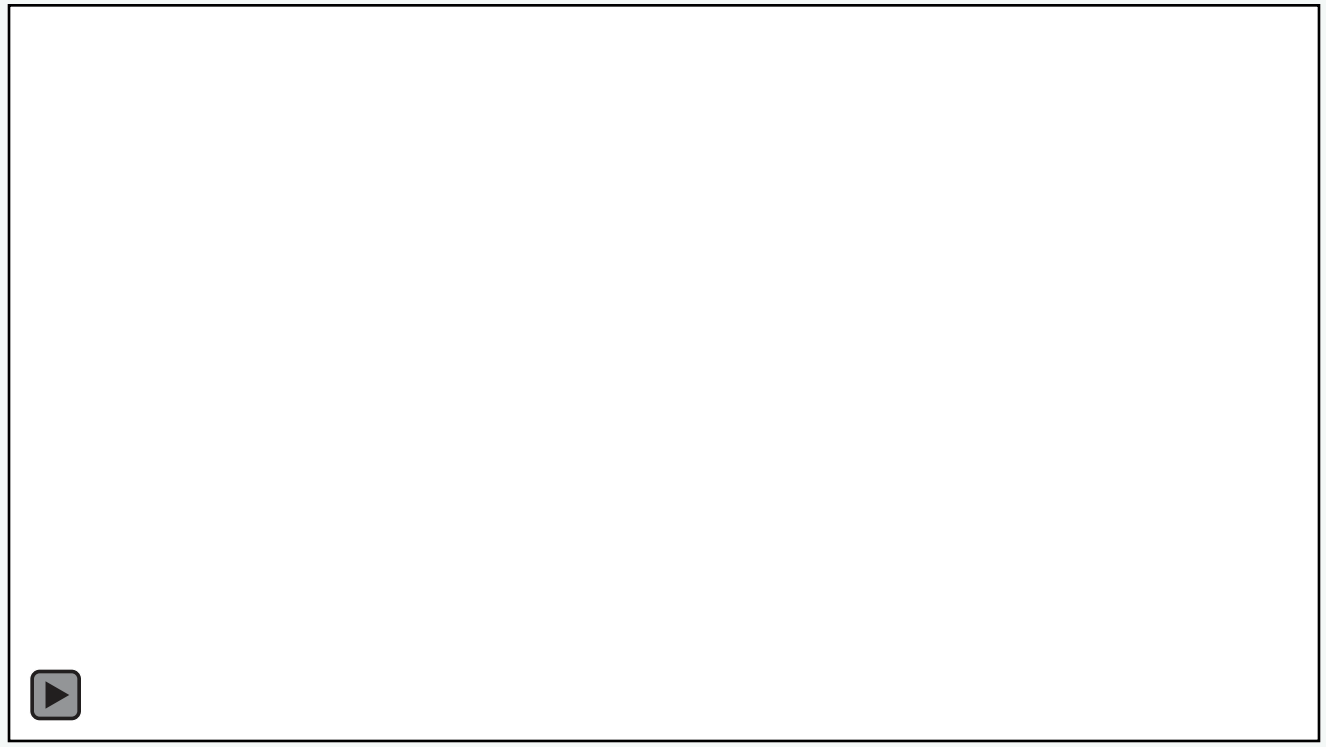
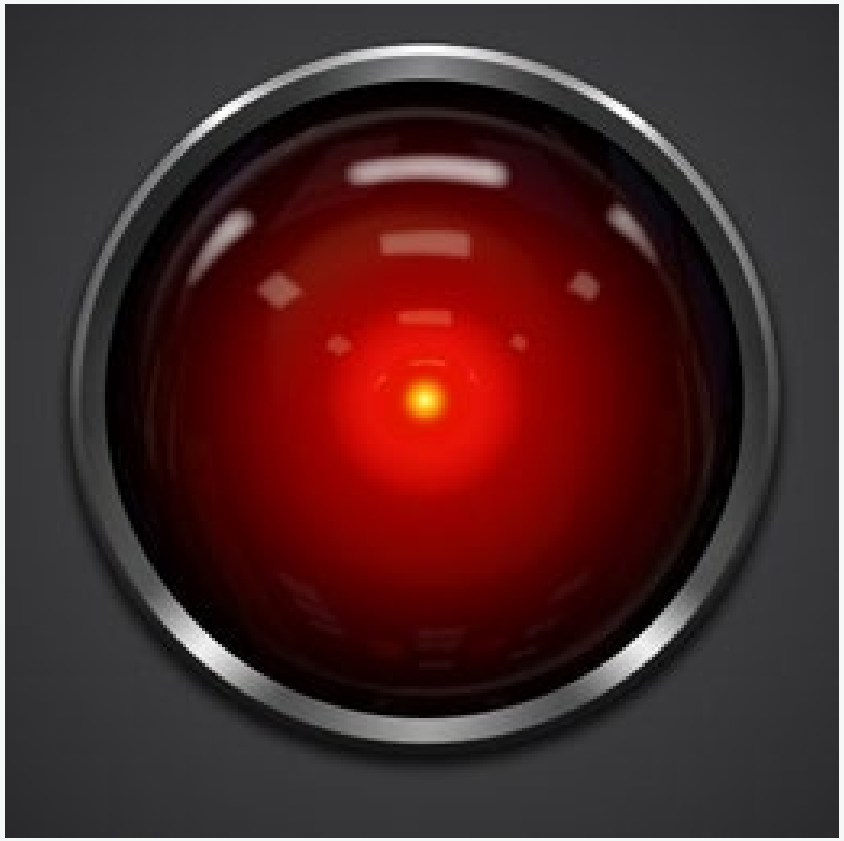


Wash, Rinse, Repeat

“Open the pod bay doors Hal”



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