THE WRITING CENTER
GEORGETOWN UNIVERSITY LAW CENTER

Just Do It: Tips for Avoiding Procrastination

By Michael Pitts and Jennifer Bennett*

It's 9:00 p.m. Your twenty-five page paper is due in exactly twelve hours, and you still have to write twenty pages, miraculously produce some sources you can actually cite, and maybe, if you're lucky, squeeze in eight minutes for a quick proofread. A familiar feeling of panic is setting in, and you know you've got a long night ahead.

This is not the first time you have pushed a paper deadline. You think, "How did I get myself into this situation again?" Then you remember that in the three months since the paper was assigned, you did everything you could to avoid working on the paper. And now, even though you have only twelve hours left, you're still not doing what you know you should be – making a pot of black coffee and settling in to work. Instead, you're staring into your refrigerator wondering if, despite having had dinner an hour ago, you're already hungry enough to take a sandwich break.

Does this scenario sound familiar to you? Most of us have been guilty of procrastination on one occasion or another, particularly when confronted with an unfamiliar writing task. The tendency to procrastinate may stem from anxiety, fear, embarrassment, or discomfort. The end result of procrastination may be a missed opportunity, a frustrated goal or a low quality work product. Whatever the causes or frequency of their occurrence, episodes of procrastination need not be terminal. With a small amount of reflection upon your particular modes of procrastination, you may be able to identify techniques that will help you enter the writing process with less stress.

Here are some tips to help you end the vicious cycle of procrastination:

1. Break the Assignment Into Small Pieces

When you initially get a writing assignment, do you immediately think that you will be unable to finish such a big or complicated project? Do you panic at the thought of everything that will need to get done before a major assignment can be handed in? Stop.

* Revised by Kaavya Viswanathan in 2011.

Try to remember that not everything has to be completed at once (unless you wait until the very end!). Make a list of the separate steps involved in the writing process (e.g., researching, generating a thesis statement, outlining, writing a first draft) and think of each step as an individual task. Just breaking up the idea of a paper in your mind can calm you down and help you feel more equipped to handle the task ahead. If you still procrastinate on the task after breaking it down, break it down even further. So, break "researching" down to "find ten relevant cases" and if that still seems unmanageable, break "find ten relevant cases" down to "run a Westlaw search." Or, break "proofread" down to "check Bluebooking," and if *that* still seems unmanageable, break it down still more to "make sure all case names are underlined." Once your tasks are as simple as possible, you're much more likely to sit down and complete them right away.

2. Make a Detailed To-Do List with Specific Deadlines

Is your only goal to complete the paper by the day it is due? Having a single, large goal with one deadline is a common mistake that facilitates procrastination. Break your assignment up into small tasks (see Tip # 1), then structure your to-do list around those specific tasks. For example, if you have completed your research and want to begin writing your first draft, set a goal of writing two pages a day, so that you can have a first draft in two weeks. Don't forget to include specific personal goals in your planning. If you schedule time to exercise, do laundry, and go grocery shopping along with your project goals, you will increase your overall sense of control and your feeling of accomplishment. Remember to be realistic in your goal-setting – there's no point in making overly optimistic to-do lists, because you'll only feel discouraged if you don't meet all your goals (nobody can write a first-draft, run five miles, walk the dog, and bake a layer cake in a single day). Finally, many people find that it helps to write a to-do list down and cross items off as they are completed – there is something intrinsically satisfying about marking off achievements, and this visual reminder of your progress is likely to inspire you to stay on task.

3. Make a Time Schedule ...

You're a soon-to-be lawyer, so you've probably got a daily planner (if you don't have one, you need to get one, or the electronic equivalent). What do you write in your planner? Do you write, "Work on first draft" each day for a full month? Instead of setting aside this type of general time to write your paper, set aside a specific time period (i.e., "Monday 7-9: Write two pages for first draft") and make yourself adhere to the schedule. Some writers find it easier to plan if they work backward. That is, set a deadline for the project and then work backward to set interim deadlines for defined tasks that need to be accomplished in order to meet the deadline. No matter which mode of scheduling you use, make sure you also schedule in some time to NOT work.

The most important thing to remember when making a schedule is that writing is an intensely personal process, and everyone approaches it differently. Do you know that it takes you a long time to research but only a short time to proofread? Tailor your schedule accordingly. Do you know that you'll be exhausted after finishing your first draft? Give yourself a day off instead of scheduling yourself to immediately start revising. It is often helpful to overestimate the amount of work you have so that you give yourself plenty of time to finish everything – i.e., if you think it will take you three to five hours to check for Bluebooking errors, err on the side of caution and schedule in six hours to Bluebook. Finishing something early is hugely satisfying; feeling as though you're scrambling to complete a task that you didn't give yourself enough time for can be frustrating and demoralizing.

4. ...and Stick to It

Do you ever sit down to write – filled with good intentions – only to find that an hour has somehow passed and you've yet to write a word? It's far too easy to spend two hours "writing" without getting anything done at all. To make sure you're actually *writing* when you're "writing," eliminate as many distractions as possible. Sign out of gchat, turn off the movie you're watching in the background, and resist the urge to compulsively check your email every two minutes. If you really need to, turn off your Internet altogether or work in a coffee shop that doesn't have Wi-Fi. If it still seems daunting to do nothing but write for a two-hour block, break that block down into smaller chunks of time. Set a kitchen timer or an alarm clock for a specific amount of time (say, fifteen minutes), and tell yourself you will do nothing but write until the alarm sounds. You will be amazed at how much you can achieve in fifteen minutes of solid, focused writing and, at the end of the fifteen minutes, you will often find that you are eager to continue writing. If you hit a wall at the end of the fifteen minutes, don't become anxious – working for fifteen minutes then taking a short break might not seem productive, but it is a much better use of your time than two hours of reading food blogs, checking Facebook, and taking an inordinately long time to type your name and the date at the top of your blank page.

5. Rules Are Meant to Be Broken

Once you actually start writing your paper, don't fall into the trap of feeling obliged to do everything in the "right" order – the sooner you accept that there is *no such thing* as a "right" order, the easier you will find it to begin and continue writing. You don't have to complete all your legal research and have it perfectly organized before you start writing a first draft. In fact, if you wait to start writing until you have a "perfect" research outline, you're guaranteed to be waiting for a long time. Research enough so that you understand the law and have some ideas for an argument and then jump right in. Note down areas of your paper where you want to find more cases or think your research is thin, and do that research later. Similarly, don't feel as though there is any single formula for writing a good paper. Sure, some people sit down, start with their introduction, and

the paper flows sequentially from there, but these people are the exception rather than rule. If you have no idea how to write your introduction, but you *do* know what you want to say on p. 8 of your argument, get started with p. 8 – you can come back to the introduction later.

There are no hard and fast rules when it comes to writing, so become comfortable tailoring your writing process to fit your personality. Some people like to write for long stretches at a time and find that they cannot make real gains on an assignment if they only sit down for an hour or two a day. If this is you, leave yourself a weekend to complete a project, so that you can work, uninterrupted, for two whole days. Other people find the thought of facing an entire weekend set aside for writing a draft daunting – if you are one of these people, break your "writing" hours up over four to five weekdays. Working regularly on writing will help you overcome anxiety about the writing process and make the task in front of you seem more manageable. You are more likely to follow a writing schedule that does not supplant all of your other normal activities. Working in short sessions will also help you practice the skill of getting into your writing quickly and effectively, which is helpful for taking exams as well as for writing papers.

6. First Things First

Our natural tendency is to work on tasks that are easy or particularly interesting to us, while putting off assignments that seem boring or difficult. Using little tasks to put off the big tasks that *really* need to get done is a particularly deceptive form of procrastination – even as we pat ourselves on the backs for checking items off our to-do list, all we're actually doing is putting off the most important, time-consuming work until the end. Yes, you do need to exercise, go grocery shopping, eat dinner, and check email. But make sure you are not using these activities as excuses for not writing a paper whose due date is creeping up on you. Cleaning your kitchen and doing laundry are important tasks, but you need to be able to prioritize more substantive work, especially if it has a deadline.

7. Set Yourself Up to Succeed

We'd all like to think we have the willpower to resist temptation, but ultimately … we don't (the fortunate few who do probably don't need tips on avoiding procrastination). Know yourself and, instead of putting yourself into situations where you have to actively resist temptation, try to avoid those temptations altogether (there's a reason that people who can never eat "just one cookie" don't keep Costco size boxes of cookies at home) by scheduling your writing and writing breaks around the path of least resistance. Don't plan to stay in the library on a Friday night and write five pages of a dense and complicated paper when you know a friend is having a birthday party. Odds are, you'll end up leaving the library for the party, and feeling guilty for not having achieved your writing goal for the day. Instead, be realistic and give yourself Friday night off – with the promise that

you'll devote two hours to the paper on Saturday morning instead. Similarly, when you take a writing break, make sure your planned "break activity" makes sense in the context of your schedule. If you've decided to take a fifteen-minute break, don't tell yourself that you'll watch "just" fifteen minutes of an hour-long episode (it's far too easy to end up watching the entire show); watch fifteen minutes' worth of movie trailers or YouTube videos or take a short walk instead.

8. Use Rewards as Incentives

Let's be honest – we'd all rather be sleeping / eating / fill-in-the-blank-with-your-activity-of-choice than working on a writing assignment. It's much easier to focus on your writing if you know you have one of these rewards to look forward to. So make sure to schedule activities you enjoy as "rewards" for achieving your goals. You're far more likely to achieve your small, specific goal of writing two pages a day if you know that completing the goal means you can see a movie that night. Knowing that you've accomplished your goal for the day also makes it easier for you to feel good about relaxing without the stress of feeling behind schedule.

9. Write Bad First Drafts (aka Stop Being a Perfectionist)

One of the most common reasons for procrastination is fear of failure – you don't want to sit down and start writing until your ideas are nuanced, your research has left no stone unturned, and you have the introductory paragraph of your piece flawlessly composed in your mind. It's a natural human tendency to want our assignments to be perfect from beginning to end, but this is almost never possible, and usually creates far too much stress, which in turn leads to procrastination … A crucial step to overcoming procrastination is accepting that it's ok to write a bad first draft (and second and third …). Nobody needs to see these "bad" drafts except you – they aren't what you are going to hand in to your professor (and your professor isn't going to know if the "first" draft you ultimately turn in to him is actually your fourth). Stop worrying that your thoughts don't make sense, your roadmaps aren't clear, or your sentences are labored and halting – these are all problems that can be fixed further down the road. Don't give up when your first attempt at putting thoughts on paper seems stilted or not what you hoped it would be. First drafts don't need to be perfect – in fact, they're not supposed to be. And even a terrible first draft is better than no first draft at all.

10. There's Nothing Wrong with a Little Time Off …

Here is the rule that is every procrastinator's dream come true – sometimes, there is value in time that you *don't* spend writing. Before I go any further, let me add a few caveats – this tip is not an excuse to take time off before you have even started researching or writing. Taking some time to "think" about your writing assignment two days before it is due, when you don't actually have a draft to think *about* will do you no

good. But, if you have followed all the other tips in this handout and you have a solid working draft, but have simply hit a mental block – it's ok to take a break.

There are points in the writing process when you simply become too "close" to what you have written – you are unable to see flaws, to spot basic errors, or to think about reformulating structure and arguments. When you reach one of these points, it can be incredibly helpful to take a step back from writing and allow your thoughts to simply simmer in your mind until ideas take on more clarity. This may sound luxurious – time off from writing! – but don't be fooled. Taking a "step back" doesn't mean you stop thinking about your assignment altogether; rather, you stop *actively* thinking about your assignment, so that latent thoughts have a chance to percolate. During these "time off" moments, it is often helpful to engage in some form of mindless, repetitive activity – exercising, cooking, or showering are some good examples – where your body is focused on a task, but your mind is free to wander. You are still thinking about your writing in these moments; you are just not thinking about your writing consciously. You will be amazed by the almost effortless way that counters to difficult arguments and strategies for structuring stubborn paragraphs will come to you when you are *simply doing something else.*

11. Call in the Cavalry (aka Don't Be Afraid to Turn to Other People for Help)

If it were easy to set and stick to deadlines all by ourselves, nobody would procrastinate. But we're human, and so it's *hard.* You can help yourself out by creating "outside accountability" checks to motivate you through the writing process. For example, ask your professor (or law fellow) if he or she would review a rough draft of your paper a week before the draft is actually due. If your professor doesn't review drafts, make an appointment at the Writing Center. Knowing that you have to show your work to another person can be a great motivator for getting things done, and getting them done well. If you don't want to make an appointment with someone who will read your writing, there are still several ways other people can help you stay on track. Make your goals public – tell your friends, your family, or your roommate that you are working on a paper and when that paper is due. Then, when the urge strikes to watch TV or put off the paper until tomorrow, you'll have people to gently (or not-so-gently) say, "Don't you have something due soon?" If you really have writer's block, consider sitting down and just *talking* to someone about your assignment – explaining your ideas to a third party is an incredibly helpful way to make those ideas clearer to yourself, and might just kickstart the urge to write.[1] Most importantly, communicate before you have a panic attack – don't be afraid to ask for help throughout the writing process; the horrible sinking feeling that hits when you have only twelve hours left in which to research and write twenty-four pages can be easily avoided by a frank discussion with a professor, Senior Writing Fellow, or counselor earlier in the semester. As a rule, we tend to avoid asking for help or sharing our difficulties with other people – telling your professor "I just don't know what to write about," may seem like a shameful admission of defeat, but it's not. Professors are

[1] This is a great opportunity to utilize the Writing Center – you can make an appointment to just come in and talk about paper topics and ideas; there's no need to have a complete draft.

here to help you and admitting that you're stuck with an assignment could lead to a productive brainstorming session.

12. Just Get Started!

Sometimes, when all else fails, you just need to get started. Fear of white space can be the most paralyzing force in a writer's life – a blank Word document and a blinking cursor induce panic in the best of us. Simply typing words on a page to eliminate that blank space is the best thing you can do to overcome this fear, and you will find that the more you type (without stopping to worry about what you're saying), the easier writing will become. There's never going to be a perfect time to write, and there will always be something else you'd rather be doing. The tips above can help you overcome mental blocks and are good strategies for making the task of completing a writing assignment less daunting, but at the end of the day – you need to make the choice to take action and start typing.

On the Papers

THE STYLE PROCLAIMS THE LAWYER: YOU ARE WHAT YOU WRITE

GEORGE GOPEN

The author is Professor Emeritus of the Practice of Rhetoric at Duke University.

So often in professional life—life in any profession—we exist in the minds of others only through our writing. They know us only through their acquaintance with our letter of application or publication or trial brief. The 18th-century French naturalist Georges-Louis Leclerc, Comte de Buffon (in an age before gender-free pronouns) put it memorably:

> Writing well consists of thinking, feeling, and expressing well, – of clarity of mind, soul, and taste. . . . The style is the man himself. ["*Le style est l'homme même.*"]

Man or woman, it matters not: One's writing style proclaims to a reader who and what the writer is, personally, morally, and intellectually. It is of the utmost importance as a lawyer for your prose to proclaim accurately not only what is going on in the case but also who and what you are. Because it will convey all these whether you wish it to or not, it makes great sense for you to be in charge of that self-portrayal.

In eight previous articles in this series, I have explained some of the details of what I call the Reader Expectation Approach to the language. To know whose story a sentence is, readers look to the grammatical subject; to know what actions are happening, readers look to the verbs; and to know what words are to be read with the most emphasis, readers look to the sentence's stress position or positions—the moments of full grammatical closure that are indicated by the presence of a colon, semicolon, or period. Here I will use this last expectation—that of the stress position containing the most stress-worthy information—to explore an example of what great negative consequences were produced by a political speechwriter's stylistic habit falsifying the character of a major political candidate.

Here is a paragraph from a 1984 campaign speech by Walter Mondale, who was the Democratic candidate up against Ronald Reagan seeking a second term.

> A. I have refrained directly from criticizing the President for three years. Because I believe that Americans must stand united in the face of the Soviet Union, our foremost adversary and before the world, I have been reticent. A fair time to pursue his goals and test his policies is also the President's right, I believe. The water's edge is the limit to politics, in this sense. But this cannot mean that, if the President is wrong and the world situation has become critical, all criticism should be muted indefinitely.

Would this passage, in 1984, have made you want to jump out of your chair and find the nearest polling booth? Mondale was a long-term senator, respected by most of his colleagues on both sides of the aisle, moderate in his tone, and pleasant in his demeanor. And yet he lost that election by the largest electoral margin in U.S. history, carrying only his home state and the District of Columbia. Exit polls suggested that even a majority of Democrats felt Mondale was not strong enough to face up to the continuing threat posed by the powerful Soviet Union.

Why should this have been the case? All those voters did not know the man from long conversations with him or from a careful review of his voting history. They knew him mostly from the few sound bites they heard from him on television. I suggest that it was sound bites such as this speech—not even written by him—that proclaimed his supposed weakness.

None of the individual sentences can be considered ungrammatical or intellectually vacuous; but the weakness of every single stress position suggested a political impotence that accorded with his overwhelming defeat.

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The stress position occupant of the first sentence emphasizes that our candidate has done the action of refraining "for three years." Since that is exactly how long Reagan had been president, "three years" translates into "forever." He might as well have said, "I have refrained directly from criticizing the president forever. Vote for me."

It is a strange claim to make. He continued:

> Because I believe that Americans must stand united in the face of the Soviet Union, our foremost adversary and before the world, I have been reticent.

The long "because" clause increases our expectation of a powerful resolution in the main clause to follow. When that main clause arrives, not only is it disappointingly anticlimactic, but it also features a stress position that once again highlights the candidate's reticence. Putting the two sentences together, valuing the stress position occupants as the most important information, we get a strange message: "I have said and done nothing, forever." Why should we vote for a man with this record? More tellingly, why should we vote for such a man? (The style proclaims the man.)

In the third sentence, he makes a point that at first sounds forceful: "A fair time to pursue his goals and test his policies is also the President's right"; but then in the stress position, he backs away with the limp qualification "I believe." Did he want his claim to be taken as mere "belief"?

If that were a sole instance of such a rhetorical retreat, it would not define his character; but he does the exact same thing in the next sentence. "The water's edge is the limit to politics," he declares with some force; but he then undercuts it by ending the sentence with "in this sense." Nothing ends decisively.

The final sentence of the paragraph, given this context, descends almost to the comical:

> But this cannot mean that, if the President is wrong and the world situation has become critical, all criticism should be muted indefinitely.

The negative verb ("cannot mean") is so far separated from its resolving clause ("all criticism should . . .") that its negative quality is undermined. As a result, we get a stress position strangely filled with "all criticism should be muted indefinitely." It almost produces this comical argument: Because all criticism should be muted indefinitely, you should vote for me, because I have made a good start on that, having said and done absolutely nothing, forever. Of course, that was not his intended argument; nor is it a logical interpretation of his words. But because it is a compilation of everything he has put into his stress positions, it subliminally becomes part of his message.

The weak stress position poisons every single sentence. Potentially important arguments for his side appear, but never in the stress position, where they would have been most noted and most valued. The speechwriter's prose presents the image of a man who cannot see things to their conclusions, who cannot stand up for his own insights, who is, in short, lacking in power and force—and will not be able to stand up to the Soviet Union.

Am I suggesting that if his speechwriter had only filled all the stress positions with the important material of the sentence, his "style"—that is to say, his character—would be so transformed that he would appear a man of strength and force and insight? Yes. Here is a revision of this passage in which something of import has been moved into every stress position.

> B. For three years, I have refrained from directly criticizing the President of the United States. I have been reticent because I believe that Americans must stand united before the world, particularly in the face of our foremost adversary, the Soviet Union. I also believe a President should be given fair time to pursue his goals and test his policies. In this sense, politics should stop at the water's edge. But this cannot mean that all criticism should be muted indefinitely, no matter how wrong a President may be or how critical the world situation may become.

The style of this revised paragraph presents us with a man who is a tower of strength, a man of clear vision, a man who can lead us all forward. A forward lean is created primarily by each sentence's leaning forward, as the structural expectations would have us do, toward the stress position.

We are all creatures of rhetorical habit.

I am not saying he would have won; but he would not have lost by such a huge margin. In looking at several others of his speeches from that campaign, I have not found a single sentence with a strongly filled stress position. The weak stress position was a major component of his style—rather, of the style he was given.

Through this faulty stylistic habit (the weakly filled stress position), the speechwriter essentially created a literary character, lacking in strength, and falsified the character of the actual candidate. We are all creatures of rhetorical habit; and the sum of all our rhetorical habits becomes the identity of the character we show to the reading world.

How are your stress positions? ■

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CONCISE IS NICE!
AN AID FOR WRITING CONCISELY[1]

A legal document that concisely conveys the same message in 10 pages is more useful than one that rambles on for 20 pages. But writing concisely does not mean hacking your document down to size. As you pursue concision, do not sacrifice important ideas or clarity of expression. You should strive to express important ideas in sufficient detail to ensure reader comprehension. Only then, trim the fat from your writing.

The following principles are designed to help you, the legal writer, produce a concise written product.[2] Keep in mind that while this document provides many tips, it is not comprehensive.

To write concisely, you must control your writing style. Choosing a direct and lucid style generally prevents wordiness. However, writing a briefer document demands more than just a concise writing style. You can also control the pure magnitude of a document's content though the scope and depth of analysis. This document does not cover scope and depth in detail, but you should be aware that early choices as to the scope of your analysis, i.e., also choosing relevant and less relevant topics, as well as the depth of your analysis, i.e., choosing to devote significant space to case facts and reasoning, dramatically affects the length of your written product.

I. Concision through Style

a) Use Concrete Language

Using concrete language instead of abstract language promotes concise writing. Abstract language refers to general and vague concepts, such as "truth," "fairness," and "kindness." Abstract language often utilizes jargon and gets to the point only after passing several roundabouts. Concrete language is plain. But plain English need not be

[1] 2010 update by Jonathan Eser

[2] The principles, with slight modification, derive from JOSEPH WILLIAMS, STYLE: TEN LESSONS IN CLARITY AND GRACE (7th ed. 2003), CHARLES R. CALLEROS, LEGAL METHOD AND WRITING (2d ed. 1994) FRANK E. COOPER, WRITING IN LAW PRACTICE (2d ed. 1963), GERTRUDE BLOCK, EFFECTIVE LEGAL WRITING (4th ed. 1992), and RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS (4th ed. 1998).

Dick-and-Jane language. Concrete language uses clear, direct statements that convey your meaning accurately.

Abstract: To excel in law school, you should consider working hard in the various assignments you receive and preparing your mind for the rigors of the law.

Concrete: To excel in law school, you must go to every class, do your reading, and take notes.

b) Focus on the Actor, the Action, and the Object with Active Verbs

When you use active instead of passive verbs, your writing becomes briefer and clearer. Using passive verbs promotes using wasted words. One way to remedy passive verbs use is to ask: "Who is doing what to whom in this sentence?" Then rewrite the sentence to focus on three key elements, the actor, the action, and the object of the action.

Not only do passive verbs add length, but they also divert attention from the most important position in the sentence—the beginning—where the reader wants to find the actor and the action.

Passive:	**Active:**
• The brief was read by us.	We read the brief.
• The evidence was suppressed by the court.	The court suppressed the evidence.
• The holding was reached by the court	The court held.
• The argument was presented by the plaintiff.	The plaintiff argued.
• A complaint was filed by the union.	The union filed a complaint.
• Our conclusion is supported by the legislative history.	The legislative history supports our conclusion.
• It is possible for the court to modify the judgment.	The court can modify the judgment.

c) Use Verbs, Avoid Unnecessary Nominalizations

The law describes the real world, a world where people live, breath, lie, cheat, steal, sue, and die. But lawyers tend not to use verbs to describe these actions. Lawyers use nominalizations.

A nominalization is just a verb that has been turned into a noun, for instance *act* becomes *take action*, *assume* becomes *make assumptions*, and *conclude* becomes *draw conclusions*. But as a writer uses more nominalizations surplus words start to gather. Cut out excess nominalizations, and you cut out surplus words.

Nominalizations can often be spotted by their endings:

- -al
- -ment
- -ant
- -ence
- -ion
- -ent
- -ancy
- -ency
- -ance
- -ity

Nominalization:	**Verb:**
• The *implementation* of the plan by the team was successful.	The team *implemented* the plan successfully.
• He made a *discovery* of the photoelectric effect.	He *discovered* the photoelectric effect.
• The agency conducted an *investigation.*	The agency *investigated.*

d) Avoid Compound Constructions

Compound constructions use three or four words to do the work of one or two words. They suck the vigor from your writing. Lawyers tend to use compound constructions rather than plain English. In our attempt to write precisely, we become verbose.

Compound:	**Simple:**
• at the point in time	then
• by means of	by
• by reason of	because of
• by virtue of	by, under
• for the purpose of	to
• for the reason that	because

• in accordance with	by, under
• inasmuch as	since
• in connection with	with, about, concerning
• in favor of	for
• in order to	to
• in relation to	about, concerning
• in the event that	if
• in the nature of	like
• prior to	before
• subsequent to	after
• with a view to	to
• with reference to	about, concerning

e) Avoid Word-Wasting Idioms

These idioms contain superfluous language. While your audience may understand their meaning, superfluous language takes up space, adds little value, and detracts from more important language.

Verbose:	**Concise:**
• the fact that she died	her death
• he was aware of the fact that	he knew
• despite the fact that	although, even though
• because of the fact that	because
• in some instances the parties can	sometimes the parties can
• in many cases you will find	often you will find
• that was a situation in which the court	there the court
• in the majority of times the grantor will	usually the grantor will
• during the time that	during, while
• for the period of	for
• insofar as... is concerned	(omit it and start with the subject)
• there is no doubt but that	doubtless, no doubt
• the question	whether, the question whether
• this is a topic that	this topic
• until such time as	until

f) Avoid Redundant Legalisms

Avoid using coupled synonyms, a pair or string of words with the same or nearly the same meaning. Not only does the use of a redundant synonym take up additional space in the sentence, but it also may confuse the reader. How is *null and void* different from simply *null*? As a legal audience we search for meaning in each word and phrase, but our search may be in vain if the author carelessly uses meaningless redundancy.

While some of these examples come to us as traditional legal phrases, they are nonetheless redundant. Do not be a slave to turgid and redundant phrases. Distinguish yourself as a lawyer among the scriveners. Beware, however, that redundancies can sometimes be terms of art (such as in a statute or contract) and cannot be deleted.

Examples of Common Redundant Synonyms in Legal Writing:

- alter or change
- last will and testament
- confessed and acknowledged
- made and entered into
- convey, transfer, and set over
- order and direct
- for and during the period
- peace and quiet
- force and effect
- rest, residue, and remainder
- free and clear
- save and except
- full and complete
- suffer or permit
- give, devise, and bequeath
- true and correct
- good and sufficient
- undertake and agree

g) Catchall - Don't Pontificate

- Use a simple word when you feel compelled to use a fancy word:
  - "behavioral dynamics" → "behavior"
  - "predicated and initiated" → "decided"
  - "relative to" → "of"

- Avoid excessive case quotations:
  - Excessive quotation not only interrupts the flow of discourse, but also adds extra words. Paraphrasing of case quotations is often a good start to paring down a wordy document.

- Delete words that mean little or nothing
  - as to
  - clearly
  - in the process of
  - it is clear that
  - personal opinion
  - honest opinion
  - actually
  - to be sure

- Change negatives to affirmatives
  - Do not write in the negative→Write in the affirmative
  - not different→similar
  - not allow→prevent
  - not many→few
  - not include→omit

- Use short sentences
  - Concise legal writing explains complex ideas simply. Long sentences make writing hard to understand. We have all read long passages consisting of only a single sentence. These sentences are no more profound because they mash many ideas together. No, these long sentences, if anything, are less meaningful because they make reading a chore.

II. Principles in Action

1. Before Brief for Petitioner at 15, Rose v. Lundy, 455 U.S. 509 (1982) (No. 80-846).

Though the wording of the statute requires exhaustion of the "the question presented" **it is clear that** Congress was not addressing the issue of exhaustion of claims as opposed to exhaustion of the entire case. In 1948 neither Congress nor this Court was likely to **have been aware of the unique situation posed when** a habeas petitioner would later combine exhausted and unexhausted claims in a single petition. At that time very few claims were cognizable on federal habeas review. See Stone v. Powell, 428 U.S. 465, 475-76 (1976). Until **the decision in Fay v. Noia**, federal courts would refuse to consider unexhausted claims where a state prisoner deliberately bypassed state procedures **in order to** seek federal habeas relief. Brown v. Allen, 344 U.S. 443, 485 (1953). Therefore, the statutory requirement that the "question" be presented to the state court was not intended to encourage piecemeal federal habeas review of mixed petitions and thereby relax the exhaustion requirement. To the contrary, Congress envisioned **complete and total** exhaustion of **each and every** claim.

1. After

Though the wording of the statute requires exhaustion of the **"the question presented," Congress was not addressing** the issue of exhaustion of claims as opposed to exhaustion of the entire case. In 1948 **neither Congress nor this Court was likely to anticipate that a habeas petitioner** would combine exhausted and unexhausted claims in a single petition. At that time very few claims were cognizable on federal habeas review. See Stone v. Powell, 428 U.S. 465, 475-76 (1976). **Until *Fay v. Noia***, federal courts would refuse to consider unexhausted claims where a state prisoner deliberately bypassed state procedures **to** seek federal habeas relief. Brown v. Allen, 344 U.S. 443, 485 (1953). Therefore, the statutory requirement that the "question" be presented to the state court was not intended to encourage piecemeal federal habeas review of mixed petitions and thereby relax the exhaustion requirement. To the contrary, Congress envisioned **complete exhaustion of each claim.**

2. Before

The process of learning to write like a lawyer is sometimes cumbersome. **Basically,** the skills required are much different **from those most law students in their first year of law school have. It sometimes seems like the student has to completely change his way of thinking about writing, and re-train his brain to cut out creativity for the sake of writing like a lawyer.** It **seems like** grades depend more on factors **that have nothing to do with the way that you write. It basically seems like** the absence of opinion in legal writing, without authority, is difficult to grasp, and creates problems for the student.

While legal writing seems daunting at first, it becomes easier **later.** With practice and **acclamation to the type of writing that lawyers do, you will start to understand more why lawyers write the way they do. Despite the fact that** you might feel confused now, **hopefully by next year sometime,** you will feel more confident. **Just think, everyone feels the same way you do, at first.**

2. After

First year law students often find legal writing cumbersome. The skills required of a legal writer are much different than those employed by other professionals. Often, students' initial impression is that they must forsake creativity for legalese. Similarly, grades depend more on factors unrelated to prose. Lastly, the absence of opinion in legal writing is often difficult for the legal writer to grasp.

While legal writing seems daunting at first, it becomes easier. With practice and experience comes confidence and understanding. Even though confusion dominates the first-year writing experience, practice leads to clarity. While all first year law students feel overwhelmed, eventually we all become comfortable with legal writing.

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Judges Speak Out Behind Closed Doors: How Your Briefs Might Bug Them, and How You Can Make Them Smile Instead

BY ROSS GUBERMAN (HTTPS://WWW.LEGALWRITINGPRO.COM/BLOG/AUTHOR/ROSSGUBERMAN/) · JUNE 26, 2017

To help lawyers write better briefs, I recently surveyed thousands of judges, ranging from state trial-court judges to U.S. Supreme Court justices. Their anonymous responses showed surprising candor and consistency.

My questions touched on everything from formatting conventions to word choice, use of case law, treatment of facts, and strategies for persuasion.

Some of the results are shown below. All have been incorporated into Brief Catch (https://www.briefcatch.com/), my new editing tool for lawyers. (Brief Catch (http://www.briefcatch.com) users will have access to the complete survey results.)

With Brief Catch (http://www.briefcatch.com), users get instant wording and organizational suggestions on their drafts, as well as up-to-the-minute scores on five proprietary writing measures.

Judges have their quirks, of course, and you should always follow court rules and individual judges' preferences. But you're sure to make many judges happier if you follow most of the advice below.

A. Looks Matter: Style Dreams

Ever wonder what the Average American Judge prefers to look at all day? See below.

1. Use the Oxford comma.

56% prefer the Oxford comma
21% prefer no Oxford comma
23% don't care

2. Put citations in the text, not in footnotes, unless the court suggests otherwise.

78% prefer citations in the text
12% prefer citations in footnotes
10% don't care

Sample comments: "Don't want to have to look down to see citations." "Sometimes they're not on the same screen when you're reading electronically." "Citations in footnotes makes you lose your place in the brief." (Note that as a compromise, you could include the caption and the court in the text while relegating the reference matter to the footnotes.)

3. Include two spaces after periods (sorry, one-space fans, but many judges are "traditional").

62% prefer two spaces after a period
21% prefer one space after a period
17% don't care

4. Do what you want with your right margin, though note that typography expert Matt Butterick recommends ragged, which is easier to read.

35% prefer the text to be fully justified
31% prefer a ragged right margin
34% don't care

5. Use italics, not bold, for emphasis, but use emphasis sparingly.

76% say that bold or italics for emphasis is okay (though many stressed that emphasis be used only "occasionally," and many prefer italics to bold)
11% don't want any use of emphasis
13% don't care

Sample comments: "Use emphasis rarely, and use italics, not bold, and never all caps." "Repeated use of emphasis is unprofessional."

6. Write numbers out only once!

73% prefer numbers to be written out just once ("three")
<1% prefer numbers to be expressed with both the word and the numeral ("three (3)")
26% don't care

7. Define terms concisely and rarely, and use words rather than acronyms.

77% prefer the defined term in parentheses ("ABC")
11% say that including "hereinafter defined as" is okay
12% don't care

Sample comments: "If you need to use a defined term, use a word rather than an acronym." "I dislike acronyms unless they're very well known, like IRS." "Avoid defining obvious terms." "Define terms only when there is a possibility of confusion."

8. Use contractions cautiously, if at all, but know that the ground may be shifting.

37% prefer no contractions (judges who dislike contractions REALLY dislike them)
42% say that contractions are okay
21% don't care

B. Simmer Down: Tone Talk

Many judges also called these common attack terms annoying:

1. disingenuous
2. clearly wrong
3. baseless
4. specious
5. without merit
6. frivolous
7. unfortunately for [the other side]
8. sanctionable

Sample comments: "Don't make personal attacks or belittle other side." "Don't attack the integrity of opposing counsel." "Don't make moral judgments about parties." "Don't use language that is angry or suggests personal dislike of opposing counsel or party."

C. Less Is More: Words Judges Like to Hate

The 34 other words, phrases, and practices that judges most often say they dislike:

1. accordingly
2. aforesaid
3. appellant / appellee (vs. parties' names)
4. arguendo
5. as follows ("just use the colon: the 'as follows' is implied")
6. as such
7. clearly
8. Comes now...
9. concerning the matter of
10. each and every
11. for the sake of argument
12. foregoing
13. hereby
14. hereinafter
15. heretofore
16. impact (as a verb)
17. in view of the fact that
18. inter alia
19. it should be noted
20. Latin in general
21. notwithstanding
22. owing to the fact that
23. prior to
24. pursuant to
25. respectfully submits
26. said (as an adjective)
27. s/he / (s)he
28. subsequent to
29. that being the case
30. the Court must ...
31. the fact that
32. the instant case
33. utilize
34. wherefore

The nation's judges shared many more preferences that could help your practice. Here are just a few examples. On fact sections: cut dates that don't matter! On using case law: two is often a crowd, and both trial judges and appellate judges bemoan excessive quoting. And on structure: the introduction should list reasons you should get the relief you seek. Judges even disagreed about a few matters (case parentheticals, for example, though most are in favor).

In the end, so many litigators and appellate lawyers do so many things that bug judges—and fail to do so much that could make them happy—that even a small effort to accommodate these preferences can go a long way.

And on that happy note, if you'd like to learn more about my new editing plug-in Brief Catch, click here (https://www.briefcatch.com/).

Eschewing Comfort Words in Legal Writing

By Matthew Salzwedel on September 26th, 2012

Sam Glover recently extolled Bill Clinton's oratory at the Democratic National Convention. But given the focus of this weekly column, I was more interested in the convention speakers' grammar and usage bungles.

True, it's neither new nor notable for a politician to mangle the English language. For example, who can forget George W. Bush's malapropisms, or President Obama's teleprompter-induced mispronunciation of Navy corpsman?

But Vice President Biden's convention speech illustrated the problems comfort words pose to persuasive legal writing—*literally*.

Joe, I Literally Understand You

In his convention speech, Vice President Biden used *literally* 10 times to intensify metaphorical claims like: "We now find ourselves at the hinge [sic] of history, and the direction we turn is not figuratively, it's literally in your hands."

The Vice President's repeated misuse of *literally* set Twitter ablaze with snarky anti-*literally* comments. And the post-speech commentary was also devastating, though some commentators feigned a minimal defense of the Vice President.

The Vice President's speechwriters weren't to blame—the word *literally* literally didn't appear in his prepared remarks. In any event, *literally* is the Vice President's favorite intensifier, and is no recent verbal tic:

What's wrong with the word *literally*? Nothing—when it's used correctly. The problem with *literally* is when a speaker or writer substitutes it for figuratively, or uses it to overemphasize a contention.

As Patricia T. O'Conner—a former editor of the *New York Times Book Review*—writes in Woe is I: The Grammarphobe's Guide to Better English in Plain English, literate writers don't substitute *literally* for *figuratively*, or use it for overemphasis:

> If you want to be absolutely correct, use *literally* to mean "to the letter" or "word for word." . . . People often use it loosely in place of *figuratively*, which means "metaphorically" or "imaginatively." No one says *figuratively*, of course, because it doesn't have enough oomph. . . . A lot of people do it, but beware that if you use *literally* in a less-than-literal way (*Grandma* ***literally*** *exploded*), you'll sound less than literate.

Other usage authorities concur with O'Conner's view, despite a modicum of dissent:

- Wilson Follett, Modern American Usage: "Writers are so often besought by rhetoricians not to say *literally* when what they mean is *figuratively* that one would expect them to desist in sheer weariness of listening to the injunction. The truth is writers do not listen; and *literally* continues to be seen as a mere intensive that means *practically*, *almost*, *all but*."
- Eric Partridge, Usage & Abusage: "**literally**, when used, as it often is, as a mere intensive, is a slovenly colloquialism, its only correct use being to characterize *exactness to the letter*."
- William Safire, On Language: "'Literal' means 'actual,' without exaggeration, no fooling with metaphors. But for more than a century, it has also been misused to mean just the opposite; now, 'literally' is reaching a critical mass, when it will become a Humpty Dumpty word, meaning whatever the speaker chooses it to mean."

Comfort Words Figuratively Kill Persuasive Legal Writing

In two post-convention posts called Actually, Literally, What Your Crutch Word Says About You and A Literal Epidemic of Crutch Words, Jen Doll of The Atlantic Wire corrected identified *literally* as a "crutch word":

> [T]hose expressions we pepper throughout our language . . . to give us time to think, to accentuate our meaning (even when we do so mistakenly), or just because these are the words that have somehow lodged in our brains and come out on our tongues the most, for whatever reason. Quite often, they do little to add meaning, though. Sometimes we even use them incorrectly. Almost always, we don't need them at all, which doesn't mean we won't persist in using them.

Some of Doll's crutch words that appear in legal writing are: *actually*, *apparently*, *as it were*, *basically*, *definitely*, *essentially*, *going forward*, *in the final analysis*, *obviously*, *really*, *seriously*, *ultimately*, and *very*.

In legal writing, I call these "comfort words." They're words lawyers trot out so they can feel like they're writing persuasively, but that instead detract from their writing. Consider two of my favorite lawyer comfort words: the sentence adverbs *clearly* and *obviously*.

As Bryan Garner points out in Garner's Modern American Usage (3rd ed.) and The Redbook, A Manual on Legal Style, sentence adverbs like *clearly* and *obviously* are "weasel words" that degrade persuasive legal writing:

> Exaggerators like [*clearly*], along with its cousins (*obviously*, *undeniably*, *undoubtedly*, and the like). Often a statement prefaced with one of these words is conclusory, and sometimes even exceedingly dubious. As a result—though some readers don't consciously realize it—*clearly* and its ilk are weasel words. . . . .
>
> [Weasel words] may reassure the writer but not the reader. If something is clearly or obviously true, then demonstrate that fact to the reader without resorting to conclusory use of these words.

As Garner notes, lawyers routinely use *clearly* to emphasize their factual and legal contentions. But when a lawyer feels the need to use *clearly* to emphasize a contention, the contention is usually *not* clear, and the added intensifier only alerts the reader to be wary about it.

The same is true for *obviously*. A lawyer might use *obviously* to emphasize a desired factual or legal conclusion, and to persuade the reader to agree with it. But if a lawyer claims that a conclusion is obvious, most readers will ask themselves, "If what he says is obvious, why are the parties disputing it?"

Strengthen Your Legal Writing by Cutting Comfort Words

I hesitated to make light of the Vice President's illiterate use of *literally*. But as President Obama likes to say, the Vice President's misuse of *literally* is teachable moment for lawyers who want to improve their legal writing.

Though it might feel good to use comfort words, try to eschew them. Comfort words like *literally*, *clearly*, and *obviously* alert your reader that what you're contending isn't literal, clear, or obvious, and they have the perverse effect of sowing doubt in your reader's mind about the merit of your arguments.

WRITING RESPECTFULLY: WHY IS IT SO HARD FOR LAWYERS TO REFRAIN FROM PERSONAL ATTACKS IN THEIR WRITING AND WHAT CAN BE DONE TO HELP FIGHT THE URGE TO HIT LOW?

BY ELANA S. EINHORN

"YOU WANT YOUR READER TO BUY TWO THINGS: your ideas and you, their source. That is, you want them to view your ideas as sound and interesting, and to view you as smart, informed, direct, and companionable .... If you don't persuade them to accept you, it's doubtful that you'll persuade them to buy the ideas you are proffering. We buy from people we like and trust—it's human nature."

John R. Trimble, *Writing with Style* 6 (2d ed. 2000), *quoted in* Bryan A. Garner, *The Winning Brief* 459 (2d ed. 2004).

When judges are asked to name the most common briefing mistakes or what annoys them the most in the briefs they read, lack of civility in writing, particularly in the form of *ad hominem* attacks, usually lands toward the top of the list. So why do we persist with such attacks? Why should we take the high road when we are charged with zealously representing our clients? How can we resist the urge to hit low?

One answer to why we should take the high road is that the written standards of our profession require nothing less. Both the Texas Lawyer's Creed, A Mandate for Professionalism and the Standards for Appellate Conduct encourage and demand that Texas lawyers behave with courtesy and civility, including avoiding disparaging personal remarks directed at opposing counsel, opposing parties, and judges. Both recognize that personal attacks have no place in our legal system and defy any concept of professionalism. The other answer is that personal attacks are not just inappropriate; they are ineffective. We try our judicial readers' patience and detract from our own arguments and our credibility when we engage in *ad hominem* attacks. They're just not worth it. Taking the high road results in better writing and stronger advocacy.

What are *ad hominem* attacks

In its clearest and worst forms, uncivil writing takes the form of direct *ad hominem* attacks on opposing counsel's character or motives. This form of a logical fallacy attempts to discredit an opposing argument not by proving that it is unsound, but by positing that because opposing counsel has a certain character flaw or a bad motive, her argument should be rejected.

Such attacks appear in subtler forms than simple name calling. Using adverbs or adjectives to dismiss an argument rather than engage with it can result in the written equivalent of eye-rolling, or an angry or defiant tone. Attempting to focus the attack on the argument itself is no better. Labeling an argument "hopeless," "myopic," "absurd," "disingenuous," "ridiculous," "pretextual," or accusing counsel of "engaging in sleight of hand," "attempting to pull the wool over the court's eyes," or even a clause such as "counsel would have the court believe" are still attacks on the character or motives of the person making the argument.

Why *ad hominem* attacks are bad advocacy

Our primary goal as advocates is to persuade courts to rule in our client's favor. *Ad hominem* attacks defeat that goal by ignoring the cardinal rule of legal writing: remember your audience. To persuade judges, we must capture and keep their attention. Anything that distracts the judicial reader—wasting the reader's time for even a moment—is noted and remembered.

As Professor Trimble explains in the epigraph, building trust and maintaining credibility are essential to the ability to persuade. We are not just selling our arguments and ideas, but ourselves, our reputations for careful and accurate presentation of the facts and law. In my experience as a staff attorney, I observed firsthand that judges want to feel good about briefs they read and the decisions they make based on those briefs. Reading *ad hominem* attacks feels bad. Attacks on others engage our own fight-or-flight systems. Georgetown University business professor, Christine Porath, studies incivility in the workplace. She points out that people don't like to see others being treated badly or even rudely. Incivility

draws attention, but not the kind of attention we want when writing to persuade.

When we attack opposing counsel, even with an adjective or by dismissing an opponent's argument, at best such attacks are a distraction; at worst they destroy credibility. When reading words of attack, the reader's attention is drawn away from the argument and to the attack, and anything that causes a reader to stumble, let alone lose the momentum of your argument, is a disservice to clients. The reader may think you've resorted to a personal attack because you don't have a good argument on the merits, or those arguments are weak, or you haven't taken the time or done the work to build a good argument, or you are hiding something. Those impressions may flash through the reader's mind in an instant, and the reader may return to the front of the brief and make note of the writer's name.

On a simpler level, *ad hominem* attacks are a waste of words and the reader's time. They are not authority. They do not advance an argument; they dilute the force of an argument. Even the kind of attack that reads more like an overstatement should be avoided. Good trial lawyers tell me the same about jury arguments – if you overstate your facts, you lose credibility with the jury. Likewise, when we rely on overstatement to make a point in our briefs, "the reader will be instantly on guard, and everything that has preceded your overstatement as well as everything that follows it will be suspect in his mind because he has lost confidence in your judgment or your poise." William Strunk Jr. and E.B. White, *The Elements of Style* 72-73 (3d ed. 1979).

Why these attacks persist

The adversarial nature of the litigation system certainly plays a role. Litigation that lasts for years can produce ongoing hostility or a persistent tone of confrontation that spills over into *ad hominem* attack. Sometimes the impetus for personal attack comes directly from the client. But while we have a duty to zealously represent our clients, we also have duties to opposing counsel and the legal system, and we can meet our duties to our clients while still adhering to the highest standards of professionalism.

Personal attacks, particularly in the form of using adjectives or adverbs to label arguments, can also creep into our writing when we're pressed for time or when we've grown weary of writing and rewriting the same arguments at different points in the litigation or for different courts. We may take a short cut by labeling an argument as ridiculous or meritless without explaining why. We may rely on intensifiers such as "very," "clearly," "obviously," which also waste words and may cause the reader to think the opposite must be true. Labeling your own argument "clearly correct" or claiming the trial court "obviously erred" doesn't make those statements any more true, and contrary to your goal, irritates the reader.

Sometimes we are angry and have difficulty separating our anger from our writing. One judge has been quoted as observing that briefs with uncivil language "'serve as some kind of weird outlet for lawyers with a lot of pent-up hostility.'" Judith D. Fisher, *Incivility in Lawyers' Writing: Judicial Handling of Rambo Run Amok*, 50 Washburn L.J. 365, 369 (2001). If you are angry, vent it and drop it by writing out your attacks and then deleting them. Or talk through your complaints with someone. Keep in mind that judges have no idea and no need to waste time considering what frustrations a trial lawyer experienced with opposing counsel outside of the public record. That history is unknown and irrelevant to the decision maker reading your brief. Justice is blind for a reason—it is based on facts and the law—not the behavior of attorneys outside the courtroom. So, take a deep breath, let it go, and trust that any anger that appears in your writing is going to distract from your purpose.

What can we do to avoid *ad hominem* attacks

The best advocacy advice is also the best writing advice: edit ruthlessly. Cultivate sensitivity to tone. Don't respond in kind when attacks are directed at your briefing. Look for and cut adjectives and adverbs that label opposing counsel or arguments. When engaging with opposing arguments, remember to show, don't tell. Show how the cases are distinguishable. Show how ruling in your client's favor is just: right on the facts, right on the law, and one hopes, right for society. Give the judicial reader a clear, distraction-free roadmap to that just result.

Have someone else read your brief and ask them about the tone and if they noted any implication of attack. When we've lived with a case, we need distance from it to see what we've written and to be sensitive to any subtext of attack. If you need more incentive to keep the language in your briefs civil, remember that a well-written brief may result in referrals.

Take the high road, always. You will feel better, and your readers will too. Which means at the end of the day, one hopes, your client will have good reason to thank you.

Elana S. Einhorn, a former Texas Supreme Court staff attorney and former member of The University of Texas School of Law writing faculty, practices appellate law at Enoch Kever PLLC. ★

MANDAMUS BRIEF

REASONS FOR DENYING THE PETITION

The Claim In The Petition Could Have Been But Was Not Timely Raised In Federal Court

The Mandamus Standard

This Court has described the standard for issuing a writ of mandamus in the following way:

> The common-law writ of mandamus against a lower court is codified at 28 U.S.C. § 1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 259-260, 67 S.Ct. 1558, 91 L.Ed. 2041 (1947). "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction." *Roche v.*

Evaporated Milk Assn., 319 U.S. 21, 26, 63 S.Ct. 938, 87 L.Ed. 1185 (1943). Although courts have not "confined themselves to an arbitrary and technical definition of 'jurisdiction,'" *Will v. United States*, 389 U.S. 90, 95, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967), "only exceptional circumstances amounting to a judicial 'usurpation of power,'" *ibid.*, or a "clear abuse of discretion," *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383, 74 S.Ct. 145, 98 L.Ed. 106 (1953), "will justify the invocation of this extraordinary remedy," *Will*, 389 U.S., at 95, 88 S.Ct. 269.

As the writ is one of "the most potent weapons in the judicial arsenal," *id.*, at 107, 88 S.Ct. 269, three conditions must be satisfied before it may issue. *Kerr v. United States Dist. Court for Northern Dist. of Cal.*, 426 U.S. 394, 403, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976). First, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires," *ibid.* — a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process, *Fahey, supra*, at 260, 67 S.Ct. 1558. Second, the petitioner must satisfy "'the burden of showing that [his] right to

> issuance of the writ is "clear and indisputable."'" *Kerr, supra*, at 403, 96 S.Ct. 2119 (*quoting Bankers Life & Casualty Co., supra*, at 384, 74 S.Ct. 145). Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. *Kerr, supra*, at 403, 96 S.Ct. 2119 (*citing Schlagenhauf v. Holder*, 379 U.S. 104, 112, n. 8, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964)). These hurdles, however demanding, are not insuperable. This Court has issued the writ to restrain a lower court when its actions would threaten the separation of powers by "embarrass[ing] the executive arm of the Government," *Ex parte Peru*, 318 U.S. 578, 588, 63 S.Ct. 793, 87 L.Ed. 1014 (1943), or result in the "intrusion by the federal judiciary on a delicate area of federal-state relations," *Will, supra*, at 95, 88 S.Ct. 269, (*citing Maryland v. Soper* (No. 1), 270 U.S. 9, 46 S.Ct. 185, 70 L.Ed. 449 (1926)).

Cheney v. U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367, 380-381 (2004) (emphasis added). The *Fahey* Court described the issue as follows:

> Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as a substitute for appeal. As extraordinary remedies, they are reserved for really extraordinary causes.

Ex parte Fahey, 332 U.S. 258, 259-260 (1947). This case is far from extraordinary, and has none of the characteristics that would support issuing a writ of mandamus directed to the Court of Appeals. The only conceivable legal theory Herring can use is that the denial of his motion for leave to file a successive habeas petition is a "clear abuse of discretion" -- that is a showing that he cannot make.[5]

---

[5] To find an "abuse of discretion," this Court would have to find that the Eleventh Circuit abused its discretion in refusing to hear a claim that (1) could have been but was not raised in Herring's initial habeas petition, and (2) had been denied on the merits by the State courts. Either fact standing alone is sufficient to justify refusing to allow a

Acronymonious

By Mark Cooney

I'm defending Northern Food Processing Corporation (NFP) against an Environmental Protection Agency (EPA) Clean Water Act (CWA) claim alleging that NFP's discharges into a publicly owned treatment works (POTW) had higher concentrations of Biochemical Oxygen Demand (BOD); Fats, Oil, and Grease (FOG); and Total Suspended Solids (TSS) than allowed by its National Pollutant Discharge Elimination System (NPDES) permit. If I can convince the EPA ALJ that under the CWA, NFP's BOD, FOG, and TSS levels meet its NPDES permit for POTWs, I'll be a BMOC. (LOL!)

This is a ridiculous example, of course, and our profession is hardly facing a scourge of teenager text-talk in legal documents. Yet we legal writers should think carefully before starting down the acronym path. A HUD here or a CPR there won't stop the earth from spinning on its axis. And some well-known acronyms, like NAACP, can be reader-friendly. But if you pile on the acronyms, you risk exasperating your reader.

I should clarify something before we go any further. Some of the so-called "acronyms" that I used above are actually initialisms, where each letter is pronounced (like CIA or SEC).[1] In a true acronym, the first letters of multiple words are combined and pronounced as a new word, like HUD or NASA.[2] For ease, I'll refer to both styles as acronyms in this article.

Acronyms—The Help Readers Don't Want

Any doubts about whether heavy acronym use puts off readers are easily dispelled. Courts have long bemoaned briefs containing an "abundance of pesky acronyms."[3] As one judge noted, acronyms are "difficult for ordinary readers to keep straight."[4] A litigator's overuse of acronyms is the legal-writing equivalent of telling an inside joke. Consider these comments, written by a federal judge presiding over a postal worker's discrimination suit:

> Plaintiff (and, to a lesser extent, Defendant) makes reference, without explanation, to certain acronyms and industry jargon that, although likely intelligible to members of the Postal Service community, are not exactly terms of common usage. Unfortunately, included among the Court's powers is not omniscience. The parties should bear this in mind in the future.[5]

Judges sometimes use a bit of sharp-edged humor to vent their vexation over acronym-laced briefs:

> Opinions addressing federal environmental statutes customarily employ acronyms. What once was a useful tool now has the force of tradition and acronyms are now used whether they aid or obscure communication....I occasionally daydream of writing an opinion employing only acronyms, patois, jargon and scientific terms. If done properly, such an opinion, like many of the briefs I receive, would not be subject to criticism for being in a foreign language, but nonetheless, would be utterly incomprehensible.[6]

One appellate court went so far as to strike a brief filled with unfamiliar acronyms, initialisms, and number strings. The court did "not appreciate this heavy reliance on shorthand notation, nor [did it] find such briefing proper under the rules of appellate procedure."[7] The court complained that it took "[t]remendous effort" to understand the brief because most sentences contained at least one acronym.[8]

Supreme Court Justice Antonin Scalia and legal-writing expert Bryan Garner strike the same tone in their book *Making Your Case: The Art of Persuading Judges*, which includes this briefing tip: "Avoid acronyms. Use the parties' names."[9] In the text that follows, they point out that acronyms are "mainly for the convenience of the writer" yet burden readers.[10]

In short, acronym-filled briefs can drive judges up a chambers wall. So it's not surprising that some courts are reluctant to do the same thing to their readers. For instance, the Missouri Court of Appeals began an opinion by announcing that it would describe the case "[s]hort as many abbreviations, acronyms and jargon as possible."[11]

Yet some courts, like lawyers, seem resigned to their presumed acronym fate. For example, a New York court deciding a water-pollution case lamented that "[a] wave of environmental acronyms and jargon, and the 'high tech' complexity of this matter, could easily becloud the fundamental issue."[12] But the court nevertheless used seven different acronyms in its opinion.

Another court was downright apologetic for its acronym use: "[T]he Court apologizes in advance for the proliferation of acronyms and jargon, which regrettably is unavoidable in this case."[13]

"Plain Language" is a regular feature of the *Michigan Bar Journal*, edited by Joseph Kimble for the Plain English Subcommittee of the Publications and Website Advisory Committee. Want to contribute a plain-English article? Contact Prof. Kimble at Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901, or at kimblej@cooley.edu. For an index of past columns, visit www.michbar.org/generalinfo/plainenglish/.

But acronyms are avoidable, even in complex cases.

What to Do?

You always want your brief to be the most readable in the pile, so heed the words of frustrated judges and think about strategies for minimizing acronym use.

To start, take your lead from judges who've taken pains to avoid acronyms in their opinions: use real words or shorthand phrases instead. (Or as a leading commentator channeling his inner John Lennon put it, "Give words a chance."[14]) Consider the federal judge who was hearing a dispute over phone rates, which involved the "total element long-run incremental cost method" of calculating rates. He avoided the common industry acronym TELRIC by instead referring to this method as the "total element" method.[15]

For party references, follow Scalia and Garner's advice and refer to parties by name (or a shortened version of their names) rather than using the "alphabet soup" approach.[16] For instance, they suggest "the Commission" rather than "the CPSC" when referring to the Consumer Product Safety Commission.[17] Notice how the Second Circuit used this approach to simplify its opinion in an environmental case:

> Cases under the Act apparently require use of a bewildering profusion of acronyms, which makes it difficult to remember what the unlikely combinations of capital letters actually mean. In an effort to minimize the use of acronyms in this opinion, we will call the Environmental Protection Agency the "Agency" rather than "EPA", The Connecticut Fund for the Environment, Inc. the "Fund" rather than "CFE", and the Connecticut Department of Environmental Protection the "Connecticut Department" rather than "DEP".[18]

These choices aren't that difficult, and they can make life much easier for your readers. You'll see some of them at work in the appendix that follows this article.

Closing Thoughts

Courts and commentators have debunked the notion that readers appreciate acronyms and that there's no way to avoid them. And now that you see how courts view acronym-filled briefs, isn't it worth considering other approaches? Often, this style choice comes down to a question of writer convenience versus reader convenience. And when your reader is a court deciding your case, a boss reading your memorandum, or a client paying your bill, the choice should be easy, IMHO. ■

Mark Cooney is a professor at Thomas M. Cooley Law School, where he teaches legal research and writing. Before joining the Cooley faculty, he spent 10 years in private practice as a civil litigator, most recently with Collins, Einhorn, Farrell & Ulanoff, P.C., in Southfield.

FOOTNOTES

1. Garner, ed., *The Redbook: A Manual on Legal Style* (Berkeley: West Group, 2006), 2d ed, p 45.
2. *Id.*
3. *Natural Resources Defense Council, Inc v BP Products North American, Inc*, unpublished opinion of the US District Court for the Northern District of Indiana, issued June 26, 2009 (Docket No. 2:08-CV-204); 2009 WL 1854527 at *2.
4. *TDS Metrocom, LLC v Bridge*, 387 F Supp 2d 935, 939 (WD Wis, 2005).
5. *Phongsavane v Potter*, unpublished opinion of the US District Court for the Western District of Texas, issued June 24, 2005 (Docket No. CIVASA05CA0219-XR); 2005 WL 1514091 at *1 n 1.
6. *Louisiana Pacific Corp v Beazer Materials & Services, Inc*, 842 F Supp 1243, 1246 n 1 (ED Cal, 1994).
7. *Cognata v RW Johnson Const Co, Inc*, unpublished memorandum opinion of the Court of Appeals of Texas, issued April 13, 2006 (Docket No. 13-05-234-CV); 2006 WL 949964 at *1.
8. *Id.*
9. Scalia & Garner, *Making Your Case: The Art of Persuading Judges* (St. Paul: Thomson/West, 2008), p 120.
10. *Id.*
11. *Missouri v Public Service Comm of Missouri*, 897 SW2d 54, 55 (Mo App, 1995).
12. *Industrial Liaison Comm of the Niagara Falls Area Chamber of Commerce v Williams*, 527 NE2d 274, 275 (NY App, 1988).
13. *Constellation Power Source, Inc v Select Energy, Inc*, 467 F Supp 2d 187, 190 (D Conn, 2006).
14. Joseph Kimble, *A Modest Wish List for Legal Writing*, in *Lifting the Fog of Legalese: Essays on Plain Language* 151, 155 (2006).
15. *TDS Metrocom*, 387 F Supp 2d at 939.
16. Scalia & Garner, n 9 *supra*.
17. *Id.*
18. *Connecticut Fund for the Environment, Inc v Environmental Protection Agency*, 696 F2d 169, 171 n 1 (CA 2, 1982).

Appendix

The example below compares a case excerpt to a possible revision. This paragraph appeared near the end of the court's opinion, and it shows how acronyms and initialisms accumulate and litter the text long after the author's explanatory parentheticals have come and gone. To keep the same feel as the original, the revised version likewise has no explanatory parentheticals.

Original **(an excerpt from the court's opinion in *Constellation Power Source, Inc v Select Energy, Inc*, 467 F Supp 2d 187, 201 (D Conn, 2006)):**

Following execution of the Select/CL & P Letter Agreement, CL & P filed an action with the DPUC to allow CL & P to recover from its customers the increased costs associated with the LMP Differential Amount. The DPUC authorized CL & P to recover the LMP Differential Amount from its customers for sixty days and directed CL & P to file a petition for a declaratory order with the FERC. CL & P filed this petition on May 27, 2003, requesting FERC to order Select and other suppliers to bear SMD-related congestion costs and losses charges incurred in transmitting to its retail purchasers the energy CL & P purchased from suppliers. The petition bore Docket No. EL03-129-000 (the "FERC Proceeding"). See Def.'s Ex. 609. Thereafter, the DPUC allowed CL & P to continue to collect the LMP Differential Amount from its customers while the FERC Proceeding was pending and ordered that the monies be held in escrow pending resolution of the FERC Proceeding.

Revised Version **(with the acronyms replaced and a few other judicious edits):**

After Select and Connecticut Light signed the letter agreement, Connecticut Light filed an action with the Department to recover from its customers the increased costs associated with the pricing-differential amount. The Department authorized Connecticut Light to recover that amount for 60 days and directed Connecticut Light to file a petition for a declaratory order with the Federal Energy Regulatory Commission. Connecticut Light did so on May 27, 2003, asking the Commission to order Select and other suppliers to bear market-design charges for congestion costs and losses that Connecticut Light incurred in sending to its retail purchasers the energy purchased from suppliers. The petition bore Docket No. EL03-129-000. See Def.'s Ex. 609. After that, the Department allowed Connecticut Light to continue collecting the pricing-differential amount from its customers—but ordered that the moneys be held in escrow while the case was pending.

2015 WL 4977004 (Cal.App. 2 Dist.) (Appellate Brief)
Court of Appeal, Second District, California,
Division 2.

Beatriz VERGARA, et al., Plaintiffs/Respondents,
v.
STATE OF CALIFORNIA, et al., Defendants/Appellants,
and
CALIFORNIA TEACHERS ASSOCIATION, et al., Intervenors/Appellants.

No. B258589.
June 24, 2015.

Appeal from the Superior Court of California, County of Los Angeles
The Hon. Rolf M. Treu, Judge Presiding
Case No. BC484642
Service on the Attorney General Required Per CRC 8.29(c)

Respondents' Brief

Theodore B. Olson (38137), Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, Tel: (202) 955-8500, Fax: (202) 467-0539.

*1 INTRODUCTION

This case is about education, "the lifeline of both the individual and society." (*Serrano v. Priest* (1971) 5 Cal.3d 584, 605 ["*Serrano I*"].) Education "lie[s] at the core of our free and representative form of government." (*Serrano v. Priest* (1976) 18 Cal.3d 728, 767-768 ["*Serrano II*"].) And it serves as "the bright hope for entry of the poor and oppressed into the mainstream of American society." (*Serrano I, supra*, 5 Cal.3d at pp. 608-609.) Indeed, education serves such a "distinctive and priceless function" that the Supreme Court has declared it to be a fundamental right guaranteed by the California Constitution. (*Ibid.*; see also Cal. Const. Art. I, § 7; *id.* Art. IV, § 16; *id.* Art. IX, §§ 1 & 5.) At a minimum, the right to education guarantees that "all California children should have equal access to a public education system that will teach them the skills they need to succeed as productive members of modern society." (*O'Connell v. Super. Ct.* (2006) 141 Cal.App.4th 1452, 1482; see also *Serrano I, supra*, 5 Cal.3d at pp. 605-607.)

In order to fulfill the constitutional promise of a meaningful education for all California children, "the State itself has broad responsibility to ensure basic educational equality." (*Butt v. California* (1992) 4 Cal.4th 668, 681.) The State must provide a public education system "open on equal terms to all," (*id.* at

p. 680), with "substantially equal opportunities for learning." (*Serrano II, supra*, 18 Cal.3d at pp. 747-748.) Where "substantial disparities in the quality and extent of availability of educational opportunities" persist, the State has a duty to intervene and ensure "equality of treatment to all the pupils in the state." (*Id.* at p. 747.) And when the State's laws infringe on the fundamental right to educational opportunity, as they do here, it is unquestionably the role of the courts to invalidate those unconstitutional laws. (See, e.g., *Serrano II, supra*, 18 Cal.3d at pp. 776-777; cf. *Brown v. Bd. of Educ.* (1954) 347 U.S. 483, 493.)

***2** In this case, the Superior Court struck down five laws - governing California's teacher tenure, dismissal, and layoff procedures - that routinely devastate the educational opportunities of a subset of students throughout California, particularly poor and minority students. As the Superior Court found, the unavoidable consequence of these statutes is that California school districts are stuck with a "significant number" of grossly ineffective teachers - teachers that everyone knows cannot, or will not, teach. (AA 7300.) These grossly ineffective teachers come in a variety of forms: English teachers who cannot spell (RT 3247:4-13 [Pulley]); burned out teachers who show movies and do crossword puzzles instead of teaching (RT 3673:5–3674:2 [Melvoin]); disorganized teachers who let their classrooms devolve "in[to] chaos" (AA 3665-3678); derisive teachers who scare and intimidate children (RT 2957:26–2958:13 [Moss]); or worse (RT 3512:17-19 [B. Vergara] [calling Latino students "cholos"]; RT 3513:15-18 [B. Vergara] [calling female student a "whore"].) But they have one thing in common: their students consistently fail to learn what they need to, and are expected to, learn.

Studies show that a single grossly ineffective teacher can cost her students up to a *full year* of learning - a deprivation the students will never recover. (RT 2770:6-16, 3513:15-18 [Kane].) Students who are stuck with even *one* grossly ineffective teacher have lower graduation rates, lower college attendance rates, higher teenage pregnancy rates, and lower lifetime earnings and savings rates than their peers - life-altering consequences that are magnified for students stuck with two or more such teachers. (RT 1202:22-1203:1 [Chetty].) Indeed, classrooms of students assigned to grossly ineffective teachers lose $1.4 million in lifetime earnings as compared to classrooms taught by average teachers. (RT 1221:26-1222:6 [Chetty].) In the words of the Superior Court, the severe harm being ***3** suffered by the students of grossly ineffective teachers "shocks the conscience." (AA 7299.)

Moreover, the Superior Court explained exactly *how* the Challenged Statutes cause school districts to be stuck with grossly ineffective teachers. Based on "extensive" and "compelling" evidence presented during a two-month trial (AA 7299, 7301), the court found that:

• The Permanent Employment Statute forces school districts to make tenure decisions after teachers have been on the job for only 16 months - far too little time to be able to predict with accuracy whether a teacher will be effective at teaching students. As a result, districts grant permanent status year after year to some grossly ineffective teachers - teachers who would be screened out if districts had more time to make considered decisions. (AA 7301-7302.)

• Once those grossly ineffective teachers obtain tenure, a series of three Dismissal Statutes makes it virtually impossible for districts to remove them from the classroom. Remarkably, in the *entire* state of

California, only *2.2 teachers* are dismissed on average, each year, for unsatisfactory performance - only 0.0008% of the nearly 300,000 teachers statewide. (RT 4913:27-4914:23 [Fekete].) School districts must spend years, and hundreds of thousands of dollars, in order to have any chance of dismissing a single grossly ineffective teacher - and even then, their efforts are likely to fail. As a result, district administrators are left with no choice but to shake their heads, hold their noses, and assign these teachers to classrooms full of unlucky students every year. (AA 7302-7305.)

• Then, when economic downturns or declining enrollment force school districts to conduct layoffs, administrators are *still* prevented from removing these grossly ineffective teachers - forced instead by the Last-In First-Out ("LIFO") Statute to fire some of their best, most beloved, most effective teachers, based almost exclusively on those teachers' lack of ***4** seniority. It is not uncommon for a teacher to be named "teacher of the year" and laid off the same year. (See AA 7305-7306; see also AA 7306 [the "logic" of the LIFO Statute is "unfathomable and therefore constitutionally unsupportable"].)

Even worse, the Challenged Statutes result in a well-known phenomenon called the "Dance of the Lemons," causing disproportionate harm to poor and minority students throughout California. (AA 7307). Because dismissal is not a viable option for districts, principals seeking to improve the teaching staff at their own schools are forced to try to transfer ineffective teachers to other schools within the district. And the schools most often on the receiving end of these "lemon" transfers are schools serving predominantly poor and minority students. As a result, African-American and Latino students in Los Angeles are 43 and 68 percent more likely, respectively, to be taught by grossly ineffective teachers than white students. (RT 2760:17-2764:7, 2779:20-27 [Kane]; Respondents' Appendix ("RA") 269.) LIFO-based layoffs also wreak disproportionate havoc on schools serving poor and minority communities because those schools tend to have teachers with lower seniority levels. In some low-income schools in California, 90% of teachers have received layoff notices in a single year (RT 1400:12-21 [Adam]), massive instability that results in a "significant loss of student achievement." (AA 4810 [CDE Report].)

The overwhelming evidence at trial leaves no doubt that each of the Challenged Statutes has a "real and appreciable impact" on students' educational opportunities (see *infra* at pp. 27-45), and places a disproportionate burden on poor and minority students in particular (see *infra* at pp. 46-51) - two independent reasons for examining the laws under the lens of strict judicial scrutiny, as the Superior Court did. The superintendents of Sacramento City and Oakland school districts perhaps summarized it best:

***5** • *Jonathan Raymond (Sacramento City)*: "We have to spend considerable energy working around, over and through [the Challenged Statutes] as opposed to simply saying, you know what, our energy should be focused on teaching and improving the lives of children. [T]hese laws are simply flawed. They must be changed." (RT 2153:28-2154:4.)

• *Dr. Anthony Smith (Oakland)*: "Our job is to ensure that there are effective teachers in classrooms, and ... to do everything we can to make sure that we get teachers that are there to meet the needs of kids. The statutes themselves, though, make it unlikely that we [can] be successful ...." (RT 9702:22-28.)

On appeal, the State Defendants and Union-Intervenors (collectively "Appellants") offer three principal arguments in defense of the statutes at issue. First, they argue that this Court should allow the statutes to stand because, according to Appellants, the statutes "reflect[] the Legislature's considered judgment" about how school districts should operate. (IB at pp. 2; see also SB at pp. 12-13.) Appellants warn against judicial interference in what they describe as a "quintessentially legislative function." (IB at p. 5.) But, of course, the role of the judiciary *is* to interfere when the Legislature's actions result in constitutional harm - particularly harm to students, who have no seat at the legislative table. (*State Bldg. and Const. Trades Council of Cal., AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547, 565 ["[T]he resolution of constitutional challenges to state laws falls within the *judicial* power, not the *legislative* power."] [citation omitted]; *U.S. v. Windsor* (2013) 133 S.Ct. 2675, 2688 ["[I]t is emphatically the province and duty of the judicial department to say what the law is."] [citations omitted].) Indeed, when Appellant California Teachers Association believed certain aspects of the *very same* statutes were violating the constitutional rights of *teachers*, it sought - and obtained - judicial ***6** intervention declaring those provisions unconstitutional. (See *Cal. Teachers Ass'n v. State of Cal.* (1999) 20 Cal.4th 327, 346.)

Second, Appellants take issue with Plaintiffs' legal theories, arguing that Plaintiffs have improperly "cloaked their ... educational policy arguments in the garb of an equal protection challenge." (IB at p. 2; SB at p. 13.) But Plaintiffs' equal protection challenge follows directly from seminal cases like *Serrano* and *Butt*. In *Serrano*, the Supreme Court found that the constitutional right to educational opportunity compels the invalidation of state laws resulting in substantially unequal access to educational *funding*. (*Serrano II, supra*, 18 Cal.3d at pp. 614-615.) In *Butt*, the Supreme Court found that the same constitutional right compels substantially equal access to *time in school*. (*Butt, supra*, 4 Cal.4th at p. 692.) Here, the Superior Court closely followed the model set by these cases and ruled that the constitutional right to educational opportunity compels the invalidation of state laws resulting in substantially unequal access to minimally effective teachers. (AA 7294-7295.) There can be no reasonable dispute that all three components - money, time, and effective teachers - are essential components of a meaningful education.

Third, Appellants ask this Court to re-weigh the evidence and find that the Challenged Statutes do not, as a factual matter, impede the educational opportunities of students. (See SB at p. 48 ["[T]he challenged teacher employment statutes have, at most, a highly attenuated connection to any child's classroom experience."]; IB at p. 45 ["[T]he impact of the challenged statutes on any student is at most indirect and attenuated ...."].) They argue that the statutes impose no significant burden on school districts and that district administrators would have no difficulty managing their teacher workforces within the confines of the statutes if only they exerted more effort. (IB at p. 18 ["[T]he dismissal process can be completed in a relatively short amount of time and at ***7** reasonable cost."]; SB at p. 11 ["[S]ome local districts ... make better decisions within the statewide framework."].) And they argue that the importance of this lawsuit for California students has been overblown, going so far as to accuse the Superior Court judge of having "delusions of grandeur." (RRJN, Ex. S [*Sacramento Bee* Article].)

Not long ago, however, when State Defendants and Intervenors were fighting over who should foot the bill for teacher dismissal proceedings, they sang quite a different tune. (See *Cal. Teachers Ass'n, supra*, 20 Cal.4th 327.) At that time, the California Teachers Association warned the Supreme Court that dismissal proceedings are a "huge financial burden," costing "an exorbitant amount of money." (RRJN, Ex. A, at p. 21 [Cal. Teachers Ass'n Answer Brief on the Merits], *available at* 1998 WL 35982541.) And the State cautioned the Supreme Court, in arguments echoing precisely what Plaintiffs have proven in this case, that

[r]equiring individual school districts or the State to pay the entire cost of [dismissal] proceedings will discourage cost-sensitive school districts from attempting to discipline teachers even where such discipline is amply justified. ***That, of course, will harm students*** and may impair employee morale.

(RRJN, Ex. B at p. 13 [State of California's Opening Brief], *available at* 1998 WL 34168701, *25 [italics added].)

Although State Defendants and Intervenors now purport to be unable to see how the Challenged Statutes harm students, the rest of the world has no difficulty seeing the connection. Indeed, when the Superior Court's ruling was announced, U.S. Secretary of Education Arne Duncan heralded the decision as "a mandate to fix these problems" and expressed his hope that the ruling would present "an opportunity for a progressive state with a tradition of innovation to build a new framework for the teaching profession that protects students' rights to equal educational opportunities ***8** while providing teachers the support, respect and rewarding careers they deserve." (RRJN, Ex. E.) The *Los Angeles Times* editorial board proclaimed that the "*Vergara* ruling offers California an opportunity to change a broken system." (*Id.*, Ex. N.) And *The New York Times* declared that the court's decision "underscores a shameful problem that has cast a long shadow over the lives of children." (*Id.*, Ex. M at p. 1; see also *id.*, Ex. O at p. 1-2 [*Washington Post* editorial] ["a smart decision for students"]; *id.*, Ex. P at pp. 1-3 [*Wall Street Journal* editorial] ["a school reform landmark"]; *id.*, Ex. Q at pp. 1-3 [*Chicago Tribune* editorial] ["rightly strikes down teacher job protection laws"]; *id.*, Ex. R [*USA Today* editorial] ["To improve schools, end the 'dance of the lemons'"].)

In short, Appellants ask this Court to turn a blind eye to severe educational inequalities that flow inexorably from excessive teacher job privileges - perks secured through the legislative process by "well-funded" (IB at p. 2) and politically connected adults at the expense of children. (See *Turner v. Bd. of Trustees, Calexico Unified School Dist.* (1976) 16 Cal.3d 818, 825 ["Our school system is established not to provide jobs for teachers but rather to educate the young."].) Plaintiffs respectfully request that this Court affirm the judgment below so that *all* California schoolchildren can have an equal opportunity to obtain the education promised to them under the state Constitution.

***

STANDARD OF REVIEW

"An appealed judgment is presumed correct, and appellant bears the burden of overcoming [this] presumption of correctness." (*Boyle v. CertainTeed Corp.* (2006) 137 Cal.App.4th 645, 649-650; see also *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 611.)

The "determination of a statute's constitutionality is a question of law" that is reviewed "de novo." (*Zubarau v. City of Palmdale* (2011) 192 Cal.App.4th 289, 307; see also *City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756, 771.) But the "trial court's findings of fact are reviewed for substantial evidence." (*Haraguchi v. Super. Ct.* (2008) 43 Cal.4th 706, 711–712 [fns. omitted].) Under this deferential standard of review, "the trial court's resolution of [a] factual issue ... must be affirmed" if it is supported by substantial evidence. (*Winograd v. American Broadcasting* ***63** *Co.* (1998) 68 Cal.App.4th 624, 632.) And "the reviewing court should not substitute its judgment for the trial court's express *or implied* findings supported by substantial evidence." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143 [italics added].) "The question is not whether there is substantial evidence that would have supported a contrary judgment, but whether there is substantial evidence supporting the judgment made by the trial court." (*Natalie D. v. State Dept. of Health Care Services* (2013) 217 Cal.App.4th 1449, 1455.)

Moreover, any "attempt" by Appellants "to reargue on appeal those factual issues decided adversely to [them] at the trial level" is a sufficiency of the evidence challenge subject to substantial evidence review, irrespective of the label Appellants give it in their brief. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 398-399; see also *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 737 [appellants' arguments were insufficiency of the evidence challenges because their brief was "devoted almost entirely to rearguing the facts," even though it merely "allude[d] in passing to [] insufficiency of the evidence"]; *Liu v. Liu* (1987) 197 Cal.App.3d 143, 157.)

Faced with a sufficiency of the evidence challenge, "the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.'" (*Whiteley v. Philp Morris, Inc.* (2004) 117 Cal.App.4th 635, 678 [italics in original].) "[W]hen two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874; see also *Beck Development Co., Inc. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1204.)

***64** Appellants claim the substantial evidence standard of review is inapplicable because the trial court supposedly used an erroneous legal standard (by applying strict scrutiny, rather than rational basis review). (See IB at p. 29; SB at p. 35.) But the level of scrutiny that the trial court applied has no bearing on the standard this Court applies in reviewing the trial court's factual findings. The sole decision on which Appellants rely for this argument - *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1 - actually *applied* substantial evidence review, even though the Supreme Court found that the lower court used erroneous legal standards. (*Hill, supra*, 7 Cal.4th at p. 51.)

Appellants also contend that substantial evidence review is inappropriate because Appellants filed

objections to the trial court's statement of decision and, according to Appellants, the court did not "correct" the supposed "omissions" identified in those objections. (IB at p. 29; SB at pp. 34-35.) But a trial court's statement of decision "need not discuss each question listed in a party's" objection, as Appellants argue here. (*Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 745.) A statement of decision need only "state ultimate ... facts" - a standard easily satisfied by the trial court's decision in this case. (*Wolfe v. Lipsy* (1985) 163 Cal.App.3d 633, 643 [disapproved on other grounds in *Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 36-39].)[24]

***

*65 ARGUMENT

During two months of trial, the Superior Court heard testimony from over *50* witnesses - including school district superintendents, administrators, principals, teachers, parents, students, economists, researchers, and distinguished professors, among many others - and considered hundreds of documentary exhibits and studies. Plaintiffs' case alone included testimony from seven of the leading education experts in the world, as well as dozens of witnesses with pertinent experience in the California school system, drawn from 28 school districts across California and covering more than 22% of California students.[25] From these witnesses and documents, the Superior Court concluded that "the Challenged Statutes cause the potential and/or unreasonable exposure of grossly ineffective teachers to all California students in general and to minority and/or low income students in particular, in violation of the equal protection clause of the California Constitution." (AA 7295.) This Court should affirm the Superior Court's well-supported decision.

2006 WL 3367871 (U.S.) (Appellate Brief)
Supreme Court of the United States.

COMMONWEALTH OF MASSACHUSETTS, et al., Petitioners,
v.
ENVIRONMENTAL PROTECTION AGENCY, et al., Respondents.

No. 05-1120.
November 15, 2006.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Reply

*1 ARGUMENT

A common theme runs throughout respondents' arguments on standing, statutory authority, and agency discretion: a judicially restrained approach to this case, respondents suggest, implies a ruling in their favor. This is not so. On standing, respondents ask this Court to make factual judgments by recasting them as legal determinations; these determinations would do violence to this Court's Article III jurisprudence. On statutory authority, respondents encourage the Court to focus not on the statutory text at issue here, but instead on the political and economic consequences of a ruling in petitioners' favor. Making interpretive principles turn, not on statutory text, but on the Court's own view of the political and economic ramifications of a case is the very antithesis of judicial restraint. Last, on agency discretion, respondents ask for a new and lenient interpretive rule for cases involving agencies' refusals to issue rules. But nothing in the background principles of administrative law that respondents invoke allows an agency to turn its back on a statute that the agency does not, for its own policy reasons, want to follow.

I. Petitioners have standing.

In the court of appeals, petitioners submitted forty-three detailed affidavits establishing their standing. No party responded to, let alone refuted, those declarations. By a vote of 2-1, the court declined to dismiss the petition for review on grounds of standing. This Court declined to take up the issue in granting review. Nonetheless, respondents make standing a centerpiece of their briefs. Accepting their arguments would rework and distort the role of standing. Respondents' arguments should be rejected.

***2 A. Petitioners have demonstrated injury in fact.**

In their affidavits, petitioners described in detail how emissions of greenhouse gases have already caused and are causing States, cities, and individuals injuries that unquestionably satisfy the "injury in fact" requirement of Article III.[1] That is no doubt why EPA has not contested injury in fact in these proceedings.

Rising temperatures have injured petitioners in the following specific and concrete ways: coastal States have lost and are losing land to rising sea levels (D.C. Cir. Jr. App. 666; Stdg. App. 179, 194, 196, 208, 212, 216, 217, 234, 266, 304-305); ground-level ozone (smog) is exacerbated by rising temperatures, leading to adverse health effects and costly efforts on the part of States to address the problem (Stdg. App. 3-5, 68); glaciers are melting, causing distinct injuries to particular individuals (JA 190; Stdg. App. 182, 190, 212). These injuries span a broad range, from the Commonwealth of Massachusetts losing coastal land (Stdg. App. 196) to Frank Keim no longer being able to hike on the Alaskan glaciers he used to enjoy (Stdg. App. 190). The former injury, the loss of sovereign territory, has been a cognizable Article III injury since the founding of the republic (*see New York v. Connecticut,* 4 U.S. 1, 4 (1799)); the latter is exactly the kind of injury held sufficient to support federal jurisdiction in *Friends of the Earth v. Laidlaw Envtl. Services (TOC),* 528 U.S. 167 (2000).

Petitioners' injuries are not " 'some day' " injuries, as respondents contend (Utility Air Regulatory Group (UARG) Br. 13, quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 564 n.2 (1992)); they are injuries in the here and now. Nor do petitioners' declarations describe mere "generalized grievances" (Alliance of Automobile Manufacturers (AAM) ***3** Br. 12); they attest to harms being visited - right now - upon particular individuals and particular States. The fact that the interests asserted here "are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Sierra Club v. Morton,* 405 U.S. 727, 734 (1972); *see also FEC v. Akins,* 524 U.S. 11, 24-25 (1998).

Industry respondents assert that petitioners' case rests on the "central allegation" that substantial harm will not occur until the year 2100. AAM Br. 9-10; *see also* UARG Br. 12 & n.4. This characterization is incorrect; it ignores petitioners' detailed statements of current harm.

The record is also filled with evidence of continuing harm. *See, e.g.*, JA 229, 233-235; Stdg. App. 5-6, 43-48, 170-174, 175-180, 234-236. Each of the injuries described above is not only continuing, but will worsen with rising concentrations of greenhouse gases. Stdg. App. 182, 207-209, 211, 213-219, 234-236. Because each of these injuries is present today and will only become more grave, respondents' arguments that these injuries do not satisfy Article III are wrong.

Respondents ask this Court to hold that temporal distance alone warrants denial of standing. Respondent UARG suggests, based on *McConnell v. FEC,* 540 U.S. 93 (2003), that standing cannot exist where an

injury will not occur for five years. UARG Br. 13. If this were true, no one would have standing to object to illegal exposure to carcinogens, as most cancers have latency periods far longer than the five-year interval involved in *McConnell.* Instead, *McConnell* stands only for the common-sense rule that temporal distance can vitiate standing where the passage of time aggravates, as opposed to reduces, uncertainty about injury; this is, indeed, the way the case was argued to the Court. Brief of Respondent FEC at 129-30, *McConnell v. FEC,* 540 U.S. 93 (No. 02-1676).

Nor does *Whitmore v. Arkansas,* 495 U.S. 149 (1990), relied upon by the automobile manufacturers (AAM Br. 10-11), hold that temporal distance alone undoes standing. *Whitmore* held that the plaintiff had no standing to object to the execution of a fellow inmate, where the plaintiff's claim of injury assumed ***4** that he would be granted habeas relief; that he would be retried, convicted, and sentenced to death; and that a comparison of his crime (which involved stabbing his victim 10 times, cutting her throat, and carving an "X" on the side of her face) to his fellow inmate's would show that his capital sentence was arbitrary given the comparative mildness of his crime. 495 U.S. at 156-157. To recall the facts of *Whitmore* is to refute respondents' extravagant reading of it; it was not temporal distance, but an implausible chain of causation, which led to the denial of standing there. That situation is precisely the opposite of what is present here, namely, one in which the magnitude and certainty of injury only *increase* as time passes.

Here, the continuing harms petitioners describe are the result of physics and chemistry, not the unpredictable workings of the electoral or criminal system. "The injury is of course probabilistic, but even a small probability of injury is sufficient to create a case or controversy - to take a suit out of the category of the hypothetical ...." *Elk Grove Village v. Evans,* 997 F.2d 328, 329 (7th Cir. 1993) (Posner, J.). Nothing in the record refutes petitioners' claims of continuing harm. To say, as *amici* Robert H. Bork, *et al.* do, that Massachusetts' claim of injury based on the loss of its land to the rising seas is "entirely speculative" unless one knows more about economics (Bork Br. 12 & n. 9), is like saying that "a homeowner whose house is destroyed by arson has not been injured by the arsonist, if the house was adequately insured." *Midwest ISO Transmission Owners v. FERC,* 373 F.3d 1361, 1367 (D.C. Cir. 2004) (Roberts, J.).

Respondents refer dismissively to petitioners' "reams of untested declarations," calling them "speculative." AAM Br. 8-9. While petitioners do bear the burden of proof on standing, the factual questions underlying standing are addressed in the same manner as other factual issues in litigation. *Lujan,* 504 U.S. at 561. Thus respondents were required to meet petitioners' proof with evidence, not adjectives. Nothing in the record refutes the conclusion, supported in petitioners' ***5** affidavits, that emissions of greenhouse gases have harmed and will continue to harm petitioners.[2]

If there *were* evidence in the record creating a genuine factual controversy about petitioners' declarations of current and continuing harm, further factfinding would be necessary.[3] Respondents do not ask for this result. They apparently would have this Court rule, by judicial fiat, that climate change has not harmed, is not harming, and will not harm petitioners. Respondents' preferred disposition of the case is thick with irony: invoking a doctrine grounded in judicial restraint, respondents in effect are

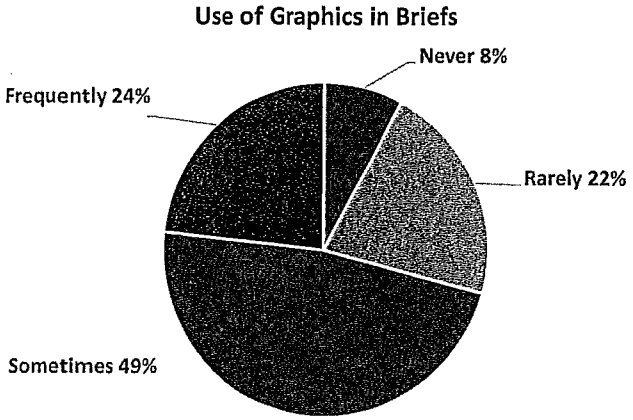
asking this Court to make the very scientific finding that they assert the accountable and expert agency charged with environmental protection need not, and indeed may not, make. Respondents' position stands standing on its head.

GRAPHICS IN BRIEFS: WHY NOT?

BY WAYNE SCHIESS

MORE LEGAL WRITERS SHOULD USE GRAPHICS IN their trial briefs, and it's already happening: In the author's survey of 133 lawyers, 70% said they frequently or sometimes use graphics in briefs. (Note: The survey targeted writers of persuasive documents at an initial-dispute stage: trials, administrative hearings, arbitrations, and others. In this article, the visuals are called graphics, the documents are called briefs, the readers are called judges, and the authors are called writers.)

Here are the results of survey question 2: "In writing briefs or other persuasive documents, do you ever use graphics: images, charts, tables, illustrations, and so on?[1]



This article addresses why some lawyers use graphics in briefs, why others don't, and how we might encourage those who don't use them to try it.

1. Graphics already appear in briefs, and more are coming.

1a. Experts recommend using graphics in briefs.
As the survey results show, many writers are already using graphics in briefs. It only makes sense because those who research and write about using graphics have been recommending the practice for several years: "Using images in appellate briefs can be an effective tool both for catching and keeping the attention of a 'wired' judge or clerk and for increasing the persuasive force of your legal argument."[2] Thus, those using graphics already recognize what the experts say: "Well-crafted images—charts, diagrams, photographs—can make your briefs more interesting and persuasive ...."[3] The written word isn't dead, but "[a]s legal writing moves toward a more digital medium, it is time for lawyers to incorporate visual persuasion into their documents.... [Graphics users] are advancing legal writing in a positive direction."[4]

1b. Writers who use graphics commend the practice.
In responding to the author's survey, writers could choose from a list of the potential benefits of graphics, and here are the top three responses, in order: (1) Sometimes graphics can convey concepts that text cannot; (2) Sometimes using graphics is easier than describing something in the text; and (3) Graphics add persuasive force to the document.

Survey respondents could also add comments, and there were several strong endorsements:

- "Using graphics, charts, etc. can be very helpful to a brief and the judge's understanding of the issues."
- "I use tables and charts as often as it makes sense. There were several occasions a party included some sort of graphic in its briefs when I was clerking, and I found them generally helpful. One table compared specific allegations in the complaint versus what the plaintiff had ultimately presented on that point after discovery. The discrepancies were already glaring, but the table really nailed it."
- "I use tables and charts when they help organize the information: with multiple parties and I'm trying to display the differing facts about each one, discovery disputes—breaking down the disputed-information categories, financial information, timelines."
- "In a case with multiple claims and multiple defendants, I created a table in which each row was a specific claim against a specific defendant. In the columns, I briefly explained why that claim failed and cited a key case."

To these endorsements we can add the obvious point that lawyers have used graphics in courtroom trials and hearings for many years. It's taken for granted that photos, maps, charts, and graphs have a strong persuasive impact on judges and juries. So it's not surprising that the same is true for briefs.

Yet 30% of survey respondents said they rarely or never use graphics in briefs. Why not?

2. Some writers rarely or never use graphics.
Only 30% of those responding said they rarely or never use graphics in briefs, and that figure has to be viewed as a success on the topic of graphics in briefs. A clear majority use graphics sometimes or frequently, and only 8% said they never use graphics. But it's still worth exploring why those writers rarely or never use graphics and seeing what can be done about it.

In the survey, the majority of respondents selected, from a list, the following three reasons for not using graphics, in order: (1) Traditional rules and conventions for the briefs I write do not embrace graphics (based on individual comments, this choice was also taken to mean "My practice area does not lend itself to graphics."); (2) I've rarely or never heard a judge recommend graphics; and (3) Effectively creating graphics is difficult and time-consuming.

Let's take these one at a time.

2a. Some writers say graphics aren't right for, or won't work in, some briefs.
There's more good news here, if we look at it this way: Mostly, writers aren't avoiding graphics because graphics don't work at all; they're avoiding graphics because graphics don't work for the particular cases and issues these writers face. Declining to use graphics is therefore a sensible exercise of editorial judgment. That's what legal writers should be doing.

As an initial matter, writers shouldn't use graphics as a way to avoid careful, analytical writing. As one survey respondent put it:

- "The use of graphics often comes off as an attempt to glide past more difficult parts of the case."

This statement rings true and has support from at least two federal judges quoted in a blog post by Joseph Regalia on the Appellate Advocacy Blog:

> *Visuals are no replacement for good writing.* Visuals can be a helpful supplement, but you can easily overdo it and shirk your writing. So lead with good writing and use thoughtful visuals if helpful.[5]

Other individual comments in the survey reflect the reality that good writers know their content, context, and audience and make decisions about graphics accordingly. It's not that these lawyers are unwilling to use graphics; it's that the type of document or practice doesn't lend itself to graphics:

- "Graphics would rarely advance any issue in my cases."
- "I [cannot see] how graphics would meaningfully improve briefing in my case area (debt collection and debt defense)."
- Most of my work involves day-to-day motion practice (e.g., motions to compel) that does not call for graphics."
- "The issues in my cases rarely lend themselves to persuasive graphic display."

In general, I'm inclined to trust these lawyers and their judgments about their own cases.

2b. Some writers say judges aren't recommending graphics.
Actually, they are—a little—and the following examples contain some solid endorsements. The legal-writing expert Ross Guberman, in his article *Judges Speaking Softly*, offers the following unattributed quotations from judges:

- "Sometimes a timeline is clearer than an essay format."
- "I ALWAYS appreciate a clear timeline of events and I am happy to have that in the text of the fact section or as an exhibit. I want one place where I can see when everything happened in the case if it's not a singular event."
- "Just as I don't like scrolling down to find authority in a footnote, I don't like flipping through clerks' papers or exhibits to find a key piece of documentary evidence that is discussed in a brief. The use of pictures, maps, and diagrams not only breaks up what can be dry legal analysis; it also helps us better understand the case as it was presented to the trier of fact (who undoubtedly was permitted to see an exhibit while it was discussed)."
- "When a case involves analysis of a map, graph, or picture, I would like to see attorneys include a copy of the picture within the analysis section of the brief."

- "I like fact sections broken down with headings and even subheadings. Define chapters in the facts or the 'next' relevant event."[6]

There's more. Judge J. Nicholas Ranjan, of the United States District Court for the Western District of Pennsylvania, offers the following advice on his website:

> Visual Tools. Use visual devices and tools to make things easier on your reader. In this regard, paragraph breaks are critical; break your paragraphs up, and avoid a paragraph that is more than a half-page long. Additionally, where appropriate, use organizational devices like numbering ("first," "second," "third"); bullet point lists; charts and graphics; and timelines. For example, in a case where the timing of events is critical or convoluted, consider creating a timeline in the fact section.[7]

And lawyers Emily Hamm Huseth and Michael F. Rafferty relate a relevant anecdote in their article, *A Picture Can Save a Thousand Words: The Case for Using Images in Appellate Briefs* (although the current article is focused on trials, the anecdote is from an appeal). The anecdote arises from *Huertero v. United States*, 601 Fed. App'x 169 (3d Cir. 2015):

> During the oral argument, Judge Theodore McKee commented: "I want to start by commending your brief ... As complicated as this case is ... the facts are messy. Your chart—you caused me to do something I hadn't done in years—you caused me to print something out and whoever's idea that was to put that chart in the brief I really want to commend you. It is a very, very helpful chart."[8]

In addition to the supportive statements quoted here, after posting the survey about graphics, the author received two email messages from judges saying that they appreciate the use of graphics in briefs and pointing out that they use graphics in their opinions and orders.

Nevertheless, there is no large, loud chorus of judges calling for more graphics in briefs. Yet 46% of those who rarely or never use graphics said that they would be persuaded to use them if judges and other decision-makers recommended the practice. So if you're a judge reading this, and you appreciate graphics, say so—publicly.

Besides the recommendations of judges, several other factors would encourage more writers to use graphics in briefs. One third of the survey respondents said they would be persuaded to use graphics if colleagues or leading practitioners recommended the practice. So if you're a graphics-using writer reading this article, recommend the practice to others.

2c. Some writers say graphics are hard to use well—they take time and expertise.

Finally, it's worth mentioning that 9% of survey respondents who rarely or never use graphics in briefs gave as a reason that using graphics was difficult and time-consuming. Here are some of the individual comments:

- "Limited software skills."
- "Need software training."
- "Software to make it easier for me to design the graphics."
- "A quicker way to get them done."
- "Need to be easy to create, format, and insert."
- "Greater technological ease-of-use."

This article can do little to remedy these problems. Suggestions are to assign graphics creation to others with the expertise, seek out training and education on graphics use, and invest in newer or better software.

3. How to increase the use of graphics in briefs.

To this point, this article has discussed using graphics in briefs only as an abstract concept. For guidance on how one might decide whether to use a graphic in a brief for a particular point, there is an excellent law review article by Steve Johansen and Ruth Anne Robbins, *Art-iculating the Analysis: Systemizing the Decision to Use Visuals as Legal Reasoning.*[9]

The authors helpfully divide graphics into three categories: Organizational visuals such as bullet lists, timelines, and tables—even the Table of Contents; interpretive visuals such as flow charts, pie charts, and Venn diagrams; and representative visuals such as images and maps. They then ask writers to imagine the legal argument visually and identify what type of graphic would aid the reasoning.[10]

Once the writer has decided to use a graphic in the brief, Johansen and Robbins suggest that it is still beneficial to assess where the graphic would fall along a "usefulness" continuum: on one end are decorative graphics that are visually interesting but that have a limited connection to the analysis; on the other are transformative graphics—they have a purpose as part of the legal reasoning and serve as a form of visual analysis.[11]

Purely decorative graphics would be nixed; transformative graphics would go in.

3a. Consider some types and examples of graphics.
Here are two simple ways to use one type of graphic—images—in briefs, as recommended by survey respondents:

- I mostly use screenshots of the contractual or other language I'm interpreting.
- Many of mine are labeled photos—essentially, evidentiary documents but placed in the body text rather than in an appendix.

But there are other ways to use graphics, and shown here are some simple examples writers can consider that would not be difficult to create. These graphics come from examples sent to the author, from other sources, and from another excellent article on graphics: Adam L. Rosman: *Visualizing the Law: Using Charts, Diagrams, and Other Images to Improve Legal Briefs.*[12]

Graphics in briefs can be as simple as the following table showing who held what position in a corporation.[13] The information here is more quickly and easily grasped than if it were conveyed in textual format.

Ralph Gilbert	Chief Executive Officer
Lester Start	Chief Financial Officer
Graydon Treat	Chief Investment Officer
Justin Bister	Board Director
Mary Sholes	Board Director
Harvey Flexer	Board Director

The following portion of a larger table was used to address a 12-factor legal test as applied to a set of facts. This is a good example of a graphic that makes digesting the analysis easier when compared to a traditional-text format.

Factor	Analysis
Evidence of actual or potential harm to patients, clients, or the public	There was actual or potential harm in this case, as Respondent's patient in the February 2011 incident went into code-blue cardiac distress when Respondent failed to fulfill her responsibilities under the standards of care for nurses. This is an aggravating factor in determining a penalty.
Evidence of a lack of truthfulness or trustworthiness	Although Respondent failed to comply with the standards of care, the ALJ does not find evidence in the record that establishes any lack of truthfulness on Respondent's part here. Respondent admitted her actions and, except in regard to whether she informed Ms. Phills that she was leaving the unit, there was little dispute over respondent's conduct—none of which involved dishonesty or untruthfulness.
Evidence of misrepresenting knowledge, education, experience, credentials, or skills that would lead the public, an employer, a healthcare provider, or a patient to rely on the misrepresentation	There is no evidence of this type of conduct by Respondent.

This chart appeared in a response to a plaintiff's motion to consolidate. It was the writer's attempt to emphasize that although the same party owned the two apartment-complex phases at issue, the buildings, subcontractors, and materials differed substantially, and the two cases would not require the same evidence. After attempting to describe the content in textual paragraphs, the writer decided to use this chart:

	Phase 1	Phase 2
Owner	Ten Pines Partners	Ten Pines Partners
General Contractor	Letco	Trescore
Architect	AATC	AATC
Completed	July 2007	July 2008
Buildings	A, B, C, D, E, F, G, N, P	K, Q, R, S, T
Subcontractors	Mega Insulation	Mega Insulation
	Gonzalez Roofers	Roscoe Roofing
	Jeremy Construction	Rickett's Protective Coatings
	A&J Plumbing	D-Tech Commercial
	Double T HVAC	Tempfan Products
Siding	Traditional	Redstrong Synthetic
Defendants	Ten Pines Partners	Ten Pines Partners
	Mega Insulation	Mega Insulation
	Letco	Trescore
	Gonzalez Roofers	AATC
	Jeremy Construction	Roscoe Roofing
	A&J Plumbing	D-Tech Commercial
	Double T HVAC	Tempfan Products

This timeline conveys key events in the evolution of social-host liability for serving alcohol under Texas law.

1987
Texas enacts Dram Shop statute, creating licensed-provider liability and stating the exclusive cause of action for providers and providing. Social-host liability in a Senate bill was deleted before enactment.

1993
In Graff v. Beard, Texas Supreme Court rejects social-host liability for serving alcohol to an adult guest, citing the deleted social-host liability in the Senate bill and the difficulties in knowing of and controlling a guest's drinking.

1997
In Smith v. Merritt, Texas Supreme Court rejects social-host liability for serving alcohol to a 19-year-old, even though he was an underage drinker.

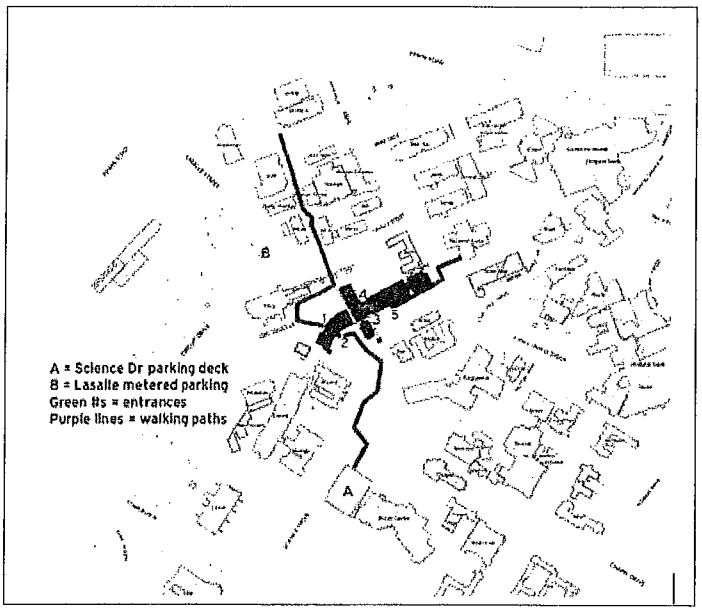
2001
In Reeder v. Daniel, Texas Supreme Court rejects social-host liability for serving alcohol to a person under age 18, stating that "we are not permitted to recognize a cause of action against social hosts under Texas law."

2005
Texas legislature adds section 2.02(c) to the Dram Shop statute, effectively overruling Reeder v. Daniel and creating liability for serving, providing, or—on your property—allowing those under 18 to be served.

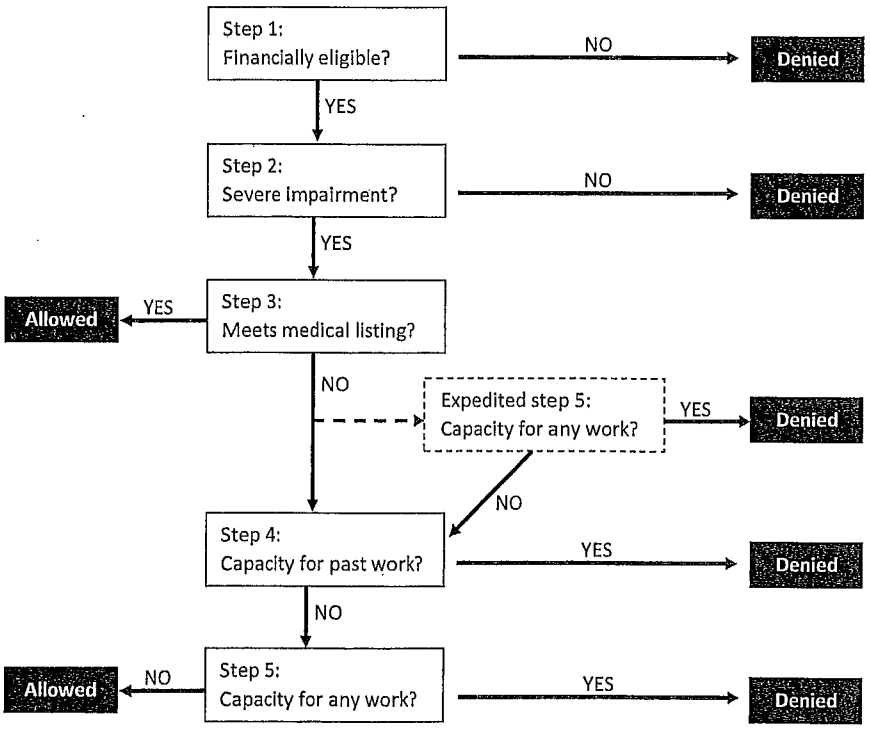
Here's another timeline, showing membership on a board of directors over time.[14]

	2006	2007	2008	2009	2010	2011	2012
1	Jones	Jones	Jones	Jones			Ludlow
2	Stephens	Stephens	Stephens	Stephens	Stephens	Stephens	Stephens
3	Edwards	Edwards	Edwards				
4	Kahn	Kahn	Kahn	Kahn	Kahn	Spellman	Spellman
5	Veasy	Veasy	Veasy	Veasy	Veasy	Veasy	Veasy
6				Foster	Foster	Foster	Foster
7					Shapiro	Shapiro	Shapiro
8					Galenter	Galenter	Galenter

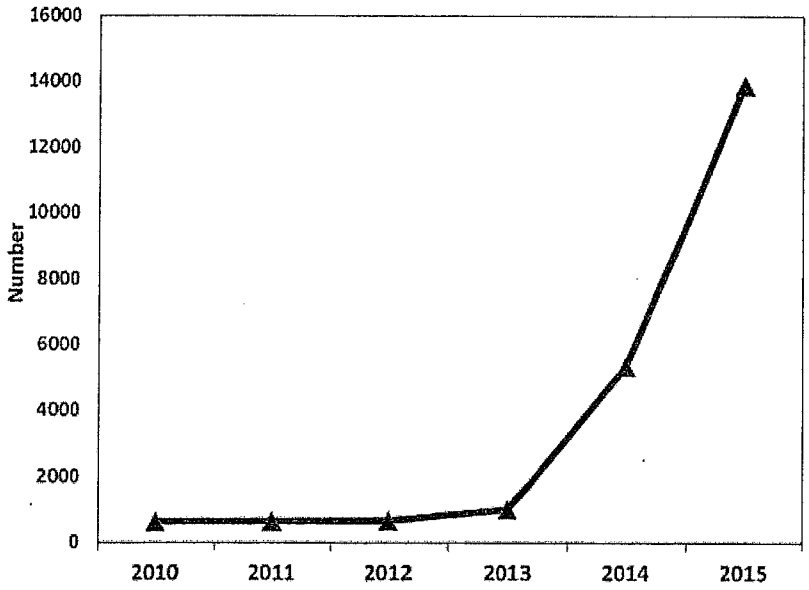
Maps can be particularly helpful as graphics in disputes relating to locations, boundary disputes, and other geographically related information.[15]



A flowchart can simplify what in the abstract seems like a complex decision.[16]



Traditional charts (such as the pie chart at the beginning of this article) and graphs can work, too. Here's one depicting the number of reported law-enforcement encounters testing positive for Fentanyl in the United States.[17]



3b. Consider, or re-consider, using graphics in a brief. These examples may give you some ideas, but it's up to you to consider the information or analysis and decide if a graphic is right for your brief. Think creatively, get some help, improve your skills, and recognize that judges are generally favorably disposed to graphics in briefs. Then try it.

Wayne Schiess is a Senior Lecturer at the University of Texas School of Law. ✯

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1 Results on file with the author.

2 Emily Hamm Huseth & Michael F. Rafferty, *A Picture Can Save a Thousand Words: The Case for Using Images in Appellate Briefs*, For the Defense 22, 23 (Feb. 2019).

3 Adam L. Rosman, *Visualizing the Law: Using Charts, Diagrams, and Other Images to Improve Legal Briefs*, 63 J. Leg. Educ. 70, 70 (Aug. 2013).

4 Steve Johansen & Ruth Anne Robbins, *Art-iculating the Analysis: Systemizing the Decision to Use Visuals as Legal Reasoning*, 20 J. of the Leg. Writing Inst. 57, 59, 60 (2015).

5 Joseph Regalia, *An Eye For Legal Writing: Five Ways Visuals Can Transform Your Briefs*, Appellate Advocacy Blog (May 25, 2019), https://lawprofessors.typepad.com/appellate_advocacy/2019/05/developing-an-eye-for-legal-writing-five-ways-visuals-can-transform-your-briefs.html.

6 Ross Guberman, *Judges Speaking Softly*, 44 Litigation 48, 49-50 (Summer 2018).

7 Judge J. Nicholas Ranjan, *Judge Ranjan's Brief-Writing Preferences*, at 2, https://www.pawd.uscourts.gov/sites/pawd/files/Ranjan_writing_tips.pdf.

8 Huseth & Rafferty, *supra* note 2, at 23.

9 Johansen & Robbins, *supra* note 4.

10 *Id.* at 67.

11 *Id.* at 69.

12 Rosman, *supra* note 3.

13 *Id.* at 78.

14 *Id.* at 79.

15 Regalia, *supra*, note 5.

16 *Id.*

17 Centers for Disease Control and Prevention, *Reported Law Enforcement Encounters Testing Positive for Fentanyl Increase Across US*, https://www.cdc.gov/drugoverdose/data/fentanyl-le-reports.html.

CAUSE NO. 10-05639

HILLWOOD INVESTMENT PROPERTIES III, LTD., individually and on behalf of DALLAS BASKETBALL LIMITED D/B/A DALLAS MAVERICKS,	§	**IN THE DISTRICT COURT**
Plaintiff,	§	
	§	**192nd JUDICIAL DISTRICT**
v.	§	
RADICAL MAVERICKS MANAGEMENT, LLC and DALLAS BASKETBALL LIMITED D/B/A DALLAS MAVERICKS,	§	
Defendants.	§	**DALLAS COUNTY, TEXAS**

WORLD CHAMPION DALLAS MAVERICKS AND RADICAL MAVERICKS MANAGEMENT'S MOTION FOR SUMMARY JUDGMENT

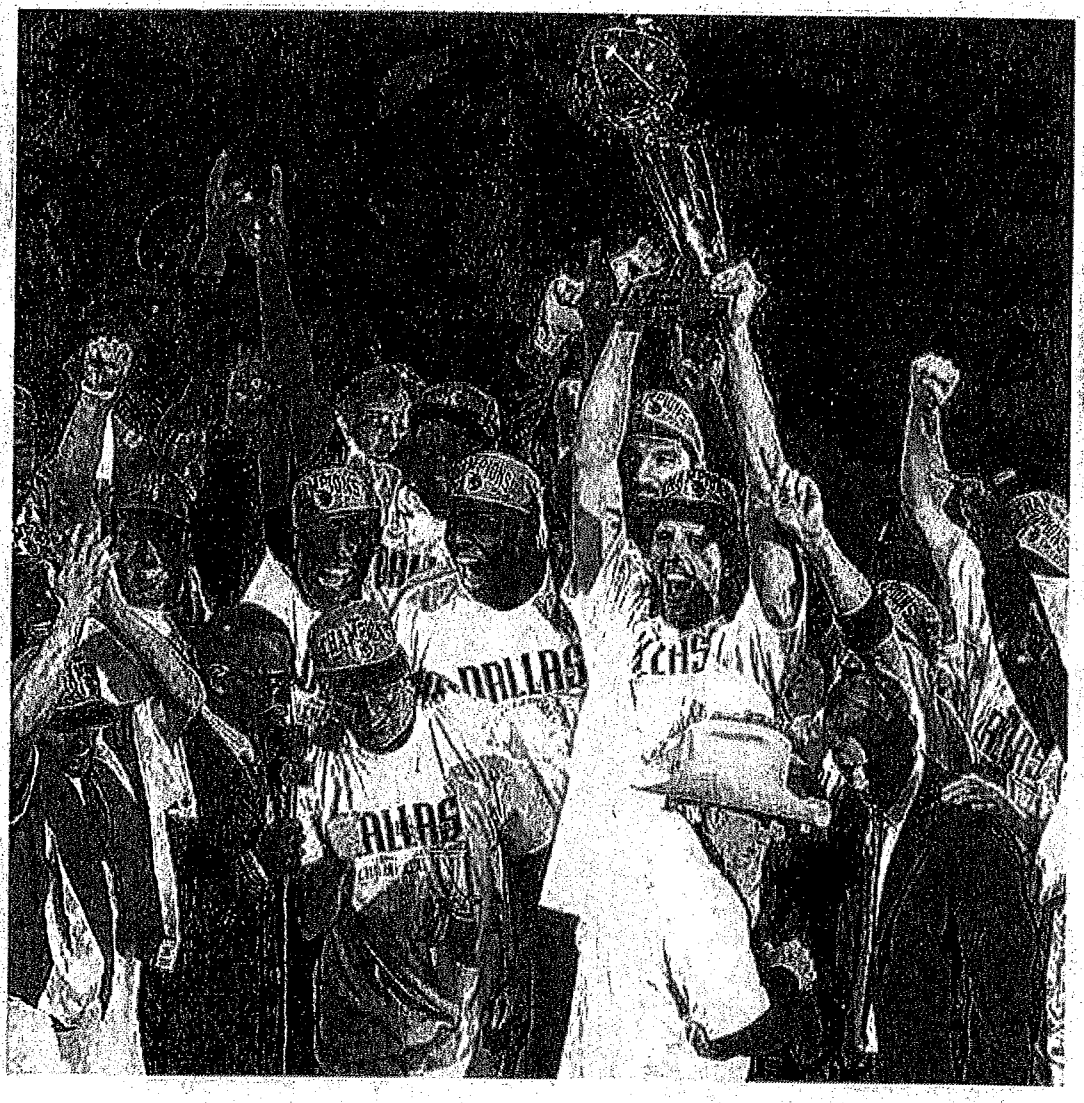
Come now Defendants Dallas Basketball Limited d/b/a Dallas Mavericks ("World Champion Dallas Mavericks") and Radical Mavericks Management, LLC ("RMM") and hereby move for summary judgment and would show the Court as follows:

I. BACKGROUND

On May 11, 2010, Plaintiff Hillwood Investment Properties III, Ltd. ("Hillwood"), a five-percent owner of the World Champion Dallas Mavericks, filed its Original Petition claiming that majority owner Mark Cuban ("Cuban") has made a "litany of questionable, business, financial and personnel decisions" regarding the World Champion Dallas Mavericks. Hillwood claims that Cuban has been "careless and reckless" in his decision-making, allegedly causing Hillwood to "lose substantial investment value." Finally, Hillwood claims that the World Champion Dallas Mavericks are "insolvent and/or in imminent danger of insolvency," and seeks to take the team away from Cuban and hand the World Champion Dallas Mavericks over to a court-appointed receiver.

II. SUMMARY JUDGMENT EVIDENCE AND ARGUMENT

On June 12, 2011, the World Champion Dallas Mavericks defeated the Miami Heat to claim the franchise's first NBA championship. A true and correct photo of one of the many victory celebrations is incorporated herein:



Under Hillwood's ownership, the team was deemed the "worst franchise" in all of professional sports. Under Cuban's stewardship the Mavericks have become one of the league's most successful teams and are now NBA champions. Accordingly, there can be no genuine

question that Hillwood's claims of mismanagement lack merit and Hilwood's claims should be disposed of on summary judgment.

III. CONCLUSION

For the reasons detailed above, the World Champion Dallas Mavericks and RMM request this Court grant summary judgment in their favor on all Hillwood's claims and award the World Champion Dallas Mavericks and RMM such further relief to which they are entitled (although they are quite content at the moment).

Dated: June 22, 2011

Respectfully submitted,

FISH & RICHARDSON P.C.

Thomas M. Melsheimer
Texas State Bar No. 13922550
M. Brett Johnson
Texas State Bar No. 00790978
Scott C. Thomas
Texas State Bar No. 24046964
1717 Main Street, Suite 5000
Dallas, Texas 75201
Telephone: (214) 747-5070
Telecopy: (214) 747-2091

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on Plaintiff's counsel of record, Don Colleluori, 3400 Bank of America Plaza, 901 Main Street, LB 125, Dallas, Texas 75202, on June 22, 2011 via hand delivery.

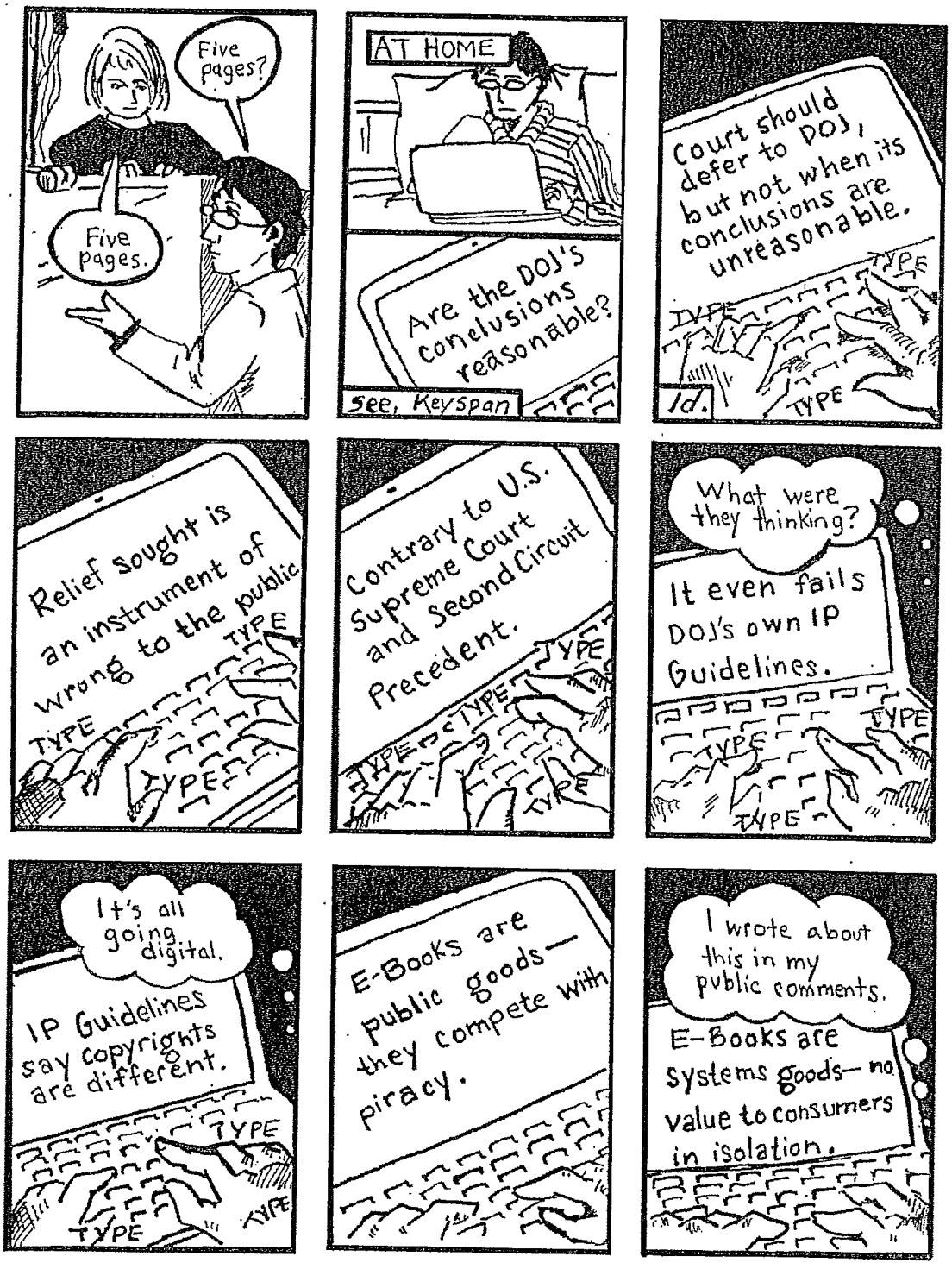
Thomas M. Melsheimer

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

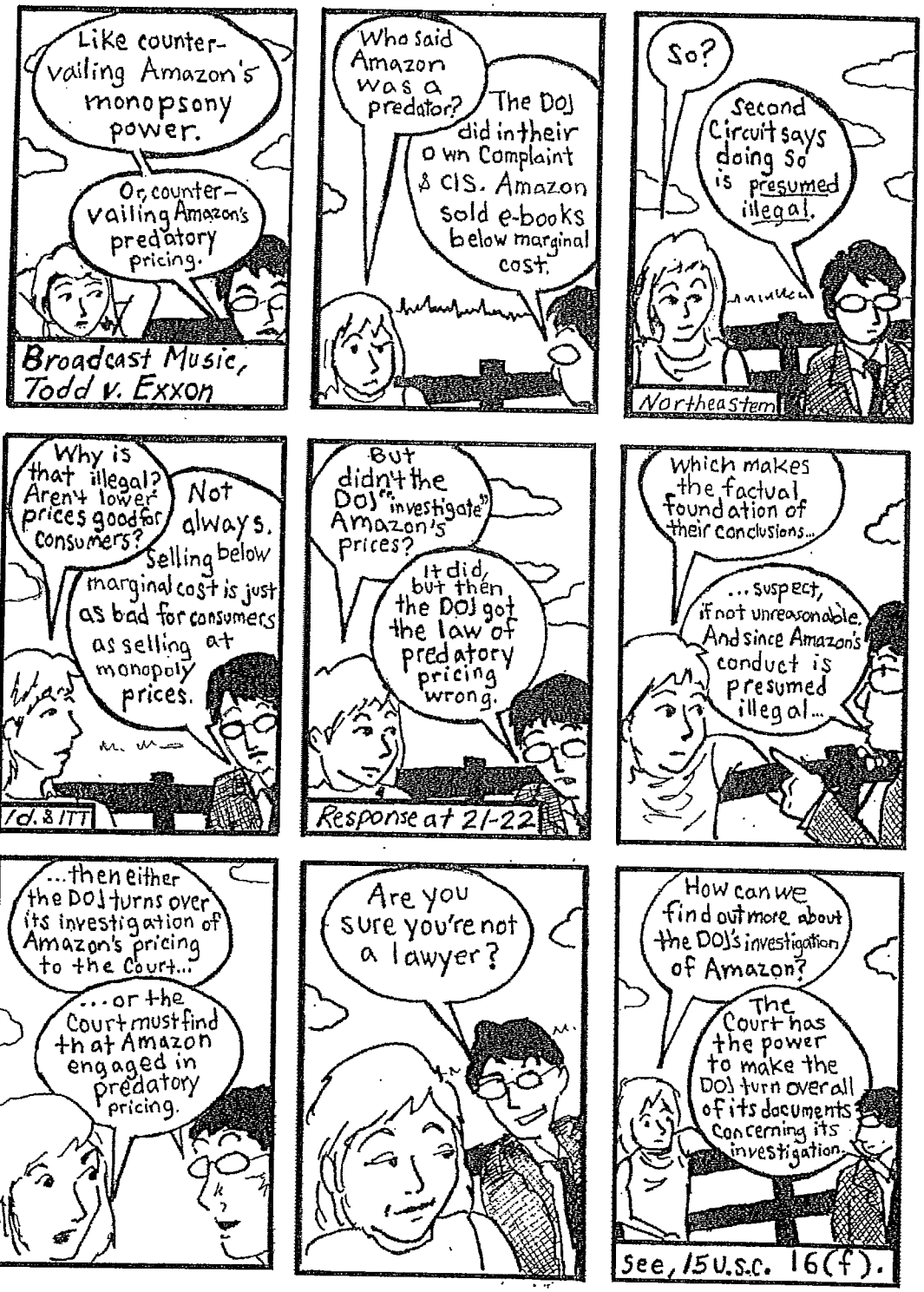
UNITED STATES OF AMERICA Plaintiff, v. APPLE, INC., HACHETTE BOOK GROUP, INC., HARPERCOLLINS PUBLISHERS, L.L.C. VERLAGSGRUPPE GEORG VON HOLTZBRINK PUBLISHERS, LLC d/b/a MACMILLAN, THE PENGUIN GROUP, A DIVISION OF PEARSON PLC, PENGUIN GROUP (USA), INC. and SIMON & SCHUSTER, INC., Defendants.	Civil Action No.12-CV-2826 (DLC)

BRIEF OF BOB KOHN AS *AMICUS CURIAE* *

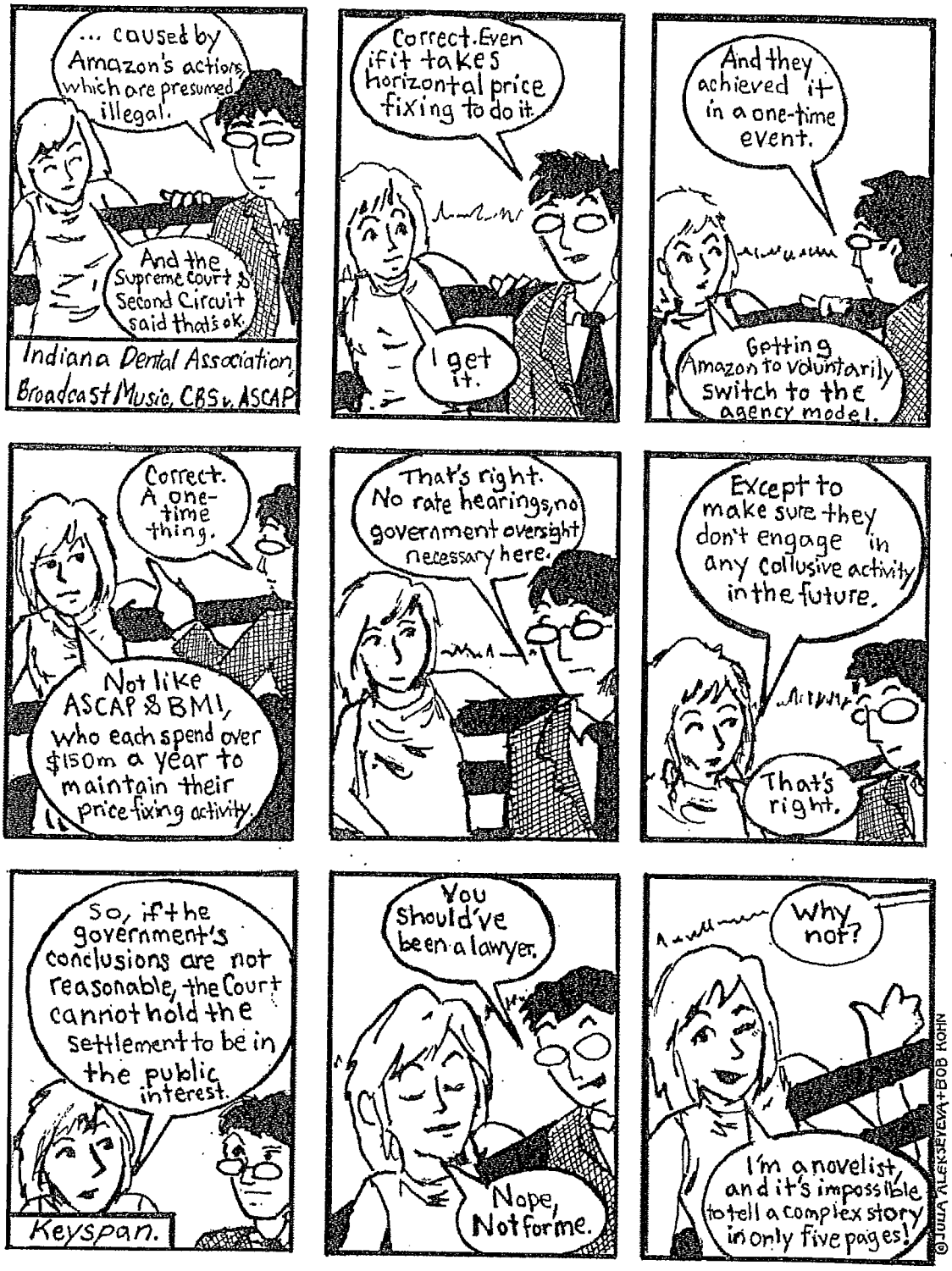
* Five-page version of Proposed Brief *Amicus Curiae* at Docket No. 97.


Five pages?
Five pages.
AT HOME
Are the DOJ's conclusions reasonable?
See, Keyspan
Court should defer to DOJ, but not when its conclusions are unreasonable.
Id.
Relief sought is an instrument of wrong to the public
Contrary to U.S. Supreme Court and Second Circuit Precedent.
What were they thinking?
It even fails DOJ's own IP Guidelines.
It's all going digital.
IP Guidelines say copyrights are different.
E-Books are public goods— they compete with piracy.
I wrote about this in my public comments.
E-Books are systems goods— no value to consumers in isolation.


Watcha workin'on?
Trying to explain why supply & demand does not operate normally on pricing of e-books.
Moor Law
Oh, because of illegal downloading
Right. And because of network effects, you also must look at effect of a restraint on a number of different goods markets.
IP Guidelines
And you must weigh the restraint against the pro-competitive benefit in these different markets.
Why?
Because if the restraint is reasonably necessary to achieve the benefits, it's legal.
Id.
THE NEXT DAY
Says who?
Says the DOJ's own U.S. Supreme Court authority!
FTC v. Indiana Dentists Assn
I'm not a lawyer, but that sounds like a major screw-up.
Yup.
My challenge is to explain all this in five pages.
So, what did the Supreme Court say?
The high court said that collusive conduct is ok under rule of reason where there is a counter-vailing pro-competitive virtue.
Did they give examples of that?
Yes, a couple, but I like this one the best: horizontal price fixing is ok if it will "create efficiencies in the operation of a market"
Like what?


Like counter-vailing Amazon's monopsony power.
Or, counter-vailing Amazon's predatory pricing.
Broadcast Music, Todd v. Exxon
Who said Amazon was a predator?
The DOJ did in their own Complaint & cls. Amazon sold e-books below marginal cost.
So?
Second Circuit says doing so is presumed illegal.
Northeastern
Why is that illegal? Aren't lower prices good for consumers?
Not always. Selling below marginal cost is just as bad for consumers as selling at monopoly prices.
Id. & III
But didn't the DOJ "investigate" Amazon's prices?
It did, but then the DOJ got the law of predatory pricing wrong.
Response at 21-22
Which makes the factual foundation of their conclusions...
...suspect, if not unreasonable. And since Amazon's conduct is presumed illegal...
...then either the DOJ turns over its investigation of Amazon's pricing to the Court...
...or the Court must find that Amazon engaged in predatory pricing.
Are you sure you're not a lawyer?
How can we find out more about the DOJ's investigation of Amazon?
The Court has the power to make the DOJ turn over all of its documents concerning its investigation.
See, 15 U.S.C. 16(f).


So, how does all this help solve the case?
You see, when Amazon lowered e-book prices to below its marginal cost...
... any conduct that raised them back to marginal cost could not have harmed consumers.
I get it! Let me complete the argument.
Showing harm to consumers is fundamental to the factual foundation of the DOJ's case.
Correct!
Without it, the DOJ's conclusion about the remedy is unreasonable.
You got it!
Keyspan
Wow! The DOJ really blew this one.
Yup
Where did the DOJ go wrong?
Well, a lot of places. But if I had to point to one it would be this...
Low prices are one of the principal goals of antitrust law
I was gob-smacked when I read that in the DOJ response
Whoa. You don't have to be an economist to see through that.
That's right. The goal is efficient prices, not low prices.
So, I see what you're saying. All the Defendants did was to counter a serious market failure.


... caused by Amazon's actions which are presumed illegal.
And the Supreme Court & Second Circuit said that's ok.
Indiana Dental Association, Broadcast Music, CBS v. ASCAP
Correct. Even if it takes horizontal price fixing to do it.
I get it.
And they achieved it in a one-time event.
Getting Amazon to voluntarily switch to the agency model.
Correct. A one-time thing.
Not like ASCAP & BMI, who each spend over $150m a year to maintain their price fixing activity.
That's right. No rate hearings, no government oversight necessary here.
Except to make sure they don't engage in any collusive activity in the future.
That's right.
So, if the government's conclusions are not reasonable, the Court cannot hold the settlement to be in the public interest.
Keyspan.
You should've been a lawyer.
Nope, Not for me.
Why not?
I'm a novelist, and it's impossible to tell a complex story in only five pages!
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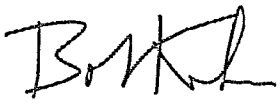
Dated: September 4, 2012

Respectfully submitted,



BOB KOHN

BOB KOHN
(California Bar No. 100793)
140 E. 28th St.
New York, NY 10016
+1-408-602-5646
bob@bobkohn.com