LEGAL COMMUNICATION & RHETORIC: JALWD

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Submission of articles and essays

Submissions of articles and essays under 15,000 words, inclusive, are due on or before **September 1** of the calendar year before an upcoming issue. More specifics about technical aspects appear below.

We welcome articles on any topic that falls within the mission of *LC&R*: to develop scholarship focusing on the substance and practice of professional legal communication, broadly defined to include many aspects of lawyering, and to make that scholarship accessible and helpful

to practitioners as well as to legal academics. Without compromising analytical rigor and the necessary theoretical and research foundation, our goal is to publish articles that are readable and usable by the broader audience of professional legal writers. We are looking for clear, concrete, direct writing; strong, interesting, intelligent voices; and a style that uses the text for substance and the footnotes to provide support, sources, and references for additional study.

Potential authors may wish to consult articles published in past issues, as well as the more specific information for authors available under the Submissions tab at www.alwd.org/lcr/submissions/.

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Technical requirements

Three parts to the submission

Electronic manuscripts should be accompanied by both a cover sheet summarizing the article and a CV, resume, or summary of scholarship background of the author, including preferred email and phone contact information.

Maximum length of submissions

For major articles, *LC&R* will consider manuscripts from **5,000–15,000 words of text, including footnotes.** For more informal essays, *LC&R* recommends manuscripts of approximately **2,500–5,000 words of text and fewer than 50 footnotes.** Book reviews are solicited separately and are short documents.

Microsoft Word (native) and explanation

Because we use a professional designer who requires it, all manuscripts must be prepared and submitted as native Microsoft Word

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Submissions should be sent through the Online Submission Form at www.alwd.org/lcr-submissions, by email to lcr@alwd.org, or via Expresso-O.

Process

This is a peer-reviewed journal. All submissions that meet the mission of the journal are sent to anonymous peer reviewers before being returned to the editorial board for a discussion of the anonymous reviews and a final vote. The peer-review system is double blind. Essays are also sent to peer reviewers.

Submission of Book Reviews

We include book reviews in each volume. Those are handled through a separate submission procedure after the articles are selected. For more information, send an email with the subject "Book Review question" to **lcr@alwd.org**.

Questions

If you have questions, please contact our co-Editors-in-Chief and co-Managing Editors at **lcr@alwd.org**.

1 Any article that originated in another program such as WordPerfect will have to be recreated in Word because the footnote formatting is not converted properly (trust us, we speak from experience).

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PREFACE

Volume 18 of *Legal Communication & Rhetoric: JALWD* introduces the theme of author as travel guide who can transport their reader to new places. Lisa Eichhorn's article, "Tonal Variation," introduces the concept of tone, which is defined as the author's attitude toward the audience. Using this frame, Professor Eichhorn explains how the author can use tone to shape the relationship with the reader. The article examines and contrasts two recent judicial opinions authored by Supreme Court Justices Kagan and Gorsuch. Through these tonal analyses, Professor Eichhorn shows how, even within an opinion, the tone may shift as the opinion moves from one purpose to another. These techniques are subtle but can be powerful and useful for any legal practitioner. Tonal analyses help practitioners better understand judicial opinions and their authors' judicial personas. Practitioners would also benefit from studying the use of tone in judicial opinions so that they can use the same techniques to create more forceful or persuasive tone in their own writing.

The metaphor of author as travel guide fully takes flight in "Fiction 201" by Ruth Anne Robbins. This article uses existing scholarship on narrative and legal storytelling as a launching pad for the discussion of storyworlds, which authors use to transport the audience into the world where a story takes place. Storyworlds are most effective as a persuasive writing strategy when they narratively transport readers into the story using action and setting. This transportation is essential in priming the reader to have their opinions changed not only about the characters in the story but about the larger themes and messages the story conveys. Professor Robbins explains that the techniques used to shift a reader's attitude towards characters in a fictional work can be used to great effect in legal advocacy when the author wishes to create sympathy towards and even change their audience's opinion about their client and the issues their client is facing.

Patrick Barry's essay, "Editing and Interleaving," takes us on a slightly different path, as is befitting of an essay that discusses the value of letting one project rest while you work on another. Short and to the point, this essay uses both cognitive science and expert testimonials to introduce and advocate for using "interleaving"—strategically switching between cognitive tasks—as part of the editing process.

"The Power of Connectivity" by Diana Simon takes the concept of transitions literally. Transitions in writing are words or phrases that

connect ideas, phrases, sentences, or even paragraphs, and, despite their ubiquity, Professor Simon shows that transitions are extremely effective in improving reading comprehension and, therefore, persuasiveness. The article analyzes the cognitive science behind transitions and presents the reader with a multitude of techniques and places to use transitions in legal writing. Professor Simon builds on that scientific foundation using examples from pop music, stand-up comedy, and legal writing to help inform readers about the power of point headings, the importance of variety, and the use of rhetorical questions as transitions. And, as is no surprise considering the subject matter, this article breaks down this information and these complex ideas into a thoroughly readable format.

Jonah Perlin's "Making Your (Power)Point" provides essential guidance for how to make the most of another tool commonly used by legal students, practitioners, and academics: digital presentations. Being able to communicate well using digital presentation software has become essential in the legal profession, but few lawyers are trained on how to create digital presentations effectively. This article treats the design of a digital presentation as a creative process and provides a multi-step and research-based method for how to create presentations that take into account the purpose and audience of the presentation. With this article, Professor Perlin aims to not only provide guidance to lawyers on how to create and use digital presentations, but also to jumpstart a more robust conversation about the use of digital presentations in the legal profession.

Our journey through new technology concludes with Michael Murphy's "The Search for Clarity." Professor Murphy acts as the reader's travel guide into what commentators call the "Duty to Google," or the duty to use an Internet search as an investigative tool to find relevant information about a matter. The article illustrates how, although courts have been imposing a Duty to Google on lawyers for the last several decades, there has been no real attempt to define the breadth and depth of the duty. Professor Murphy argues that the Duty to Google should be codified as a specific addition to the rules of professional conduct so that attorneys have some guidance on how to meet this emerging professional requirement. Like any good guide, this article concludes with a suggested model rule that provides direction for attorney use of existing technology as well as whatever technology comes next.

This volume's book reviews show readers a variety of worlds they can explore, some of which are bracing critiques of our society's heart-breaking shortcomings, and some of which dig deep into how to improve various skills and communication techniques. For those interested in books that discuss current social and civil rights issues, Aysha S. Ames reviews Caste: The Origins of Our Discontents by Isabel Wilkerson,

Ezra Ross reviews Against Empathy: The Case for Rational Compassion by Paul Bloom, and Pamela A. Wilkins reviews Down Girl: The Logic of Misogyny by Kate Manne. For those seeking practical advice on aspects of effective communication and legal skills, Derek H. Kiernan-Johnson reviews How to Do Things with Legal Doctrine by Pierre Schlag & Amy J. Griffin, Gabrielle Marks Stafford reviews Pity the Reader: On Writing with Style by Kurt Vonnegut & Suzanne McConnell, and Jessica Lynn Wherry reviews Range: Why Generalists Triumph in a Specialized World by David Epstein.

Finally, this volume provides three specialized and annotated bibliographies for those who wish to further engage in legal communication topics. Ellie Margolis provides a comprehensive bibliography of scholarship that involves the visual aspects of legal writing, an increasingly important subject in our digital world. Kristen E. Murray contributes an update of Kathy Stanchi's bibliography on persuasion, focusing on how scholars have built upon the foundational works included in the original bibliography. J. Christopher Rideout has compiled an updated bibliography of an essential topic for legal communication: applied legal storytelling.

As our work on Volume 18 comes to a close, we must say farewell to two of our Board Members: Maikieta Brantley, Social Media Editor, and Kristin Gerdy Kyle, Inter-Journal Liaison. Both took on new roles during a particularly challenging time, and their work has helped the journal to continue its transition to a new online format. Maikieta was a perfect choice for our first Social Media Editor because of her scholarly interest in the legal implications of social media. As a newer scholar and legal academic, we can't wait to see where her career takes her. Kristin has a long record of service to both the Association of Legal Writing Directors and the Legal Writing Institute, as well as both institutions' journals. In fact, before she was our Inter-Journal Liaison, she served as a Lead Editor. Her scholarship focuses on legal writing pedagogy, with an emphasis on communicating client-centered concepts to law students. Her institutional knowledge and familiarity with existing legal communication scholarship has been invaluable to *LC&R* over many years of service, particularly during the editorial process. We wish both Maikieta and Kristin the best as they move forward in their careers.

Margaret Hannon & Dr. JoAnne Sweeny
(Summer, 2021)

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ARTICLE

Declaring, Exploring, Instructing, and (Wait for It) Joking

Tonal Variation in Majority Opinions

Lisa Eichhorn*

1. Introduction

Few news reports regarding *Chiafalo v. Washington*,[1] the Supreme Court's 2020 "faithless electors" case, failed to note that Justice Elena Kagan had referred to both *Hamilton* and *Veep* in the majority opinion she authored for herself and seven other Justices.[2] For a few days, legal blogs and social media also noted,[3] celebrated,[4] condemned,[5] or debated[6]

* Professor of Law, University of South Carolina School of Law. I wish to thank journal editors Sherri Keene and Carol Mallory for their helpful insights and guidance throughout the process of editing this article.

1 140 S. Ct. 2316 (2020) (rejecting a constitutional challenge to a state statute that imposes fines on electors if they cast their Electoral College ballots for someone other than the candidate whom they had pledged to support).

2 *See, e.g.*, Robert Barnes, *Supreme Court Says a State May Require Presidential Electors to Support Its Popular-Vote Winner*, Wash. Post (July 6, 2020), https://www.washingtonpost.com/politics/courts_law/supreme-court-electoral-college-faithless-electors/2020/07/06/cf88f706-bf8f-11ea-b178-bb7b05b94af1_story.html; Mark Sherman, *Justices Reference 'Hamilton,' 'Veep' in Electoral College Decision*, Associated Press (July 6, 2020), https://www.dailynews.com/2020/07/06/justices-reference-hamilton-veep-in-electoral-college-decision; Marcia Coyle, *States Can Enforce Laws Punishing Presidential Electors Who Break Pledge, Justices Say*, Law.com (July 6, 2020, 10:29 AM), https://www.law.com/nationallawjournal/2020/07/06/states-can-enforce-laws-punishing-presidential-electors-who-break-pledge-justices-say/; Greg Stohr, *Top Court Lets States Stop 'Faithless' Presidential Electors (2)*, U.S. Law Week (July 6, 2020, 2:13 PM), https://news.bloomberglaw.com/us-law-week/high-court-lets-states-stop-faithless-presidential-electors.

3 *See, e.g.*, Amy Howe, *Opinion Analysis: Court Upholds Faithless Elector Laws*, SCOTUSblog (July 6, 2020, 1:43 PM), https://www.scotusblog.com/2020/07/opinion-analysis-court-upholds-faithless-elector-laws/.

4 For example, "A Hopeful Citizen" tweeted as follows: "Justice Kagan drops a Veep and Hamilton reference in the Chiafalo v. Washington introduction. I love it!" @ThePubliusUSA, Twitter (July 6, 2020, 10:28 AM), https://twitter.com/ThePubliusUSA/status/1280146643413864450.

5 *See, e.g.*, Gerard Magliocca, *Pop Culture References in Judicial Opinions*, PrawfsBlawg (July 6, 2020, 10:33 AM), https://prawfsblawg.blogs.com/prawfsblawg/2020/07/pop-culture-references-in-judicial-opinions.html ("I'm against it . . . . Won't all of this be really dated really quickly?").

6 *See id.* (listing reader comments stating various opinions regarding the propriety of Justice Kagan's references).

her mentioning of the Broadway and HBO hits. But Kagan's title-dropping is only one instance of a feature of any judicial opinion, including any majority opinion, that merits deeper analysis over the long term: tone.

Taking "tone" in the literary sense of a speaker's attitude toward a listener,[7] this article posits that the genre of the majority judicial opinion leaves more room for tonal variation than many writers and readers may have realized. I will first elaborate on the concept of tone, distinguishing it from voice and style. I will next review the literature on tone in legal writing and then describe the specific dynamics of tone inherent in majority opinions. At that point, I will closely analyze the tone of the *Chiafalo* opinion, contrasting it with the tone of another significant 2020 Supreme Court opinion, that of Justice Neil Gorsuch for a majority in the Title VII LGBT-rights case of *Bostock v. Clayton County*.[8] Finally, I will conclude with thoughts regarding the value of focusing on tone and tonal shifts in majority opinions.

2. Tone defined and distinguished

In modern literary theory, the concept of tone has been traced to I.A. Richards,[9] a theorist whose front-page obituary in the *New York Times* noted that he "dazzled Cambridge University in the 1920's with his works on criticism" and then, "decade after decade, generated new interest among intellectuals on both sides of the Atlantic in the . . . power of language."[10] In *Practical Criticism*, his seminal 1929 treatise, Richards defined "tone" as the reflection of a speaker's "*attitude to his listener*"[11] and theorized that tone was one of four ways in which a literary work communicates meaning, along with "sense" (the subject matter of the speaker's utterance), "feeling" (the speaker's attitude toward that subject matter), and "intention" (the speaker's purpose in making the utterance).[12] In the male-centered language of the time, Richards noted that a speaker "chooses or arranges his words differently as his audience varies, in automatic or deliberate *recognition of his relation to them*. The tone of his utterance reflects his awareness of this relation, his sense of how he stands

7 *See* I.A. Richards, Practical Criticism 175 (1929) (discussing tone).

8 140 S. Ct. 1731 (2020) (holding that Title VII prohibits discrimination based on homosexuality or transgender status).

9 M.H. Abrams, A Glossary of Literary Terms 136 (5th ed. 1988) (noting that "[t]he modern concern with tone dates mainly from I.A. Richards' definition of the term as expressing a literary speaker's 'attitude to his listener'").

10 Eric Pace, *I.A. Richards, Author, Teacher and Literary Critic, Is Dead at 86*, N.Y. Times, Sept. 8, 1979, at 1. The same obituary noted his popularity for decades as a teacher at Harvard: "When his audiences overflowed the lecture halls, he lectured in the street." *Id.* at 36.

11 Richards, *supra* note 7 (emphasis in original).

12 *Id.* at 174–76.

towards those he is addressing."[13] While some critics have used "tone" more broadly to encompass the speaker's attitude toward the subject matter and general mood,[14] or, in a different vein altogether, to refer to the quality of words' musicality,[15] I will use the term as Richards used it, in the sense of a speaker's attitude toward a listener.

Critics most often consider the literary speaker in a narrative work to be the persona that the author has assumed—that is, the one whom the reader understands to be telling the story.[16] Thus, tone reflects the storyteller's view of the storyteller's own relationship to the listener or reader. The tone of a literary work, like the tone of a speaking voice, can be "formal or intimate, outspoken or reticent, . . . condescending or obsequious, and so on through numberless possible nuances of relationship and attitude."[17] When a literary work succeeds, according to Richards, its tone represents "the perfect recognition of the writer's relation to the reader in view of what is being said and their joint feelings about it."[18] Tone thus reflects a quintessentially human aspect of writing. Indeed, the perception of tone evidently requires a human heart, as some recent missteps of IBM's Watson Tone Analyzer suggest.[19]

An author reveals tone most directly through word choice.[20] Sentence structure, organization of ideas, and inclusion or omission of certain

13 *Id.* at 175.

14 *See, e.g.*, J.A. Cuddon, The Penguin Dictionary of Literary Terms and Literary Theory 726 (5th ed. 2013) (defining "tone" as "[t]he reflection of a writer's attitude (especially toward his readers), manner, mood and moral outlook in his work; even, perhaps, the way his personality pervades the work"); Kelly J. Mays, The Norton Introduction to Literature 546 (12th ed. 2017) (noting that "tone" is "an effect of the speaker's expressions, *as if* showing a real person's feelings, manner, and attitude or relationship to a listener and to the particular subject or situation"); *see also* Abrams, *supra* note 9 (emphasizing I.A. Richards's definition of "tone" but noting that "some critical uses of 'tone' are broader and coincide in reference with what other critics prefer to call 'voice'").

15 *See* Bret Rappaport, *Using the Elements of Rhythm, Flow, and Tone to Create a More Effective and Persuasive Acoustic Experience in Legal Writing*, 16 Legal Writing 65, 68 (2010) (referring to rhythm, flow, and tone as "musical elements" that should be incorporated into legal writing); *see also* Richards, *supra* note 7, at 197 n.1 (distinguishing his own definition of "tone" from "the qualities of verse sounds," but noting that such qualities "do enable us to infer differences in the way the reader feels that he is being addressed").

16 Abrams, *supra* note 9, at 135–36.

17 *Id.* at 136.

18 Richards, *supra* note 7, at 198.

19 The Watson Tone Analyzer is an online program that "uses linguistic analysis to detect . . . tones found in text." https://tone-analyzer-demo.ng.bluemix.net/. Professor Jennifer Romig recently ran two versions of a mock email from an attorney to a client through the program. Among other results, Watson reported that the sentence, "This message follows up on discovery in Acme v. Client" indicated "joy" and that the words "enclosed please find" scored "high on emotional range" and indicated "anger." Jennifer Romig, *Emotions in Writing*, Listen Like a Lawyer (July 11, 2017), https://listenlikealawyer.com/2017/07/11/emotions-in-writing/; *see also* Kelly VanBuskirk & Matthew R. Letson, *An IBM Watson Tone Analysis of Selected Judicial Decisions*, 19 Scribes J. Legal Writing 25 (2020) (reporting results of Watson's analysis of 12 criminal-law decisions from New Brunswick, Canada).

20 Mays, *supra* note 14, at A15 (glossary entry).

information also contribute to the tone of an utterance or writing.[21] Consider the difference between these sentences:

- "The patient suffered a low-grade myocardial infarction."
- "I've got some bad news: Michael Walker had a mild heart attack."
- "Mia's daddy got sick and had to go to the hospital, but he's going to be okay."

Each may have been uttered by the same speaker, but each reflects a different attitude on the part of the speaker toward the listener and thus has a different tone. In the first example, the speaker believes the listener shares a sophisticated understanding of medical terminology and is relying on the speaker for a quick, precise report on a patient's condition. The speaker and listener are perhaps colleagues working in a hospital, and the speaker respects the listener as a trained professional. In the second example, the speaker perceives the listener as a layperson with respect to medicine who nevertheless can understand the gravity of even a mild heart attack. In addition, the speaker believes that the listener's emotions deserve respect. In the third example, the speaker views the listener—presumably a young child—as someone less sophisticated and more fragile than the speaker and as someone to whom the speaker owes a duty of reassurance. If we knew that the listener in the third example was someone more sophisticated and mature than a young child—perhaps a seventeen-year-old or even an adult—then we might say that the speaker's tone was condescending or patronizing instead of gentle and solicitous.

Tone in this sense is related to, but distinct from, two other terms from literary criticism: voice and style. Most critics use "voice" to refer to the qualities indicating the "pervasive presence" of a particular author behind a literary work, a "determinate intelligence and moral sensibility" that "has selected, ordered, rendered, and expressed these literary materials in just this way."[22] Voice allows us to recognize a work as the product of a particular author because voice inevitably reflects the author's persona.[23] Thus, unlike tone, voice focuses on the literary speaker independent of that speaker's relation to or attitude toward listeners.

21 *See* Cathren Page, *Not So Very Bad Beginnings: What Fiction Can Teach Lawyers About Beginning a Persuasive Legal Narrative Before a Court*, 86 Miss. L.J. 315, 326 (2017).

22 Abrams, *supra* note 9, at 136.

23 *See* Mays, *supra* note 14, at A15 (defining "voice" in a glossary entry as referring to "the speaker" or "the 'person' telling the story and that person's particular qualities of insight, attitude, and verbal style"); Andrea McArdle, *Teaching Writing in Clinical, Lawyering, and Legal Writing Courses: Negotiating Professional and Personal Voice*, 12 Clinical L. Rev. 501, 503 (2006) [hereinafter McArdle, *Teaching Writing*] (noting that voice "help[s] to distinguish individual writing"). For scholarly explorations of voice in legal writing, see generally Andrea McArdle, *Understanding Voice: Writing in a Judicial Context*, 20 Legal Writing 189 (2015) [hereinafter McArdle, *Understanding Voice*] (positing the simultaneous presence of both

"Style" as a concept in literary criticism is also distinct from tone. Style normally denotes an author's overall manner of expression and is independent of content; diction, rhythm, use of imagery, and various rhetorical devices are all components of style.[24] Style is thus broader than tone: the rhetorical choice to manifest a particular attitude toward the audience—that is, the choice of tone—is just one of many ingredients of an author's style.

3. Scholarly commentary on tone in legal writing

Scholarly treatments of tone in legal writing have tended to focus on advocacy and the appropriate tone to use in briefs; Kathryn Stanchi, Linda Berger, Bret Rappaport, and Elizabeth Fajans have all discussed or mentioned tone in terms of how forcefully attorneys should push their messages toward their audiences in written legal arguments.[25] The work of these scholars represents a consensus that a measured, reasonable tone—as opposed to an emotional, aggressive one—is more respectful to the reader and thus more likely to persuade a court.[26] If we think again of tone as reflecting the authorial persona's attitude toward the reader, then it makes eminent sense to avoid the hard, hyper sell. No judge wants to get the impression while reading a brief that the attorney-author views the court as one of P.T. Barnum's suckers.

Further, while not focusing on tone expressly, scholar Melissa Weresh has explored ethos in persuasive legal writing in a manner that relates to tone.[27] In classical rhetoric, ethos is a means of persuasion based upon

genre-based and authorial voices in judicial writing and recommending analyses of these voices as an aid to deeper understanding of opinions); McArdle, *Teaching Writing, supra*, at 503 (recommending ways in which teachers can help students maintain their individual voices as they enter a new professional discourse community); J. Christopher Rideout, *Voice, Self, and Persona in Legal Writing*, 15 Legal Writing 67 (2009) (exploring the concept of voice in legal writing and advocating the express teaching of voice-related concepts in legal writing courses).

24 Mays, *supra* note 14, at A13 (glossary entry); Cuddon, *supra* note 14, at 688. Critics may sometimes use the terms "voice" and "style" interchangeably, but voice can encompass choices regarding what to express in addition to choices regarding how to express it. McArdle, *Teaching Writing*, *supra* note 23, at 503 n.6.

25 Linda L. Berger & Kathryn M. Stanchi, Legal Persuasion: A Rhetorical Approach to the Science 141–48 (2018) (explaining how attorneys can establish a persuasive tone in their briefs by organizing content logically, acknowledging weaknesses in arguments, and avoiding disparagement of their opponents); Rappaport, *supra* note 15, at 99 (noting that appropriate tone helps establish a writer's credibility with readers); Elizabeth Fajans, *Hitting the Wall as a Legal Writer,* 18 Legal Writing 3, 27–32 (2012) (using introduction sections from two trial briefs to demonstrate persuasive and unpersuasive tone and "pitch"); *see also* Page, *supra* note 21 (explaining how opening sentences in both fictional narratives and legal briefs can set an effective tone).

26 *See, e.g.,* Berger & Stanchi, *supra* note 25, at 141 (instructing that "a more moderate, tempered tone is more persuasive than a one-sided, aggressive tone"); Rappaport, *supra* note 15, at 100 (advising that a "too strident" tone can backfire by making the reader feel "bludgeoned" and thus "angry"); Fajans, *supra* note 25, at 30 (criticizing as unpersuasive a brief excerpt whose tone is "aggressive and heavy handed").

27 Melissa H. Weresh, *Morality, Trust, and Illusion: Ethos as Relationship*, 9 Legal Comm. & Rhetoric 229 (2012).

the audience's perception of the speaker. Aristotle's *Rhetoric* lists three attributes that inspire an audience to believe that a speaker is credible: good sense, good moral character, and goodwill.[28] Weresh posits that while these attributes of ethos may reside in the speaker (whom Weresh labels "the source"), the likelihood that the audience will perceive and be persuaded by these attributes depends upon the relationship that the speaker has cultivated with the audience through the speech.[29] If that relationship is one of familiarity, similarity, and attraction, then the speaker is more likely to persuade as a matter of ethos.[30]

While the text of Weresh's article mentions "tone" only in one very short paragraph,[31] the idea inheres in her thesis to the extent that a speaker's attitude toward an audience affects the potential for a positive relationship to form between them. The concept of tone also inheres in some of the advice Weresh offers to attorneys in the article. For example, she notes that attorneys should use "subtle" but persuasive organizational strategies that prevent readers from feeling manipulated[32] and suggests that they might include references to literature.[33] Such techniques signal a writer's respect for the reader's agency, intelligence, and education and thus predispose the reader to feel positively toward the writer. Thus, building on Weresh's work, one could say that a writer persuades by creating a positive relationship with a reader, but also that the creation of a positive relationship depends in part on the reader's perception of the writer's attitude toward the reader—or, in other words, the reader's perception of the writer's tone. Indeed, Aristotle's *Rhetoric* itself teaches that "it adds much to an orator's influence that . . . he *should be thought* to entertain the right feelings towards his hearers."[34]

In terms of judicial writing, scholars and commentators have often focused on style[35] or voice[36] as opposed to tone.[37] When the literature

28 Aristotle, *Rhetoric, in* The Rhetoric and the Poetics of Aristotle 1, 91 (W. Rhys Roberts trans., Modern Library College Editions 1984).

29 Weresh, *supra* note 27, at 235 (positing that "a positive ethos is based not only on the positive characteristics of the source, but on the relationship that the source is able to foster with her audience" and that an advocate should therefore strive both to exhibit "characteristics of ethos" in herself and to develop "positive source-relational attributes").

30 *Id.* at 234.

31 *Id.* at 255 ("Style also influences the tone of legal writing and therefore fosters the relationship between advocate and reader.").

32 *Id.* at 247 (discussing organizational priming as a subtle persuasive technique); *id.* at 248 (discussing foreshadowing as a subtle persuasive technique).

33 *Id.* at 262–64.

34 Aristotle, *supra* note 28, at 90–91 (emphasis added).

35 *See, e.g.*, Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. Chi. L. Rev. 1421 (1995); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1415–18 (1995) (discussing judicial style and judicial personality).

on judicial opinions does discuss tone in the I.A. Richards sense, it does so primarily in terms of dissenting opinions, where individual judicial writers have the most rein to develop authorial personae and express their attitudes toward readers. J. Lyn Entrikin, for example, has studied the attitudes that Supreme Court dissenters have shown toward their colleagues in the majority, a critical slice of the readership of any dissenting opinion; she documents a declining level of respect toward these readers over the Court's history and focuses on Justice Scalia's notable lack of civility in dissent.[38]

The few scholars expressly considering tone in majority opinions have tended to treat the concept quite generally, casting courts and their readers in two relatively monolithic roles. As a result, these scholars posit that a particular tone, or at most one of two particular tones, either should characterize—or inevitably does characterize—all majority opinions.

For example, in a 1961 essay, Walker Gibson encourages appellate judges to consider four questions when taking up the task of opinion-writing:

1. To whom am I talking – who is my reader?
2. What do I want my reader to do?
3. Who am "I"—that is, what sort of speaking voice shall I project by the manner in which I compose my language?
4. What relation should I express between this "I" and my reader—should I be formal or informal, distant or intimate? To use the literary term, what is my *tone*?[39]

The essay goes on to criticize a tendency of judicial opinions to adopt a "lofty" tone of verbosity and affected certainty.[40] As a remedy, Gibson, in thankfully outdated sexist language, advises judicial writers to acknowledge opposing arguments and to strive for conciseness: "the tone should imply two busy men, writer and reader, both perfectly capable of

36 *See generally* McArdle, *Understanding Voice*, *supra* note 23; Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotions in Supreme Court Opinions*, 59 Wash. & Lee L. Rev. 193 (2002) (analyzing the voices of eight twentieth-century Supreme Court justices); Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 Yale J.L. & Human. 201, 204–08 (1990) (identifying a "monologic voice" in judicial opinions).

37 While Richard Posner, in an article on judicial style, does briefly discuss "tone," he uses the term more in the sense of register, or level of formality. Posner, *supra* note 35, at 1426–27 (discussing devices that raise or lower tone). Patricia Wald, in exploring judicial rhetoric, also mentions "tone" from time to time, but she most often uses the term to refer to the writer's attitude toward the subject matter rather than toward the reader. *See, e.g.*, Wald, *supra* note 35, at 1412 ("The typical tone of a dissent is troubled, outraged, sorrowful, puzzled.").

38 J. Lyn Entrikin, *Disrespectful Dissent: Justice Scalia's Regrettable Legacy of Incivility*, 18 J. App. Prac. & Process 201 (2017).

39 Walker Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U. L. Rev. 915, 921 (1961).

40 *Id.* at 924 ("In their effort at dignified conviction, judges may lose a sense of life's mystery and complication, and by adopting too lofty a tone, they remove themselves from their readers.").

following an argument that is succinct, and efficiently composed."[41] Thus, although Gibson encourages the judicial writer to think of himself (or, I would add, herself) as an "I," his prescriptions imply that every "I" behind a majority opinion should be the same "busy man" who should express the same attitude toward the reader—yet another generic "busy man."

A more recent and comprehensive examination of judicial style by William Popkin discusses tone as a rhetorical component of majority opinions and recommends, as does Gibson, that judges avoid a tone of affected certainty, at least for opinions in truly hard cases.[42] However, Popkin theorizes that only two tones can exist in majority opinions: an "authoritative tone," which "speaks down to the audience" with decided confidence, or an "exploratory tone," which "draws the reader into a participatory community with the judge, wondering aloud about how to deal with the complexities of the case."[43] He notes that the authoritative tone, which masks the decisional difficulty in hard cases, leaves a "hollowness" in judicial opinions, and he warns that "a profession aware of its own posturing will provide a weak defense when confronted by a questioning public."[44] For this reason, Popkin recommends the use of the exploratory tone in such cases, noting its better "fit" with modern legal culture.[45]

Scholar Robert Ferguson would contend that an exploratory tone is incompatible with the genre of the majority opinion; in a seminal article, he identifies a "declarative tone"—not unlike Popkin's "authoritative tone"—as inhering generically in majority opinions, which, by their nature and to preserve judicial legitimacy, must "reach[] down from above in a way that can be accepted from below."[46] He posits this tone as one ingredient contributing to a necessary "rhetoric of inevitability" in such opinions and describes the declarative tone as one of "[h]yperbole, certitude, assertion, simplification, and abstraction."[47] Further, Ferguson

41 *Id.* at 923.

42 William D. Popkin, Evolution of the Judicial Opinion: Institutional and Individual Styles 169–70 (2007) (stating that judges should "reject an authoritative tone [and] instead acknowledge the multiple values relevant to a decision and the resulting complexity and uncertainty in determining judicial law").

43 *Id.* at 147. Popkin cites an opinion of Oliver Wendell Holmes as exemplifying an authoritative tone in that the opinion summarily dismisses an opposing argument without explicit reasoning and states the majority's premise with brevity and without substantial analysis. *Id.* at 152 (citing Lucas v. Earl, 281 U.S. 111 (1930)). As examples of exploratory tone, Popkin cites excerpts from dozens of opinions of Judge Richard Posner in which Posner expressly shares doubts regarding the law and its application, thinks aloud regarding his analysis, and rejects bright-line rules in favor of more nuanced standards. *Id.* at 167–75.

44 *Id.* at 173.

45 *Id.* at 177.

46 Ferguson, *supra* note 36, at 213.

47 *Id.* While Ferguson's article uses excerpts from two Supreme Court flag-salute cases from the 1940s to illustrate his theory, it also notes that this choice is "an arbitrary one in that any case or series of cases or level of cases might serve." *Id.* at 203 (explaining the author's reasons for choosing as examples Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) and W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).

theorizes that "the listener-reader of the judicial opinion" inevitably "welcomes the declarative tones that make [the enterprise of judgment] possible."[48] Ferguson's theory, while widely cited,[49] spends little time on the individuality of writers and readers of judicial opinions. Thus, neither Gibson's prescriptions, nor Popkin's bivalent view, nor Ferguson's theory leave much room for the possibility of tonal diversity in majority opinions.

I.A. Richards himself notes that some contexts will constrain a writer's tone. He offers the example of the author of a scientific treatise, whose tone is "settled" by "academic convention."[50] The treatise author, if "wise" enough to hew to convention, will show respect for readers and take pains to facilitate their accurate understanding and acceptance of his content. In the case of majority judicial opinions, convention—and the institutional role of the court—similarly dictate that authors demonstrate respect for readers and take pains to be understood by them. The legitimacy of the judicial system also depends on societal acceptance of majority opinions, and this dependence similarly constrains tone, as Ferguson explains. But within these constraints, a variety of tones can and does exist, largely as a function of how individual judicial authors envision themselves and their readers, who are actual humans, unlike Gibson's one-dimensional "busy man."

4. The dynamics of tone in majority judicial opinions: As whom and to whom do their authors write?

4.1. Personae and majority opinions

If tone, in the I.A. Richards sense, is the attitude of a speaker toward a listener, then it depends on the identities of both the speaker and the listener. In the context of a majority opinion, the speaker is the persona of the opinion's author—the "I" as whom the author has chosen to write. Of course, in the broadest sense, the authorial persona in a majority opinion is the court; by definition, a majority opinion speaks for the court.[51] But different judges may choose to speak *as* the court in different ways.

Indeed, Christopher Rideout has noted that although "the task of the writing judge is to appropriate" the voices of all judges who voted in the majority "into a single authoritative voice of the court,"[52] the persona of

48 *Id.* at 211.

49 A Westlaw search on January 3, 2021, revealed over 100 citations to Ferguson's article, occurring, among other places, in multiple articles in both the *Harvard Law Review* and the *Yale Law Journal*, as well as in four articles in *Legal Communication and Rhetoric* and another four articles in *Legal Writing: The Journal of the Legal Writing Institute.*

50 Richards, *supra* note 7, at 177.

51 Ruggero J. Aldisert, who was a federal circuit judge and noted authority on opinion-writing, once explained that the author of a majority opinion, "for the purposes of the case, is the designated representative or spokesperson for the court to all future readers." Ruggero J. Aldisert, Meehan Rash & Matthew P. Bartlett, *Opinion Writing and Opinion Readers*, 31 Cardozo L. Rev. 1, 18 (2009).

the majority opinion is not completely pre-ordained: "The individual act of writing . . . represents an instantiation of those voices in a particular moment and context, and through a particular subjectivity."[53] Thus, there is some room to maneuver within the authorial persona, despite the constraints of the genre.

Some judges, for fear of making the court appear partial (or perhaps fallible), may choose a traditionally formal, institutional persona that sits well within boundaries of conventional constraints. For example, Judge Edith Hollan Jones of the Fifth Circuit has explained that she resists using the word "we" in opinions because she believes "that this pronoun casts an air of subjectivity upon statements that ought to reflect the objectivity of the law and legal process."[54]

Others, such as Judge Patricia Wald, who presided over the District of Columbia Circuit, have applauded opinions whose words flow from a more particular, human persona:

> I think it a good thing that judges write and reason differently—and recognizably so. It is no sin if the personality of the individual judge colors the opinion. It should be at least minimally comforting to a litigant to know that a live human being has brought her faculties to bear on his problem . . . .[55]

Even Judge Wald herself, however, confessed that she might have been, like most judges, "too timid" to inject too much personality and informality into opinions, lest she be viewed as insufficiently "serious" or accused of pandering to the public or the media.[56] And, sometimes, a human persona can suffer from human failings, especially when colleagues on the bench disagree pointedly on a case: "If a dissent is outraged and self-righteous, the majority author will frequently rejoin in kind."[57]

Judge Posner's opinions, even when written for the majority, have a distinct persona. He once explained that he tried make his opinions "sound conversational rather than declamatory."[58] His persona has been described as someone in the process of thinking through the analysis of a case, openly admitting to doubt and exploring various avenues of

52 Rideout, *supra* note 23, at 88.

53 *Id.* at 90.

54 Edith Hollan Jones, *How I Write*, 4 Scribes J. Legal Writing 25, 29 (1993).

55 Patricia M. Wald, *How I Write*, 4 Scribes J. Legal Writing 55, 61 (1993).

56 *Id.* at 63.

57 *Id.* at 57.

58 Richard A. Posner, *How I Write*, 4 Scribes J. Legal Writing 45, 47 (1993).

resolving issues.[59] Because his majority opinions explain the reasoning that moved him personally, rather than the common-denominator reasoning of the majority, they are more likely than others' opinions to appear in the reporters followed by concurrences and dissents from colleagues.[60] Nevertheless, Posner once wrote that his "nonstandard" practice of self-focus made his opinions "strong and honest," which was better than being "unanimous."[61] The Posner persona thus resides at the edge of the envelope of conventional constraints regarding the majority-opinion genre.

Justices of a system's highest court find themselves in a slightly different position when it comes to the formulation of personae. On the one hand, their authority is famously final,[62] so perhaps a justice has more leeway to be unconventional, even when writing for the majority, than does a judge on an intermediate appellate court.[63] On the other, an individualistic persona may be "too intimate" to represent so august an institution, and Popkin has noted that Justices of the United States Supreme Court "might feel especially burdened by their responsibility and anxious to project an air of authority that could be undermined by the familiarity and uncertainty of a personal/exploratory style."[64]

4.2. Audience and majority opinions

The readership of a majority judicial opinion may be varied and vast. Some readers are insiders to the case: the lower-court judge or judges whose court's opinion is being reviewed and the parties' attorneys. The parties, depending on their level of legal sophistication and direct involvement with the litigation, may read the opinion as well. If the opinion was not unanimous, then the judges or justices not joining the majority will be the ultimate insider-readers. Indeed, when draft opinions are circulated among the appellate judges who have heard the case, then a judge or justice who originally voted against the majority may actually be persuaded by a draft of the majority opinion to switch votes and join in it, before the final version is publicly announced.[65] A final group of insider-

59 Popkin, *supra* note 42, at 159 (noting that a Posner opinion "reads as though the author is thinking out loud about how to work through the issues").

60 Posner, *supra* note 58, at 47.

61 *Id.*

62 As Justice Robert Jackson wrote, "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (Jackson, J., concurring).

63 *See* Rideout, *supra* note 23, at 103 (explaining that Justice Stevens had the freedom to insert more of an "authorial presence" in a particular opinion in part because the opinion was a dissent but also simply because "as a Supreme Court justice he ha[d] both the legal and the rhetorical authority" to do so).

64 Popkin, *supra* note 42, at 175–76.

readers is only potential but nevertheless important: if the opinion comes from an intermediate appellate court, then the justices of the highest court in the system will of course read the opinion if a litigant appeals and the highest court agrees to review it.

Among outsiders to the case, the most likely readers of a majority opinion are attorneys and judges performing research on the issues addressed, who need to understand the opinion's precedential implications. Laypersons with a particular interest in the issues may sometimes read a majority opinion, especially one issuing from the Supreme Court, although most lay readers probably see only those snippets that have made it through the filters of journalists and bloggers. Academics and law students studying the issues are outsider-readers as well.

These groups each have differing levels of legal sophistication, knowledge of the case, familiarity with the conventions of legal writing generally and opinion-writing in particular, and motivations for reading the opinion in the first place. And judges, while certainly conscious of all these potential readers, may aim particularly at one group or another when drafting a majority opinion.[66] Naturally, the groups to whom a given judge primarily writes will affect the tone of the resulting opinion.

The Federal Judicial Center's manual on opinion-writing explains that appellate opinions are written primarily for litigants, their counsel, and the lower courts whose decisions are being reviewed.[67] However, a 1960 discussion at a conference for state and federal appellate judges turned up a wide variety of responses when the judges were asked for whom they wrote, ranging from "posterity" to "the losing lawyer," from "law students" to "the bar," and from "the legislature" to "the readers of the *New York Times*, or comparable local newspapers."[68] The discussion naturally included comments on these and other responses, with one judge noting that "posterity" was so vague as to be meaningless, another confessing that the idea of writing for law students "never occurred to me," and another commenting that unless one is on the Supreme Court, having one's opinion featured in a newspaper was so rare as to be "just a judge's dream."[69]

65 The official website of the U.S. federal court system explains that Supreme Court justices may "switch their votes" in the process of reading circulated draft opinions. *See Supreme Court Procedures*, U.S. Courts, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (last visited July 28, 2020).

66 *See* Posner, *supra* note 35, at 1431 (discussing audiences at which opinion-writers "seem[] particularly to be aiming"); Patricia M. Wald, *A Reply to Judge Posner*, 62 U. Chi. L. Rev. 1451, 1453 (1995) (identifying "litigants and lawyers" as the "primary audience" for judicial opinions and explaining that the author, a federal appellate judge, included detailed facts in a particular opinion to help "prosecutors, defense attorneys, and trial judges in future cases" understand the precise holding).

67 Fed. Jud. Ctr., Judicial Writing Manual: A Pocket Guide for Judges 5 (2d ed. 2013).

68 Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 Colum. L. Rev. 810, 813–14 (1961) (describing a conference session led by Walker Gibson at the Appellate Judges Conference in 1960).

Such very human differences among judges did not disappear in 1960,[70] and these differences allow for, and surely produce, a wide variety of tones in majority opinions. A writer addressing "posterity" will adopt a different attitude toward the reader than will a writer who is focused on explaining to "the losing lawyer" why certain arguments were rejected. A writer envisioning a classroom of law students will project a still different tone, and one implicitly lobbying a legislature to amend an unworkable statute yet another. Indeed, in moving from one passage of an opinion to another, a writer may envision different audiences as the focus and purpose of the opinion's passages change. Thus, even a single majority opinion may exhibit a diversity of tones.

5. A comparative study of tone in two recent majority opinions

At this point, some concrete examples of diverse tones are in order, and this section will focus on two recent Supreme Court majority opinions, one authored by Justice Elena Kagan and the other by Justice Neil Gorsuch. Both Justices have been noted for their writing,[71] and both will likely remain on the Court for quite some time, perhaps continuing to evolve their tones and certainly influencing the writing of future judges and justices.

Justice Kagan was an absolute beginner in terms of authoring opinions in her own name when she joined the Court in 2011; she remains the only sitting Justice who had never served as a judge before her confirmation.[72] Of course, as a clerk for Judge Abner Mikva and then for Justice Thurgood Marshall, as a Harvard Law School professor and dean, and as the United States Solicitor General, she had influenced, written about, and generally marinated in Supreme Court opinions for decades.[73] Her opinion-writing style has been praised for its accessibility to lay readers[74] and also for its

69 *Id.*

70 *See, e.g.,* Thomas M. Reavley, *How I Write*, 4 Scribes J. Legal Writing 51, 54 (1993) (explaining, as a Fifth Circuit judge, that "[w]e write to be read by lawyers and judges"); Jones, *supra* note 54, at 29 (asserting that opinions should be "comprehensible to an intelligent nonlawyer"); Posner, *supra* note 35, at 1431 (noting that some judges, so-called "impure judicial stylist[s]," write for a primary audience of lawyers and laypeople who can "'see through' the artifice of judicial pretension"); *see also* Laura Krugman Ray, *"The Hindrance of a Law Degree": Justice Kagan on Law and Experience*, 74 Md. L. Rev. Endnotes 10, 10 (2015) (quoting Justice Elena Kagan as saying that she tries to make her opinions "understandable to a broad audience").

71 *See, e.g.*, Mark Joseph Stern, *Elena Kagan Is the Best Writer on the Supreme Court*, Slate (Mar. 1, 2016, 2:07 PM), https://slate.com/news-and-politics/2016/03/elena-kagans-dissent-in-lockhart-v-united-states-shows-shes-scalias-successor-as-the-best-writer-on-the-supreme-court.html; Ross Guberman, *Neil Gorsuch Is a Gifted Writer. He's a Great Writer. But Is He a "Great Writer"? Part One: Four Gifts*, Legal Writing Pro (Feb. 7, 2017), https:// www.legalwritingpro.com/blog/judge-gorsuch-gifts/.

72 Margaret Talbot, *The Pivotal Justice,* New Yorker, Nov. 18, 2019, at 36.

"wit and pizzazz."[75] Indeed, she has been called the Court's "most innovative writer"[76]—and sometimes its best.[77] Commentators have noted her frequent use of colloquialisms, analogies between legal issues and quotidian situations, and vivid language.[78] She has explained that she wants her opinions to be "understandable to a broad audience" and to "sound like" herself.[79] She recognizes, however, that when writing for a majority of the Court, she "can't go to town" with her personal voice and may need to leave "some of [her] favorite lines" on the "cutting room floor."[80]

Justice Gorsuch had served as a judge on the Tenth Circuit for over ten years and had authored 175 published majority opinions before joining the Supreme Court in 2017.[81] Like Kagan, he had worked as a United States Supreme Court clerk, in his case for Justice Byron White and then for Justice Anthony Kennedy. [82] His experience also included service as the Principal Deputy Associate Attorney General at the United States Department of Justice.[83] When he received his Supreme Court nomination, commentators frequently praised his writing style.[84] Indeed, an academic study of his Tenth Circuit majority opinions has noted that "Gorsuch's writing style conforms in large part to the guidance of legal writing experts, who urge judges to write accessible, engaging, and even entertaining opinions."[85] Critics have been more divided regarding Gorsuch's writing style in recent years, with some citing a tendency to overexplain that has inspired a hashtagful of mockery,[86] but others continuing to note a gift for writing readable prose.[87]

73 *Current Members*, Sup. Ct. of the U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Aug. 1, 2020).

74 *See, e.g.,* Jeffrey Rosen, *Strong Opinions*, New Republic (July 28, 2011), https://newrepublic.com/article/ 92773/elena-kagan-writings (praising Kagan's ability to explain "the constitutional stakes in plain language that all citizens can understand").

75 Stern, *supra* note 71.

76 Ray, *supra* note 70.

77 Stern, *supra* note 71.

78 Ray, *supra* note 70.

79 *Conversation with Supreme Court Justice Elena Kagan*, C-SPAN (Sept. 20, 2012), https://www.c-span.org/video/?308291-1/conversation-supreme-court-justice-elena-kagan&start=2782.

80 *Id.*

81 Nina Varsava, *Elements of Judicial Style: A Quantitative Guide to Neil Gorsuch's Opinion Writing*, 93 N.Y.U. L. Rev. Online 75, 76 (2018).

82 *Current Members*, *supra* note 73.

83 *Id.*

84 *See, e.g.,* Adam Liptak, *In Judge Neil Gorsuch, an Echo of Scalia in Philosophy and Style*, N.Y. Times (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/us/politics/neil-gorsuch-supreme-court-nominee.html?searchResultPosition=2 (praising Gorsuch's "talent for vivid writing" and calling him "a lively and accessible writer"); Eric Citron, *Potential Nominee Profile: Neil Gorsuch*, SCOTUSblog (Jan. 13, 2017, 12:53 PM), https://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch/ (referring to Gorsuch as "a particularly incisive legal writer" whose opinions have "flair").

85 Varsava, *supra* note 81.

Stylistically, both Kagan's and Gorsuch's opinions share a number of features. Both writers use narrative techniques from time to time, both dispense with legalese whenever possible, and both use colloquial language, giving their prose a relatively informal flavor, at least for judicial writing.[88] Commentators have gone so far as to describe at least one opinion of each as "breezy."[89] Yet for all this stylistic similarity, each deploys different tones in majority opinions, and each can use a different range of tones within a single opinion.

A. *Chiafalo v. Washington*: A case study in Kagan's majority-opinion tones

A "faithless elector" is a member of the Electoral College who has pledged to cast a ballot for the winner of a state's popular vote but then violates that pledge.[90] The Supreme Court held in *Ray v. Blair*[91] that states may extract such pledges from the electors whom they appoint, and *Chiafalo*[92] raised the issue of whether states may constitutionally enforce such pledges—for example by fining faithless electors as the State of Washington fined Peter Chiafalo, Levi Guerra, and Esther John.[93] These three electors challenged their thousand-dollar fines, arguing that the United States Constitution allowed them to cast their electoral ballots however they pleased.[94] An eight-Justice Supreme Court majority held against the electors, finding no such right in the Constitution.[95] Justice Elena Kagan authored the Court's opinion. Justice Clarence Thomas concurred in the judgment but filed a separate opinion.[96]

86 *See* Dan Epps (@danepps), Twitter (Jan. 23, 2018, 4:18 PM), https://twitter.com/danepps/status/955912760629526528 ("Let's rewrite some classic lines from SCOTUS ops . . . #GorsuchStyle.").

87 Adam Liptak, *#GorsuchStyle Garners a Gusher of Groans. But Is His Writing Really That Bad?*, N.Y. Times (Apr. 30, 2018), https://www.nytimes.com/2018/04/30/us/politics/justice-neil-gorsuch-writing-style.html (discussing critics' mixed opinions).

88 *See* Varsava, *supra* note 81 (describing Gorsuch's style as using narrative suspense, eschewing technical language, and being much less formal than average); Laura Krugman Ray, *Doctrinal Conversation: Justice Kagan's Supreme Court Opinions*, 89 Ind. L.J. Supp. 1, 6 (2012) (noting that Kagan's style shows a recognition of opinions as "narratives"); *id.* at 9 (noting Kagan's lack of "legalese"); *id.* at 4 (noting Kagan's "informal and even colloquial diction").

89 Mark Joseph Stern, *Neil Gorsuch Just Handed Down a Historic Victory for LGBTQ Rights*, Slate (June 15, 2020, 12:19 PM), https://slate.com/news-and-politics/2020/06/supreme-court-lgbtq-discrimination-employment.html (referring to a Gorsuch majority opinion as "breezy"); Noah Feldman, *It's Okay to Laugh at the Supreme Court*, Bloomberg (Mar. 4, 2016, 9:10 AM), https://www.bloomberg.com/opinion/articles/2016-03-04/it-s-ok-to-laugh-at-the-supreme-court (describing a Kagan dissent as "breezy").

90 *Chiafalo*, 140 S. Ct. at 2321–22 (explaining the concept of "so-called faithless voting" by electors and the history of states' treatment of "faithless electors").

91 343 U.S. 214 (1952).

92 140 S. Ct. 2316.

93 *Id.* at 2322.

94 *Id.*

95 *Id.* at 2320.

While Kagan's majority opinion hews to conventions of the genre in that it is organized around traditional Roman-numeral headings and contains citations in the Court's usual style,[97] its tone is almost never the "declaratory" one that Robert Ferguson described, which speaks with "hyperbole, certitude, assertion, simplification, and abstraction."[98] The opinion does exhibit "certitude" in that it is never tentative in its analysis or conclusions (and thus does not exhibit William Popkin's "exploratory" tone, either), but the opinion is devoid of hyperbole and contains a wealth of concrete details rather than simplification and abstraction. Nor does the opinion "speak down" to the reader in William Popkin's "authoritative" tone. The opinion's authority, of course, is inherent, and Kagan takes advantage of this fact as a writer to let tones do other work.

Indeed, the *Chiafalo* majority opinion exhibits a palette of tones as it proceeds from a brief introduction, to a detailed explanation of the issue (which necessitates elaboration of some Constitutional history), to the Court's legal analysis, to—finally—a one-paragraph summary of that analysis. The introduction, in three short paragraphs, speaks respectfully and directly to a reader who is certainly an outsider to the case and probably to the legal discourse community. With the exception of a single citation, the introduction uses no technical or legal language as it describes the issue and states the Court's holding:

> Every four years, millions of Americans cast a ballot for a presidential candidate. Their votes, though, actually go toward selecting members of the Electoral College, whom each State appoints based on the popular returns. Those few "electors" then choose the President.
>
> The States have devised mechanisms to ensure that the electors they appoint vote for the presidential candidate their citizens have preferred. With two partial exceptions, every State appoints a slate of electors selected by the political party whose candidate has won the State's popular vote. Most States also compel electors to pledge in advance to support the nominee of that party. This Court upheld such a pledge requirement decades ago, rejecting the argument that the Constitution "demands absolute freedom for the elector to vote his own choice." *Ray v. Blair*, 343 U.S. 214, 228, 72 S.Ct. 654, 96 L.Ed. 894 (1952).

96 *Id.* at 2329 (Thomas, J., dissenting).

97 The United States Supreme Court has its own guide to style and citation. *See* Office of the Rep. of Decisions, Supreme Ct. of the U.S., The Supreme Court's Style Guide (Jack Metzler ed., 2016), https://budgetcounsel.files.wordpress.com/2018/10/supreme-courts-style-guide.pdf.

98 *See supra* note 36 and accompanying text.

> Today, we consider whether a State may also penalize an elector for breaking his pledge and voting for someone other than the presidential candidate who won his State's popular vote. We hold that a State may do so.[99]

The tone is respectful from the first sentence, which assumes no knowledge of the subject matter on the part of the reader but also avoids pedantry. It simply states, as a journalist might, a fact that would work for anyone as an easy point of access to a complex issue. The second sentence, with its informal "though" instead of "however," adds a conversational note, as though a speaker is warming up to her subject in the presence of interested listeners. This straightforward, non-legalistic tone continues through the rest of the introduction. Indeed, the giveaway that this text is in fact a judicial opinion does not come until the seventh sentence of the introduction, with the reference to "This Court." In the last two sentences, the "Court" becomes the eight-Justice *Chiafalo* majority with a formulaic "we," but, based on the tone established earlier, the "we" does not sound particularly royal.

Part I of the opinion proceeds to a more precise explanation of the issue, which requires a constitutional history lesson regarding the Electoral College along with a tonal shift that establishes more intimacy with the reader. This part begins with the sentence "Our Constitution's method of picking Presidents emerged from an eleventh-hour compromise."[100] Now the first-person plural no longer refers to the Court; instead, it refers to the speaker and all (American) readers as one unified group. The "eleventh-hour compromise" hints of a good story to come, perhaps one told between acquaintances. The diction becomes less formal as Kagan describes how the delegates to the Constitutional Convention accepted a proposal for an Electoral College, "but with a few tweaks," resulting in Article II, § 1, clause 2, which requires states to appoint a certain number of electors in any manner their legislatures deem appropriate.

From there, as the text elaborates on Article II, § 1, the tone becomes even less formal and more intimate: "The next clause (but don't get attached: it will soon be superseded) set out the procedures the electors were to follow." This is not communication between Walker Gibson's "busy men"; the speaker and her audience have become friends. Kagan's joking aside is both ironically self-deprecating ("Surely you've been loving and memorizing everything I've told you so far, right?") and slightly apologetic ("I'm sorry to bog you down with this legal detail, but trust me; I'm

99 *Chiafalo*, 140 S. Ct. at 2319–20.

100 *Id.* at 2320.

going somewhere.") The speaker knows the listener well enough to have confidence that all of these messages will be received.

This intimate, friendly tone reaches its height with two paragraphs in Part I that recount what the opinion later calls "a pair of fiascos."[101] The first occurred in 1796. Because Article II originally required electors to each cast two ballots, with the ballot-winner becoming President and the runner-up his Vice President, it allowed for candidates from two warring parties, Federalist John Adams and Republican Thomas Jefferson, to become President and Vice President, respectively. Kagan's opinion, after relating this story, notes parenthetically that "One might think of this as fodder for a new season of Veep."[102] Now speaker and listener are on the couch binge-watching together.

The intimacy continues in the recounting of the second fiasco:

> Four years later, a different problem arose. Jefferson and Aaron Burr ran that year as a Republican Party ticket, with the former meant to be President and the latter meant to be Vice. For that plan to succeed, Jefferson had to come in first and Burr just behind him. Instead, Jefferson came in first and Burr . . . did too. Every elector who voted for Jefferson also voted for Burr, producing a tie. That threw the election into the House of Representatives, which took no fewer than 36 ballots to elect Jefferson. (Alexander Hamilton secured his place on the Broadway stage—but possibly in the cemetery too—by lobbying Federalists in the House to tip the election to Jefferson, whom he loathed but viewed as less of an existential threat to the Republic.) By then, everyone had had enough of the Electoral College's original voting rules.[103]

One can almost hear the rimshot after the "did too." And the reference to Hamilton, while unnecessary to the story and to the legal analysis to come, maintains the tone of close connection between speaker and listener, writer and reader, by drawing on common cultural knowledge.

The remainder of Part I explains how the Twelfth Amendment, ratified in 1804, ushered in our modern system of electors who vote specifically for President and Vice President with distinct ballots, and how states instituted popular presidential elections and statutory measures requiring electors to cast ballots for the winner of the popular vote. The opinion at this point also describes the state of Washington's system of extracting from would-be electors a pledge of faith to the popular vote

101 *Id.* at 2327.

102 *Id.* at 2320.

103 *Id.* at 2320–21.

before finalizing their appointments, and of enforcing that pledge through monetary fines.

This passage of the opinion eases off the intimate, joking tone of earlier paragraphs and moves toward a more pedagogical one, aimed at explaining legal complexities to an interested beginner. For example, a lead-in to a block quote from a portion of the Twelfth Amendment refers not to what its "operative language provides" but instead to what its "main part . . . says."[104] Another sentence refers to what Washington does "[w]hen the vote comes in" rather than "when the election returns are reported."[105] And, like a treat for those who complete all of the assigned reading, Kagan drops the following self-referential note describing two states with anomalous electoral voting rules: "Maine and Nebraska (which, for simplicity's sake, we will ignore after this footnote) developed a more complicated system . . . ."[106] The "we" here refers literally to the majority, but it seems just as much to refer to Kagan and her implied students.

After explaining the procedural history and noting that the Tenth Circuit, in a different case, had reached a different holding on the ultimate issue than had the Supreme Court of Washington, Part I ends, as did the introduction, with another tonal shift: "We granted certiorari to resolve the split. We now affirm the Washington Supreme Court's judgment that a State may enforce its pledge law against an elector."[107] The "we" is now unmistakably the majority, and the tone very briefly shifts from pedagogical to authoritative.

Part II of the majority opinion describes the Court's reliance on the text of Article II, § 1 and of the Twelfth Amendment, as well as on historical context, to conclude that the Constitution does not give electors the right to vote how they please. Kagan reverts back to a pedagogical tone, sometimes articulating a concept in two different ways to aid comprehension: "And the power to appoint an elector (in any manner) includes power to condition his appointment—that is, to say what the elector must do for the appointment to take effect."[108] This pedagogical tone also manifests itself in down-to-earth analogies. For example, in explaining that the Twelfth Amendment's use of the words "vote" and "ballot" do not necessarily give electors discretion, the opinion invites readers to "[s]uppose a person always votes in the way his spouse, or pastor, or union tells him to. We might question his judgment, but we would have no

104 *Id.* at 2321.

105 *Id.* at 2322.

106 *Id.* at 2321 n.1.

107 *Id.* at 2323 (citation omitted).

108 *Id.* at 2324.

problem saying that he 'votes' or fills in a 'ballot.' In those cases, the choice is in someone else's hands, but the words still apply . . . ."[109] Note that the "we" has now shifted back to embrace both the majority and the audience, teacher and students.

The rest of Part II maintains this teacherly tone, often speaking directly to the audience: "Begin at the beginning";[110] "Recall that in this election . . ."; "Remember that the Amendment grew out of a pair of fiascos . . . ."[111] The diction remains free from gratuitous technical language and sometimes becomes colloquial: under the old system, electors "risked the opposite party's presidential candidate sneaking into the second position," and states enacted statutes "requiring electors to pledge that they would squelch any urge to break ranks with voters."[112] Thus, as the analysis proceeds, the tone is not as intimate as it was in Part I, but it remains engaging and cordial.

The final section of the opinion, Part III, is a one-paragraph summary of the Court's reasoning that represents another tonal shift:

> The Electors' constitutional claim has neither text nor history on its side. Article II and the Twelfth Amendment give States broad power over electors, and give electors themselves no rights. Early in our history, States decided to tie electors to the presidential choices of others, whether legislatures or citizens. Except that legislatures no longer play a role, that practice has continued for more than 200 years. Among the devices States have long used to achieve their object are pledge laws, designed to impress on electors their role as agents of others. A State follows in the same tradition if, like Washington, it chooses to sanction an elector for breaching his promise. Then too, the State instructs its electors that they have no ground for reversing the vote of millions of its citizens. That direction accords with the Constitution—as well as with the trust of a Nation that here, We the People rule.

Here, the diction is more formal and sophisticated. The opinion is no longer speaking to a friend or a student; it is speaking officially, for the record, and the tone is much less personal and more self-conscious, dressed up for posterity. The "We" in "We the People" is not referring to a group of specific individuals but instead to a population with a public role. In this conclusion, which immediately precedes the Court's judgment

109 *Id.* at 2325.

110 *Id.* at 2326.

111 *Id.* at 2327.

112 *Id.* at 2328.

affirming the decision of the Supreme Court of Washington, the opinion comes closest to manifesting Robert Ferguson's declaratory tone.

In all, then, the majority opinion contains a few major points of tonal shift and manifests attitudes from warm and intimate to official and impersonal toward the reader, as the text seeks to accomplish different purposes. And even though the opinion speaks for eight Justices, it frequently bears the tonal hallmarks of its author such as informal diction and parenthetical asides.

5.2. *Bostock v. Clayton County*: A case study in Gorsuch's majority-opinion tones

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against individual employees "because of . . . sex."[113] *Bostock*, a consolidated appeal of three separate cases, raised the issue of whether an employer violates this provision of Title VII by terminating an employee based on the employee's homosexual or transgender status.[114] A six-Justice majority held that such conduct indeed violates Title VII, and Justice Neil Gorsuch authored the Court's opinion.[115] That opinion drew two dissents, one by Justice Samuel Alito, in which Justice Clarence Thomas joined, and another by Justice Brett Kavanaugh.[116] Thus, *Bostock* represents a more contested decision than *Chiafalo*, where all nine Justices joined in the result. This increased level of contention is evident in the tone of the *Bostock* majority opinion, whose implied audience most often appears to be those who would disagree with the holding: the dissenters, the losing litigants, and their attorneys. Presumably because of this differing dynamic, Gorsuch's opinion in *Bostock* uses a different range of tones than does Kagan's in *Chiafalo*, with the *Bostock* opinion relying more on the declaratory and authoritative tones described by Robert Ferguson and William Popkin.

The introduction to the majority opinion exhibits a more emphatic, argumentative tone than does the *Chiafalo* introduction:

> Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace

113 42 U.S.C. § 2000e-2(a)(1).

114 140 S. Ct. 1731, 1737 (2020).

115 *Id.* at 1733 (noting that Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan joined in the majority opinion).

116 *Id.* at 1754 (Alito, J., dissenting); *id.* at 1822 (Kavanaugh, J., dissenting).

> on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.
>
> Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. . . . But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.[117]

Each paragraph of the introduction contains an express declaration that no valid contrary arguments exist: "The answer is clear," and "it's no contest." The use of "exactly" only bolsters this message. These words and phrases denoting certainty are markers of Robert Ferguson's declaratory tone.

Nevertheless, the opening sentence anticipates an objection raised by the defendant-employers and by the dissenters: that Congress in 1964 did not expect that Title VII would prohibit discrimination against homosexual and transgender persons. The reader encounters the word "unexpected" in the first, short sentence, and the final sentence emphasizes that the statutory language, rather than supposed legislative expectations, must govern the analysis. This strategy of anticipating and responding to a counterargument gives the text the persuasive, argumentative tone of an oral argument opening.

Gorsuch's *Bostock* opinion also differs from Kagan's *Chiafalo* opinion in its use of the first-person plural, which in *Chiafalo* sometimes appears to refer to the author and her layperson readers, along with the majority. In *Bostock*, if the phrase "our time" in the third sentence of the introduction is ambiguous regarding who "we" are, the "we must decide" just a few lines later leaves no doubt that the "we" refers to the *Bostock* majority. For the rest of the opinion, the first-person plural will refer only to the majority or, in a few instances and with even greater force, to the Supreme Court itself, as when the opinion asks readers to "[c]onsider three of our leading precedents."[118] Indeed, later on, the opinion twice refers to the "cases" at issue in the *Bostock* appeal as being "ours."[119] This we-as-

117 *Id.* at 1737.

118 *Id.* at 1743.

119 *See id.* at 1744 ("The lessons these cases hold for ours are by now familiar."); *id.* at 1753 ("Separately, the employers fear that complying with Title VII's requirement in cases like ours may require some employers to violate their religious convictions.").

entire-Court usage gives the *Bostock* opinion a tone that is more expressly authoritative than the tone of the majority opinion in *Chiafalo*.

Part I of the *Bostock* opinion proceeds to explain the facts and procedural history in straightforward language, neither technical nor colloquial, and Part II then sets forth the majority's analysis regarding its interpretation of the key statutory terms: "sex," "because of," and "discriminate." At this point, the opinion indulges in some of the over-explaining for which Gorsuch has been mocked:

> In the language of law, . . . Title VII's "because of" test incorporates the "'simple'" and "traditional" standard of but-for causation. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.[120]

This section of the analysis, like some parts of the majority opinion in *Chiafalo*, has a pedagogical tone, but in this case the teaching method seems more like lecturing than leading a discussion. Questions followed immediately by answers move the audience through the talking points: "What did 'discriminate' mean in 1964? As it turns out, it meant then roughly what it means today . . . . So how can we tell which sense, individual or group, 'discriminate' carries in Title VII? The statute answers that question directly." [121] Further, the implied audience for the lecture is not the lay public—who are referred to twice at the start of Part II in the third person as "the people"[122]—but rather the dissenters, and perhaps the losing litigants and their attorneys.

As Kagan did in *Chiafalo*, Gorsuch in Part II of *Bostock* sometimes makes direct requests of the reader, in this case posing a series of hypotheticals that clarify the majority's reasoning as to why "sex" is an inherent cause of discrimination based on homosexual or transgender status. The opinion, for example, asks the audience to "Consider, for example, an employer with two employees, both of whom are attracted to men."[123] And to "take an employer who fires a transgender person who was identified as a male at birth." And to "[i]magine an employer who has a policy of firing any employee known to be homosexual."[124] At these points, the opinion

120 *Id.* at 1739 (citations omitted).

121 *Id.* at 1740.

122 *Id.* at 1738 ("If judges could add to, remodel, update, or detract from old statutory terms . . . we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on . . . .").

123 *Id.* at 1741.

124 *Id.* at 1742.

is no longer talking down to its audience; the pedagogical tone becomes more engaging, as if the speaker is reaching out more directly to foster among all audience members a precise understanding of the reasons underlying the majority's interpretation of the statutory terms.

A tonal shift then occurs in Part III, where the opinion moves from explaining the majority's reasoning in a relatively moderate, pedagogical tone, to discussing the employer-defendants' losing arguments in a more confrontational one. Here, the attitude toward the implied readers—the dissenters—ranges from mildly tried patience to vexed disbelief. The most notable devices communicating these tones are a host of rhetorical questions. Part III itself, which follows the majority's explanation of its analysis, in fact begins with one: "What do the employers have to say in reply?"[125]

Some of these rhetorical questions put words in the mouths of the employers so that the opinion can then respond to each opposing argument. For example, after explaining that the Court has previously held that employers discriminate because of sex when they refuse to hire women, but not men, with young children, or when they require women to make higher pension-plan contributions than men, the *Bostock* majority opinion proceeds as follows: "Aren't these cases [i.e., the three cases consolidated in *Bostock*] different, the employers ask, given that an employer could refuse to hire a gay or transgender individual without ever learning the applicant's sex? . . . Doesn't that possibility indicate that the employer's discrimination against homosexual or transgender persons cannot be sex discrimination?"[126] The response is immediate and short: "No, it doesn't." Of course, a detailed explanation follows, but this abrupt first sentence gives that explanation its impatient tone.

Other rhetorical questions, posed in the voice of the majority itself, follow quick paraphrases of various employer arguments. For example, the opinion at one point explains that Congress considered, but rejected, several proposals to add sexual orientation as a characteristic protected by Title VII, and the opinion's text then proceeds as follows: "This postenactment legislative history, [the employers] urge, should tell us something. But what?"[127] The "But what?" indicates again that the Court's patience is growing short in the face of vague, unsupported contentions.

The most, and the most pointed, rhetorical questions appear in the final section of Part III, where the opinion addresses the employers' "extra-textual" arguments, which run most afoul of Justice Gorsuch's textualist philosophy.[128] In response to the argument that few in 1964 would have

125 *Id.* at 1744.

126 *Id.* at 1746.

127 *Id.* at 1747 (citations omitted).

expected Title VII to prohibit discrimination against gay and transgender people, the opinion first asks, "But is that really true?"[129] Then, after citing contemporary examples of people who argued or predicted this broader application of Title VII, the opinion asks, "Why isn't that enough to demonstrate that today's result isn't totally unexpected? How many people have to foresee the application for it to qualify as 'expected'?"[130] And five more rhetorical questions immediately follow these two, after which the paragraph ends by commenting that "[n]one of these questions have obvious answers, and the employers don't propose any."

The question that most persuasively makes its point does not need a follow-up comment. After noting that applications of Title VII to prohibit sex-segregated employment advertising and various forms of sexual harassment were once unexpected, the opinion simply ends a paragraph by asking, "Would the employers have us undo every one of these unexpected applications too?"[131] Here, the tone has reached its you-must-be-kidding crescendo of confrontation.

Finally, like the *Chiafalo* majority opinion, the *Bostock* majority opinion shifts its tone one last time at the start of its conclusion, where the opinion takes on a less heated, more declaratory tone that connects the ruling to its broader societal and institutional context:

> Some of those who supported adding language to Title VII to ban sex discrimination may have hoped it would derail the entire Civil Rights Act. Yet, contrary to those intentions, the bill became law. Since then, Title VII's effects have unfolded with far-reaching consequences, some likely beyond what many in Congress or elsewhere expected.
>
> But none of this helps decide today's cases. Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.[132]

128 *Id.* at 1749.

129 *Id.* at 1750.

130 *Id.* at 1751.

131 *Id.* at 1752.

132 *Id.* at 1754.

6. Conclusion

As the tonal analyses of the *Chiafalo* and *Bostock* opinions demonstrate, authors of majority opinions can draw from a universe of possible tones that extends well beyond the declaratory, exploratory, and authoritative. Even within an opinion, the tone may shift as the text moves from one purpose to another—from describing the issue in context, to detailing the majority's reasoning, to dispatching possible counterarguments, to announcing the ruling.

Paying attention to tones and tonal shifts deepens a reader's understanding of a majority opinion by forcing the reader to consider why the author feels the need to address a particular implied audience in a particular manner at any given point in the text. Advocates, in particular, can benefit from studying tones in opinions because many of the devices that create forceful or persuasive tones in opinions can be adopted in briefs. And, finally, even though a majority opinion speaks for multiple judges or justices, its tone or tones can reveal something of its author's judicial persona—the way in which that particular individual speaks as the court to the society the court serves.

ARTICLE

Fiction 102

Create a Portal for Story Immersion*

Ruth Anne Robbins**

"Stories cannot demolish frontiers, but they can punch holes in our mental walls. And through those holes, we can get a glimpse of the other, and sometimes even like what we see."[1] This is how storytelling acts as a powerful form of advocacy for our clients. Stories lawyers tell on behalf of clients are nonfiction narratives designed to organize facts as cause and effect. The scheme alone helps persuade the audience, even before reaching the end, that the legal outcome must cohere to the rest of the legal story.[2] Legal stories are—or should be—designed to create a response in the audience, not only to engage their acceptance of the story as laid out, but perhaps to change or reinforce its current attitudes, beliefs, or behaviors.[3]

* The title of this article alludes to an article published twenty years ago, Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections,* 32 Rutgers L.J. 459 (2001). Thank you to Gwen Robbins for the back half of the title.

** Distinguished Clinical Professor of Law, Rutgers Law School. Thank you to Linda Berger for connecting me to the concept and presenting with me, which satisfied a long-time wish. Thank you to Ken Chestek, and Kris Tiscione for the writers' retreat referenced in the vignette mid-article and for your support as I wrote it. Thanks also to Victoria Chase, Brian J. Foley, Ian Gallacher, Barbara Gotthelf, Steve Johansen, Cathren Page, Steve Robbins, Dr. JoAnne Sweeny, and Melissa Weresh for their many concrete ideas; to the wonderful reference librarians Genevieve Tung and Nancy Talley who helped me with the interdisciplinary research; to research assistant Tamirah Robinson who assisted with the legal research and helped analyze several of those sources; to the younger members of my family: to Shelby Robbins and Matthew Hollowniczky for their ease-of-comprehension review and insights about some of the psychological materials, and to Gwen Robbins for the suggestions about titling; and to the Delaware Valley Clinical Scholarship Workshop: Susan Brooks, Ann Freedman, Rosemarie Griesmer, Sarah Katz, Michael Murphy, and Spencer Rand who put me on a schedule and provided invaluable feedback. Finally, many thanks to the editors: Joan Ames Magat and Aysha S. Ames, whose editing input made this article a much more watertight vessel, to the co-EICs: Dr. JoAnne Sweeny and Margaret Hannon, and to the co-MEs: Susan Bay and Jessica L. Wherry.

1 From the TED talk of Dr. Elif Shafrak. *The Politics of Fiction*, TED (July 2010), https://www.ted.com/talks/elif_shafak_the_politics_of_fiction?language=en at minute 3:56. Dr. Shafrak, currently a professor of literature at Oxford, writes novels in both Turkish and English. She is a bestselling author, a women's rights activist, and a foreign relations expert. She has delivered two TEDGlobal talks. This talk focused on nonfiction storytelling.

2 J. Christopher Rideout, *Twice-Told Tale: Plausibility and Narrative Coherence in Judicial Storytelling*, 10 Legal Comm. & Rhetoric 67 (2013) (hereinafter Rideout, *Twice-Told Tale*); Foley & Robbins, *supra* note *, at 472–73.

3 Gerald R. Miller, *On Being Persuaded: Some Basic Distinctions*, *in* The Persuasion Handbook: Developments In Theory And Practice 3, 6, 7 (James Price Dillard & Michael Pfau eds., 2002); Anat Gesser-Edelsburg & Arvind Singhal, *Enhancing the Persuasive Influence of Entertainment-Education Events: Rhetorical and Aesthetic Strategies for Constructing Narratives*, 27 Critical Arts: Ent. Educ. & Soc. Change 56, 60 tbl. (2013), doi:10.1080/02560046.2013.766973.

Lawyers who seek to effectively use the power of story to persuade in the spoken or written word need to understand not only the science of narrative cognition but also the linguistic mechanisms that will activate the experience of mentally sending the audience into what we call the legal *storyworld*—the jurisdiction and setting where a legal story takes place.[4] Storyworlds—whether real or fictionalized—have rules and social norms. Sending the audience into the storyworld matters because audience attitudes and beliefs may shift as a result of experiencing the story from inside of it, including an experience of rules and norms from characters' perspectives.[5] Key to the storyteller's successfully opening a portal and transporting the audience—the traveler—mentally into the storyworld is the use of strategic description—and particularly the description of ***action*** and ***setting***.

The primary lessons of Applied Legal Storytelling demonstrate the concepts of character, conflict, and resolution. This article moves the legal storyteller beyond that first level to more sophisticated theories focusing on the importance of describing action and the imagery of setting precisely and strategically. The use of description is a critical tool of storytelling—in both the telling of the client's story and in some types of legal reasoning. The success of such description, and the science behind it, apply whether the story is told verbally or embedded in written advocacy.

1. Introduction

To say that stories are powerful adds nothing new to what has been observed for millennia. History, sociology, anthropology: these are all disciplines that study stories. Law, as a mirror of society, is likewise comprised of nonfiction stories.[6] The idea of story, legal scholars remind us, speaks to us "precisely because it nourishes the kinds of human understanding not achievable through reason alone but involving intuition and feeling as well."[7] Stories call to us because the characters experience emotions we can comprehend and that we, as the audience, can experience ourselves.[8]

4 David Herman, Basic Elements of Narrative 105 (2009), defines storyworlds as the worlds evoked by the narrative. This is not to suggest that a storyworld is necessarily a made-up place. Nonfiction stories mentally transport audience members into the storyworld of real places.

5 Richard C. Gerrig, Experiencing Narrative Worlds 17 (1993).

6 Kenneth D. Chestek, *The Plot Thickens: Appellate Brief as Story*, 14 J. Legal Writing 137 (2008); Linda H. Edwards, *Speaking of Stories and Law*, 13 Legal Comm. & Rhetoric 157 (2016).

7 Paul Gewirtz, *Aeschylus' Law*, 101 Harv. L. Rev. 1043, 1050 (1988).

8 Jeffrey Pence, *Narrative Emotion: Feeling, Form and Function*, 34 J. Narrative Theory 273–76 (2004), cited in Helena Whalen Bridge's award-winning article, *Negative Narratives: Reconsidering Client Portrayals*, 16 Legal Comm. & Rhetoric 151, 170 (2019).

Stories are persuasive when they connect to the audience: that is, when the stories are well constructed, and when they present information in a way that piques interest.[9] Contrary to those who might worry that the act of storytelling presents a special ethical dilemma—ethical challenges beyond the rules already governing lawyers, rules that prohibit fabrication or misrepresentation—presenting facts in narrative form triggers no *specialized* or *different* obligations other than telling the facts truthfully.[10]

A story is not information itself, but a construct, a way of structuring information that creates context and relevance and that engages the audience. Doing so enhances memory and can bring about changes in the audience's attitude and behavior.[11] A well-told story will involve the elements of character, conflict, plot, setting, theme, point of view, tone, and style. Add to those things what no story can do without: the storytelling tools of organization and description.[12]

Storytelling as advocacy relies on the audience's experience of the story, which is an immersive activity—a plunge into the story's milieu.[13] "Narrative reasoning'" is not just telling a tale, but the tale's organization as a cause-and-effect flow of information. In contrast, presenting facts outside of a story without the familiar structure of a plot (such as by presenting facts as a list, as a straight chronology, or as a syllogism) asks recipients to assess information through a different cognitive process.[14] While scientific data presents truth and facts, the audience's response to receiving information that way does not necessarily result in the audience fully absorbing that information if the audience is biased heavily against that truth. By way of example, scientific data demonstrates, definitively, that there is zero causal connection between vaccines and autism. Yet a small but vocal portion of the population persists in ignoring the science. Much of the time the anti-vaccine information is presented as a story, one in which the vaccine is portrayed as a villain, and it is the story structure that adds to the persuasion.[15]

9 I will interchangeably be using the two words "audience" and "story-experiencer" throughout this article.

10 Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ALWD 63, 84 (2010).

11 Kendall Haven, Story Proof: The Science Behind the Startling Power of Story 15 (2007) (hereinafter Haven, Story Proof); Michael D. Slater & Donna Rouner, *Entertainment-Education and Elaboration Likelihood: Understanding the Processing of Narrative Persuasion*, 12 No. 2 Comm. Theory 173, 176, 178 (May 2002) (including the diagram of a theoretical model for engagement and attitudinal changes that relies on the story line, the quality of the writing, and other factors).

12 *E.g.*, James N. Frey, How to Write a Damn Good Novel xiii (1987) (cited in Foley & Robbins, *supra* note *, at 466).

13 Melanie C. Green and Timothy C. Brock, *The Role of Transportation in the Persuasiveness of Public Narratives*, 79 J. Personality & Soc. Psychol. 701, 702 (2000) (hereinafter Green & Brock, *Public Narratives*).

14 See *infra* section 3.1 for more detail about the differences of these two processes.

15 *See, e.g.*, Christopher Graves, *Why Debunking Myths About Vaccines Hasn't Convinced Dubious Parents*, Harv. Bus. Rev., Feb. 20, 2015, https://hbr.org/2015/02/why-debunking-myths-about-vaccines-hasnt-convinced-dubious-parents#.

This technique can be used to improve health as well. Health-related studies have concluded that narrative reasoning does a better job motivating audiences towards behavioral modification than do statistics and other more data-driven, "logic-focused" approaches.[16] In one of these studies—examining ways to improve African American breast cancer survival rates—more African American women were persuaded of the need for regular mammography screening when they were shown videos of stories told by other African American women, as compared to being shown informational statistics without a story *showing* cause and effect.[17] In another study, researchers looking at information used to persuade audiences about tobacco-use cessation determined that video viewers were more influenced by narratives including a *showing* of cause and effect.[18]

An audience-focused approach to storytelling likewise matters in legal advocacy. In law, one empirical study has concluded that narratively written briefs persuade judges more than those written with a purely logical organization.[19]

This article focuses on the way that we can tell more effective legal stories by having our legal audience travel into the world of the story. The act of entering a story and experiencing it next to characters can persuade the audience enough to affect their beliefs and opinions. Social psychologists studying this process by which we enter the storyworld use the term "narrative transportation," and, as discussed in section 3, it is considered a universal effect that can lead to persuading the traveler.[20] The idea of narrative transportation has become relatively recent fodder for study by narrative and cognitive psychologists, and by an emerging subset of social psychologists dealing with rhetorical persuasion.[21] But mainstream

16 *See, e.g.*, Leslie J. Hinyard and Matthew W. Kreuter, *Using Narrative Communication as a Tool for Health Behavior Change: A Conceptual, Theoretical, and Empirical Overview*, 34 Health Educ. & Behav., 2007, no. 5, at 777, 777; *see also* Melanie C. Green & Jenna L. Clark, *Transportation into Narrative Worlds: Implications for Entertainment Media Influences on Tobacco Use*, 108 Addiction 477 (2012); Amy McQueen & Matthew W. Kreuter, *Women's Cognitive and Affective Reactions to Breast Cancer Survivor Stories: a Structural Equation Analysis*, 815 Patient Educ. and Counseling 15 (2010); *see also infra* Section 3.1.

17 McQueen & Kreuter, *supra* note 16.

18 Jessica H. Williams et al., *Stories to Communicate Risks About Tobacco: Development of a Brief Scale to Measure Transportation into a Video Story—the ACCE Project*, 70 Health Educ. J. 184 (2010).

19 Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story* 7 J. ALWD 1 (2008).

20 The study of narrative transportation is a subdiscipline of narrative psychology. The idea of narrative psychology is mainstream enough to appear in textbooks exploring the practicalities of research methods. *See, e.g.*, Michael Murray, *Narrative Psychology and Narrative Analysis*, *in* Qualitative Research in Psychology: Expanding Perspectives in Methodology and design 95–112 (P. M. Camic, J. E. Rhodes & L. Yardley Eds., 2003), https://doi.org/10.1037/10595-006.

21 Melanie C. Green & Timothy C. Brock, *In the Mind's Eye: Transportation-Imagery Model of Narrative Persuasion*, *in* Narrative Impact: Social and Cognitive Foundations 316 (Melanie C. Green et al. eds., 2003) (hereinafter Green & Brock, *In the Mind's Eye*).

22 *See, e.g.*, Annie Neimand, *Science of Story Building: Narrative Transportation*, Medium, May 10, 2018, https://medium.com/science-of-story-building/science-of-story-building-narrative-transportation-923b2701e286; Patrick Moreau,

interest also appears to be growing.[22] Media and marketing professionals also have become interested in the idea of narrative transportation and its persuasive effect as a deliberate way to increase interest in quick-narrative product advertising.[23]

Relatedly, an entire branch of scholars writing about Applied Legal Storytelling theory have written about the relationship between storytelling and legal persuasion.[24] Discussions about the science and application of narrative transportation have begun in some of the lawyering scholarship, but not yet with a full appreciation of the importance of audience response to the science[25] nor with a fully framed analysis of the techniques the writers should use to activate narrative transportation. Moreover, some legal scholars have begun to explore how narrative transportation may extend to transactional documents.[26]

Narrative Transportation: What It Is and Why Every Storyteller Needs to Know It, Muse Storytelling, https://www.musestorytelling.com/blog/narrative-transportation; Lani Peterson, *The Science Behind the Art of Storytelling*, Harv. Bus. Rev., Nov. 14, 2017, https://www.harvardbusiness.org/the-science-behind-the-art-of-storytelling/; Leo Widrich, *The Science of Storytelling: What Listening to a Story Does to Our Brains*, Buffer, Nov. 29, 2012, https://buffer.com/resources/science-of-storytelling-why-telling-a-story-is-the-most-powerful-way-to-activate-our-brains/; Annie Murphy Paul, Opinion, *Your Brain on Fiction*, N.Y. Times, Mar. 17, 2012, https://www.nytimes.com/2012/03/18/opinion/sunday/the-neuroscience-of-your-brain-on-fiction.html?pagewanted=all&_r=0.

23 There are too many articles to cite comprehensively. A small cross-section includes Jennifer Escalas, *Narrative Processing: Building Consumer Connections to Brands*, 14 J. Consumer Psychol. 168 (2004); Jennifer Edson Escalas, *Imagine Yourself in the Product*, 22 J. Advert. 37 (2004) (hereinafter Escalas, *Imagine Yourself*); Jae-Eun Kim et al., *Narrative-Transportation Storylines in Luxury Brand Advertising: Motivating Consumer Engagement*, 69 J. Bus. Rsch. 304 (2016); Nai-Wei Lien & Yi-Ling Chen, *Narrative Ads: The Effect of Argument Strength and Story Format*, 66 J. Bus. Rsch. 516 (2013); Inma Rodriguez-Ardura & Francisco J. Martinez-Lopez, *Another Look at "Being There" Experiences in Digital Media: Exploring Connections of Telepresence with Mental Imagery*, 30 Comput. Hum. Behav. 508 (2014); Jeffrey J. Strange and Cynthia C. Leung, *How Anecdotal Accounts in News and in Fiction Can Influence Judgments of a Social Problem's Urgency, Causes, and Cures*, 25 J. Soc'y for Personality & Soc. Psychol. 436 (1999); Tom Van Laer et al., *The Extended Transportation-Imagery Model: A Meta-Analysis of the Antecedents and Consequences of Consumers' Narrative Transportation*, 40 J. Consumer Rsch. 797 (2014).

24 J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 Legal Comm. & Rhetoric 247 (2015) (hereinafter Rideout, *Applied Legal Storytelling Bibliography*). That Bibliography has been updated in the same volume where this article appears. 18 Legal Comm. & Rhetoric 221 (2021).

25 *See* Mary Ann Becker, *What is Your Favorite Book? Using Narrative to Teach Theme Development in Persuasive Writing*, 46 Gonzaga L. Rev. 575, 589–91 (2011) (discussing narrative transportation for several paragraphs as an aspect of conveying point-of-view); *see also* Min Kyung Lee, *A Story of a Birth and a Funeral: A Rhetorical Analysis of* Windsor *and* Shelby County, 23 J.L. & Pol'y 507, 523 (2015) (providing a brief description of narrative transportation); Astrid Dirikx, *Media Use and the Process-Based Model for Police Cooperation*, 54 British J. Criminology 344 (2014) (summarizing the basics of narrative transportation); James S. Liebman et al., *The Evidence of Things Not Seen: Non-Matches as Evidence of Innocence*, 98 Iowa L. Rev. 577, 631 n.229 (2013); Bruce Ching, *Narrative Implications of Evidentiary Rules*, 29 Quinnipiac L. Rev. 971, 973 (2011) (quoting another author for the idea of narrative transportation as a reason for story's power in persuasion); Brian J. Foley, *Until We Fix the Labs and Fund Criminal Defendants: Fighting Bad Science With Storytelling*, 43 Tulsa L. Rev. 397, 399–400 (2007) (mentioning narrative transportation while discussing the types of evidence that are more likely to lend to better storytelling); Kevin Jon Heller, *The Cognitive Psychology of Circumstantial Evidence*, 105 Mich. L. Rev. 241, 287–91 (2006) (spending a subsection on the topic, but ultimately dismissing narrative transportation as a storytelling tool when dealing with the relative abstraction of circumstantial evidence). One article that does spend significant time discussing the importance of narrative transportation is Susan M. Chesler & Karen S. Sneddon, *From Clause A to Clause Z: Narrative Transportation and the Transactional Reader*, 71 S.C. L. Rev. 247 (2019). The authors spend significant time in the article discussing the ways that narrative transportation can evoke audience participation, problem-solving, or replotting participatory response in the readers of transactional documents.

26 *See infra* section 6.

In two earlier articles, I examined the structure of legal storytelling generally and then explored the importance and technique of character-development as a central tool of Applied Legal Storytelling.[27] All of that represents a first-level of understanding how to build legal stories from the facts of the client's case. This article connects to that earlier inquiry but moves readers deeper into the analysis of legal storytelling by investigating the importance of describing actions and setting in the storytelling to the outcomes of actual persuasion. To get there, I explain the way that certain types of descriptions create mechanisms for narrative transportation that lead to more effective advocacy in legal storytelling. Specifically, I discuss how some of the applied studies of narrative transportation can be used in legal storytelling in documents that involve (a) a recitation of facts in a cause-effect manner, or (b) at least a partial reliance on analogical reasoning for the advocacy.

This article thus centers on two aspects of storytelling critical to narrative transportation: action and setting. And both rely on description to get there. These two story tools have gone largely underexplored in the Applied Legal Storytelling literature. Previous works that have taken a deep-dive into the building blocks of story have centered on character-building or theme development.[28] While a very few Applied Legal Storytelling articles have discussed specialized aspects related to settings[29] and objects,[30] this article brings together the science and more holistic techniques. It also brings to the fore how important description is to triggering the audience's response to the story.

2. A lightning-fast description of description

This entire article is premised on the idea that imagery is central to storytelling and that certain kinds of description will activate the types of storytelling mechanisms that lead to persuasion. Ergo, this section

27 Foley & Robbins, *Fiction 101, supra* note *; Ruth Anne Robbins, *Harry Potter, Ruby Slippers, and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 Seattle U. L. Rev. 767 (2006).

28 *Id.*; *see also* Becker, *supra* note 25 (discussing narrative transportation as an aspect of point of view).

29 One that has looked at setting is Cathren Koehlert-Page, *A Look Inside the Butler's Cupboard: How the External World Reveals Internal State of Mind in Legal Narratives*, 69 N.Y.U. Ann. Surv. Am. L. 441 (2013). Professor Page discusses the idea of objective correlative, which lawyers can use effectively when strategizing the use of scenic evidence. That is, a description of the setting can be used to convey emotion or truth even in the face of seemingly contradictory statements. Professor Page also suggests that details about the setting can be important in demonstrating sufficient facts to reach the requisite burden of proof.

30 Two that have are James Parry Eyster, *Lawyer as Artist*: *Using Significant Moments and Obtuse Objects to Enhance Advocacy*, 14 Legal Writing, 87, 102 (2008) (discussing the "obtuse object" as cognitive dissonance aiding in memory) and Cathren Koehlert-Page, *Like a Glass Slipper on a Stepsister: How the One Ring Rules Them All*, 91 Neb. L. Rev. 600 (2013) (explaining the concept of endowed objects that help weave a thematic thread in a legal story or to identify the key piece of physical evidence).

provides a quick explanation of how writers create imagery through the use of description. I have chosen to place this information up front, to plant the seeds of understanding as to how the next section's science will connect to the lawyering strategy of legal storytelling.

Less experienced legal writers are often exhorted to *show* rather than *tell*. Though the phrase might read as trite, this in fact is exceptionally good advice because it is supported by the science of narrative comprehension. A person's reaction to a story depends on their ability to so fully imagine the story that they can travel into the story itself. The art of showing the audience the place and characters of the legal storyworld—of creating a portal into the story—is the activity of description, as is evident from the very definition of a story itself: a *descriptive* telling of a character's efforts, over time, to overcome obstacles and to reach a goal.[31] Description creates the mental imagery for the audience that it needs for the story to cohere in their minds. Mental imagery thereby permits the transfer of content to memory.[32]

Four categories of things can be described narratively:

- Actions
- Settings
- Objects
- Characters.[33]

Showing the precise image requires writers to select details that will form the description. There are five types of details to choose from when describing actions, settings, objects, or characters.

- **The name**. A name can also include a category. For example, "national park" is a named category of settings.[34]
- **The function**. Objects and characters can have function. "household cleaning product" describes a function. So too does "pizza delivery person."
- **The history or development**. Objects, settings, and actions can all have a history of development, just as characters can.
- **Sensory information**. These details call upon the senses of sight, sounds, smell, touch, and taste. The dimensions of a computer screen, how crisp the air feels, how high the person

31 Haven, Story Proof, *supra* note 11, at 79 (emphasis supplied).

32 *Id.* at 94 (internal citations omitted).

33 Kendall Haven, Get It Write: Creating Lifelong Writers from Expository to Fiction 123–25 (2004). Note that more abstract concepts are missing from this list, e.g. an idea. Different narrative techniques must be employed to describe an abstract idea.

34 *Id.*

jumped, or how heavily the side yard is scented with lilacs—all rely on sensory details.

- **Analogy to other objects, actions, settings, or characters**. An analogical detail describes something through comparison to other things—sometimes explicitly and sometimes metaphorically. "It tastes like chicken" is a description that relies on analogy. So does the heading to this subsection, "a lightning-fast description of description."

Specific details provide a description with greater emphasis and provide the audience with richer fare from which they can construct mental images. As a corollary, the more sparse the detail about actions, settings, objects, or characters, the more sparse the story experiencer's mental images, permitting them either to conjure any image that comes to mind or to form only fuzzy pictures.[35] Creating images with description does not necessarily require a bulk of details, but instead relies more on specificity—choosing the right words, the precise words, the evocative words. Precision matters. Skilled writers can create memory with a mere few words—if those words are precise enough to stimulate a mental image. "He was baking cinnamon bread as he did every early Sunday morning" provides a great deal of information with a mere few words about action, setting, object, and even character. The sentence is enough to anchor us in a scene.

3. There is no frigate like a brief: What does a legal storyteller need to know about narrative transportation?

It was dusk and raining like hell.[36] But the twinkling of the holiday lights she had brought with her to cheer up the writing-retreat room cut through the gloom. She gazed down from the Airbnb apartment windows to the street below, then turned to the other professors in the room who were all bent over their laptops, "I am ready for a break and there are at least two pubs right on the block—let's go."

That paragraph was not designed to resonate with all audiences but was chosen to resonate with audiences who understand the act of writing and the need to sometimes hole up to hyper-focus. Assuming you, this article's reader, are part of the target audience, what did you

35 Ruth Anne Robbins, Steve Johansen & Kenneth D. Chestek, Your Client's Story 166–67 (2d ed. 2019).

36 I avoided "'Twas a dark and stormy night" because the use of a cliché would have interfered with the description's function to transport the audience into the scene.

imagine as you read the above paragraph? Anything? Did you visualize a place? The time of year? The temperature outside? Did the word "pub" put you someplace different than if the words "bar" or "restaurant" had been used?[37] If you felt yourself to be part of the scene, you were experiencing what has been termed, "narrative transportation." By this, narrative psychologists mean the phenomenon of imaginatively leaving the place where you are and entering the world of a story.[38] Audiences experience stories by traveling from their seats into the narrative world, and audience members' attitudes can be changed by their temporary dwelling in that story world.

Most of us can relate to traveling into and inside of a story world, whether by virtue of reading, listening to, or watching stories. It is the feeling one gets when losing track of time and even one's physical locale while watching a movie. Our language even has idioms that capture this idea. "Lost in a good book," and "getting into," being "swept away," or being "drawn into" a story.[39] Emily Dickinson famously wrote about this in her poem, *There is No Frigate Like a Book*, from which this subsection derives its title. The poem's first two lines say it all: "There is no Frigate like a Book/ To take us Lands away."[40] This poem is used in some grade-school teaching because its theme of narrative transportation is considered an abstract concept that is nevertheless so understandable that young children can comprehend and relate to it.[41]

37 Or does the word "pub" just make you assume it's an academic trying to pretend that Philadelphia is somewhere in Yorkshire?

38 Gerrig, *supra* note 5, at 157.

39 It is such a common metaphor that Jasper Fforde used that as a title in one of his books about a character who literally jumps into books to solve mysteries. Jasper Fforde, Lost in a Good Book (2004). There is also a PBS children's series in which characters, including Little Red Riding Hood, go inside books on a giant bookshelf to help solve little-children problems. *Super Why!* (PBS Kids television series).

40 The full poem is very short:

There is no Frigate like a Book
To take us Lands away
Nor any Coursers like a Page
Of prancing Poetry—
This Traverse may the poorest take
Without oppress of Toll—
How frugal is the Chariot
That bears the Human soul.

Emily Dickinson, *There is No Frigate Like a Book*, a letter written around 1873 and published in Letters, Vol. 1 (1894) (capitalization in original). The letter is in the public domain. As an aside, the first to write about narrative transportation in detail, Richard Gerrig, quoted Emily Dickinson's poem twice in his book, and perhaps for that reason the poem has become a bit of an anthem for people writing about narrative transportation. Gerrig, *supra* note 5, in the unpaginated frontispiece and at 12.

41 Do a quick search on the web and you will find dozens of elementary school videos of children reciting or singing the poem to the tune of *Amazing Grace*. You can easily find lesson plans and conversations about lesson plans using this poem. The commercial website, Schmoop, has a page devoted to the teaching topic: https://www.shmoop.com/there-is-no-frigate-like-a-book/.

Thus, the idea of narrative transportation as a phenomenon is nothing new. Narrative transportation as a field of scientific study, however, is relatively young.[42] Professor Richard C. Gerrig, in his germinal book on the topic, borrows the verb "transported" from a passage in Paul Theroux's novel, *My Secret History*, because he believed that the novelist had captured "one of the most prominent phenomenological aspects of the experience of narrative worlds."[43] As Professor Gerrig explains, we do more than just read or hear stories—we also experience them by the flow of description. Imagining place and action of the story permits the audience to transport to and exist in that space transiently, borrowing the author's property, "like a rented apartment."[44]

3.1. Linking narrative transportation to persuasion is actually about *connection*

The power of narratives to affect the audience's beliefs "has never been doubted and always been feared."[45] In the gestalt, understanding and learning from story is a fundamental cognitive process.[46] Stories enthrall us, not for any one isolated reason, but because we are able to engage in them holistically—narrative transportation takes us there.[47] We connect to the story at many levels. Through these connections we are persuaded.

When we are transported into a story, some part of our own world becomes inaccessible. We must make do without some of the material comforts or norms of our physical locale.[48] The phenomenon operates regardless of whether we are reading real stories (as in the case of legal stories) or fiction.[49] When we travel through the portal into a storyworld we suspend our disbelief;[50] doing so jumps us over the cognitive resistance or counterargument that we normally employ with other forms of persuasion. That is, we do not question the premises but accept them. By temporarily adopting the norms of storyworld, we also open ourselves up to change.[51]

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42 The literature doesn't go back before the early 1990s. The scholarship begins with the publication of Richard C. Gerrig's book in 1993, *supra* note 5.

43 Gerrig, *supra* note 5, at 2–4 (citing Paul Theroux, My Secret History 402 (1989)).

44 Van Laer, *supra* note 23, at 799.

45 Green & Brock, *Public Narratives*, *supra* note 13, at 701.

46 Melanie C. Green and John K. Donahue, *Simulated Worlds: Transportation into Narratives*, *in* Handbook of imagination and mental simulation ch. 16 (Keith D. Markman, William M. P. Klein & Julie A. Suhr eds, 2008) (ebook).

47 Slater & Rouner, *supra* note 11, at 176.

48 Gerrig, *supra* note 5, at 14–15.

49 Slater & Rouner, *supra* note 11, at 179.

50 Samuel Taylor Coleridge, Biographia Literaria ch. XIV (1872), http://www.gutenberg.org/files/6081/6081-h/6081-h.htm ("that willing suspension of disbelief for the moment, which constitutes poetic faith").

51 Gerrig, *supra* note 5, at 16; Green & Brock, *Public Narratives*, *supra* note 13, at 701–02, 718–19.

Two of the best-known psychologists studying this area, Dr. Melanie C. Green and Dr. Timothy C. Brock, have written extensively about the persuasive assist that narrative transportation provides.[52] Drs. Green and Brock describe narrative transportation as a distinct mental process that melds attention, imagery, and affective responses (i.e., feelings).[53] They distinguish the cognition mechanisms present in narrative persuasion versus rhetorical persuasion—what they term "advocated opinions," relying on arguments with claims and evidence.[54] Likewise, legal arguments by themselves are based on complex syllogisms, but the addition of narrativity adds a different dimension to the legal audience's cognition.[55] Cognitively, narrative transportation moves us into a place where we process arguments distinctly and differently from the way we cognitively process arguments presented in a syllogistic manner.[56] That is because transporting into a storyworld "entails an experiential component as well as a melding of cognition and affect."[57]

Fundamentally, the idea of narrative transportation enhances audience connection and response to story. Transportation leads to persuasion through realism, which can prompt a strong affective response. And it has the advantage of short-circuiting the audience's negative thoughts because of the experiential aspect.[58] When persuading an audience through analytical processes, an audience naturally has resistance to the persuasion.[59] Part of logical analyses, or "cognitive elaboration," involves the audience thinking through conclusions presented.[60] That type of reasoning engages the audience in methodological doubt—that is, the audience logically tests arguments against a counterweight thought of "or not."[61] In contrast, persuasion via storytelling avoids the audience engaging in negative responses by lowering the audience's resistance to the message.[62] This happens because we live our lives through

52 *See, e.g.*, Green & Brock, *In the Mind's Eye*, *supra* note 21, at 320–21; Green & Brock, *Public Narratives*, *supra* note 13, at 703.

53 Green & Brock, *Public Narratives*, *supra* note 13, at 701.

54 Green & Brock, *In the Mind's Eye, supra* note 21, at 320–21.

55 Derek Kiernan-Johnson, *A Shift to Narrativity*, 9 Legal Comm. & Rhetoric 81, 93–95 (2012) (proposing the term "narrativity" as a top-level term in applied legal contexts that incorporates ideas of legal text, narrative, and performance, i.e., storytelling, and is broad enough to encompass the broader word "narrative" in lieu of the narrower root "story").

56 Green & Brock, *Public Narratives*, *supra* note 13, at 703.

57 *Id.* at 718–19.

58 Escalas, *Imagine Yourself*, *supra* note 23, at 38.

59 Eric S. Knowles & Jay A. Linn, Resistance and Persuasion (2003).

60 Green & Brock, *Public Narratives*, *supra* note 13, at 702.

61 Peter Elbow, *The Believing Game—Methodological Believing*, 13 J. Assembly Expanded Persp. on Learning 1, 2 (2009) (using methodological doubt as a synonym for critical thinking).

62 *Id.*; Slater & Rouner, *supra* note 11, at 174.

story,[63] so we naturally trust and respect a story as authentic, realistic, and plausible.[64] We, as story-experiencers, will assess the story not for accuracy but for verisimilitude, that is, the "lifelikeness" of the situations and characters.[65] This includes temporarily adopting the characters' world view in the storyworld, using the norms and laws of that storyworld. What is key is the audience's sense that they are engaging these different world views of their own free will.[66]

That the audience feels autonomous is very powerful in overcoming resistance to new ideas. The combination of the audience identifying with a character's world view while also temporarily dwelling inside the storyworld reduces the audience's impulse to question the belief-systems in the storyworld. Messages produced in the storyworld that present the audience with familiar situations or images and with familiar belief systems to that of the audience will *reinforce* the audience members' beliefs.[67] Messages that similarly present the audience with familiar situations or images but that subtly expose the audience to new or oppositional messages can *overcome* or *change* the audience's preexisting beliefs because the audience feels invited into the world where it can safely—because it will only temporarily—engage with the new ideas.[68]

Psychologists reason that story structure is one of cause-and-effect relationships.[69] When we read a story, we engage it as part of the story's creation because our own mental images combine with the ones the author creates for us. In his foundational book on the topic, Dr. Gerrig, who first coined the term "narrative transportation," teaches us that the metaphor of being transported serves as a schema; this is something we as legal scholars can relate and respond to. Gerrig's schema, paraphrased, is thus

- The story-experiencer is transported by some means of transportation and as a result of certain actions.

63 Haven, Story Proof, *supra* note 11, at 24–25.

64 Gesser-Edelsburg & Singhal, *supra* note 3, at 57, 64; *see also* David Koelle et al., *Providing Decision-Support Using Insights from Narrative Science*, 3 Procedia Mfg. 3998, 3999 (2015).

65 Van Laer, *supra* note 23, at 800; Cathren Page, *Stranger Than Fiction: How Lawyers Can Accurately and Realistically Tell a True Story by Using Fiction Writers' Techniques That Make Fiction Seem More Realistic Than Reality*, 78 La. L. Rev. 907 (2018) (discussing the idea of verisimilitude as a conduit to persuasion in Applied Legal Storytelling).

66 Gesser-Edelsburg & Singhal, *supra* note 3, at 62.

67 *Id.* at 59.

68 *Id.* at 62.

69 Fritz Heider & Marianne Simmel, *An Experimental Study of Apparent Behavior*, 57 J. Am. Psychol. 243 (Apr. 1944) (demonstrating that humans think in cause and effect by showing test subjects a one-minute video of shapes moving around a piece of paper; the vast majority of test subjects saw a story). You can easily find that video online. *See also* Green & Brock, *In the Mind's Eye: supra* note 21, at 316.

- The story-experiencer goes some distance from their world of origin, and that makes inaccessible some aspects of the origin world.
- Finally, the story-experiencer returns to the world of origin, changed by the journey.[70]

That last point demonstrates the importance of narrative transportation to the advocate. Traveling into a story can change the story-experiencer's mindset.[71] Narrative transportation matters to legal persuasion because experiencing a story can change story-related attitudes as a result of becoming involved in that story.[72] When a story-experiencer is narratively transported, they identify with the characters the author has chosen along with those characters' relationship to the storyworld itself and most importantly to the characters' value systems.[73] It is through the act of temporarily adopting the norms of storyworld that the audience becomes more open to allowing attitudes to shift or change.[74]

Other narrative psychologists have tested Dr. Gerrig's theories and their studies led them to agree that the immersion in a story—that is, the transportation into the storyworld—can have powerful emotional and persuasive consequences.[75] Some psychologists studying these principles have relied on stories that implicate social issues in which some public-interest lawyers might be engaged. Others conducting empirical studies have concluded that attitudes can be transformed. For example, one set of researchers concluded that audience members' beliefs could change when they were presented with an issue-based story about high-school dropout rates. That transformation was possible regardless of whether the audience understood the story to be fiction or journalism. This is because stories don't have to be accurate so much as they need to be plausible and coherent.[76] Likewise, Drs. Green and Brock found that study participants, after reading about a young girl attacked in a shopping mall by a psychiatric

70 Gerrig, *supra* note 5, at 10–11.

71 *Id*. at ch. 3. Gerrig's hypothesis has been tested and confirmed that a story can create transformation. Van Laer, *supra* note 23, at 800.

72 Green & Brock, *Public Narratives*, *supra* note 13.

73 Geoff F. Kaufman & Lisa K. Libby, *Changing Beliefs and Behavior Through Experience-taking*, 103 J. Personality & Soc. Psychol. 1 (2012); *see also* Loris Vezzali et al., *The Greatest Magic of Harry Potter: Reducing Prejudice*, 45 J. App. Soc. Psychol. 105 (2015).

74 Melanie C. Green and John K. Donahue, *Persistence of Belief Change in the Face of Deception: The Effect of Factual Stories Revealed to be False*, 14 Media Psychol. 312, 313 (2011) (hereinafter Green & Donahue, *Persistence of Belief Change*); Green & Brock, *Public Narratives*, *supra* note 13, at 701–02; Gerrig, *supra* note 5, at ch. 3.

75 Green & Dohanue, *Persistence of Belief Change*, *supra* note 74, at 313; *see also* Slater & Rouner, *supra* note 11.

76 Jeffrey J. Strange & Cynthia C. Leung, *How Anecdotal Accounts in News and in Fiction Can Influence Judgments of a Social Problem's Urgency, Causes, and Cures*, 25 Personality & Soc. Psychol. Bull. 436, 444–45 (1999). For the idea that stories need plausibility and coherence, see Rideout, *Twice-Told Tale*, *supra* note 2.

patient, changed their story-relevant attitudes, including their individual assessments about programs that furloughed psychiatric patients. [77]

A classic example can be seen in the way scores of former 1L–law students can remember the story as told by New York Court of Appeals' Chief Judge Benjamin Cardozo in the famous *Palsgraf* case.[78] The mere mention of that case and its facts will likely cause an American-law-trained audience to begin creating a mental image of a scene set at a railway station with people hurrying to get to a train that is about to depart. [79] Actually re-reading the case underscores the point. One paragraph alone has the power to narratively transport an audience to a specific place and perspective. The specificity of the setting and the action clearly present the characters and perspective that Chief Judge Cardozo chose for legal readers to see, making it easier for those legal readers to appreciate the legal conclusions Cardozo reached.[80]

3.2. Narrative transportation relies on required story conditions

Narrative transportation and its persuasive effect is far from a given. There are key conditions precedent for a narrative to create transportation that effectively persuades. Drs. Green and Brock developed five postulates about when and how narrative transportation—and subsequent persuasion—works:

1. The text must be an actual story, and one that evokes images and that can implicate a belief system.
2. The effect on the audience matters and must be taken into consideration.
3. The audience member must have some ability to be transported.
4. The story must be well crafted.
5. The medium and context of the narrative must be taken into consideration. [81]

77 Green & Donahue, *Persistence of Belief Change*, *supra* note 74, at 313; *see also* Green & Brock, *Public Narratives*, *supra* note 13.

78 Palsgraf v. Long Island R.R. Co., 248 N.Y. 339 (Ct. App. 1928).

79 As I boldly assume has just happened.

80 *Palsgraf*, 248 N.Y. at 340–41. Chief Judge Cardozo also demonstrated that one paragraph alone has the power to narratively transport an audience to a specific place and perspective.

81 Green & Brock, *In the Mind's Eye*, *supra* note 21, at 316. The distinction between a narrative and a list demonstrates the problem with the argument that transactional legal documents can create narrative transportation. By design, those documents rely primarily on list structures and are a series of rules setting out future behavior, rather than a tale of an unresolved conflict with a protagonist and a challenge to overcome.

From the outset, Drs. Green and Brock explain that persuasion via narrative transportation is limited to story texts that are actually stories versus lists of information or instructions.[82] Narrative transportation doesn't happen without a story to travel into. A story raises unresolved conflicts and depicts activities towards solving those conflicts.[83] Those stories must evoke images and implicate belief systems because characters in the story inevitably have belief systems. The images and the story must logically correspond for the audience to be persuaded.

The impact on the audience matters. An audience member's ability to have their belief system changed depends in part on their ability not only to be narratively transported but also to become fully absorbed into the story[84]—that is, to also feel what the characters are feeling. The last item on the list, medium and context, relates to the mode of communicating the story (verbal versus visual) and the historical context in which the story is told. Certain stories, as we know, do not age well. I address these issues later in the article.

4. The importance of imagery in narrative transportation

Mental imagery is central to the narrative transportation postulates set out by Drs. Green and Brock.[85] Narrative transportation happens when the audience can fully engage with the story, and doing so involves the ability to form mental images. Vivid images permit the audience to remember the events in the story just as we reconstruct images from memories of our own lives.[86] In a story, some imagery is more effective at persuading than other imagery. The imagery needs to include action, for reasons discussed in this section.

4.1. The story-experiencer participates in the storyworld because there is imagery

Story-experiencers are not merely passive recipients of a story. When we read, listen to, or watch a story, we engage it and, with the addition of mental imagery, take part in creating some of the story itself.[87] We are

82 *Id.* at 316.

83 *Id.* at 320.

84 *Id.* at 316–17, 320.

85 *Id.* at 323, 327.

86 Melanie C. Green & Timothy C. Brock, *Transportation into Narrative Worlds: Implications for Entertainment Influences on Tobacco Use*, 108 Addiction 477 (2013); *see also* Haven, Story Proof, *supra* note 11, at 94.

part of the story's own creation. We shadow the characters with whom we identify or whom we find interesting. That is, we are active participants even if it is not us, but the characters who engage us, with whom the story characters are interacting.

During the story experience, the author can take audience members only so far. Then it is up to the audience to fill in the mental picture of the storyworld by pulling images and scenes from their own mental filing cabinet. In that way story-experiencers actively author as well.[88] Actively authoring allows the audience to engage more fully and deeply. Dr. Gerrig termed audience involvement and partial creation of story as "performance" and devoted two chapters of his book to that concept.[89]

Experiencing story in this way is a skill that most of us innately possess and that can be further developed.[90] Some people will be more susceptible to narrative transportation than others, although not all causes for that are known.[91] Researchers have found that people who read fantasy fiction are able to develop a deeper sense of empathy than audience members who read primarily nonfiction non-narratives. The differences, they conclude, are attributable to the more active engagement of story-experiencers who must ask more of their imaginations to create the storyworld.[92]

Imagery is so important that it can drive the plot. In popular culture, Professor Dumbledore of the *Harry Potter* series possessed a magical stone bowl called a pensieve which illustrates how the idea of Dr. Gerrig's performance concept operates. The pensieve is a stone bowl filled with a glowing viscous liquid whose purpose is to allow someone to experience another person's memories.[93] When activated with the addition of a memory to the bowl—shown as a silvery thread—the pensieve pulls

87 Michael R. Smith, Advanced Legal Writing: Theories and Strategies in Persuasive Legal Writing 38 (3d ed. 2012) (citing Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 Mich. L. Rev. 2225 (1989)).

88 Van Laer, *supra* note 23, at 799.

89 Gerrig, *supra* note 5, at chs. 2 and 3.

90 Green & Brock, *In the Mind's Eye*, *supra* note 21, at 327.

91 Phillip J. Mazzocco et al., *This Story Is Not for Everyone: Transportability and Narrative Persuasion*, 1 Soc. Psych. & Personality Sci. 361 (2010). Dr. Melanie C. Green was a coauthor on this paper along with several others.

92 Keith Oatley, *Fiction: Simulation of Social Worlds*, 20 Trends Cognitive Sci. 618 (2016); Raymond A. Mar et al., *Bookworm Versus Nerds: Exposure to Fiction Versus Non-Fiction, Divergent Associations with Social Ability, and the Simulation of Fictional Worlds*, 40 J. Rsch. Personality 694 (2006) (distinguishing fiction from nonfiction but explaining that by "nonfiction" the authors mean non-narrative nonfiction. Presumably, nonfiction narrative would share some of the same empathy development with fiction readers because the differences appear to hinge on the storyworld construction that readers must do in either case.

93 J.K. Rowling's several books with these references in chronological order are Harry Potter and the Goblet of Fire (2000) (Book 4), Harry Potter and the Half-Blood Prince (2005) (Book 6), Harry Potter and the Deathly Hallows (2007) (Book 7).

Harry Potter into the bowl and he falls into the scene of the memory, leaving behind the real world of Professor Dumbledore's office. Inside the memory, we see Harry watching actions from the same angle and perspective as the memory-donor, whom we see nearby. Harry is not part of the scene but is an invisible observer. Each time he uses the pensieve, Harry walks away with fresh insights and changed attitudes. All of that occurred because he *saw* the scene.

From the pensieve, Harry witnessed key events in history—the inquisition of a war criminal and subsequent capture of another; early scenes from the childhood of the series' villain; and memories of another professor, who loved Harry's own mother and who eventually sacrificed himself for that love.[94] Each time, Harry came away from the pensieve *changed* from having seen those memories—being inside them affected him and re-oriented his own understandings of his world. Rowling's pensieve scenes precisely encapsulate the sensation and effect of what happens to a transported story-experiencer. Her skill in the story-telling also demonstrates the type of description that will best effectuate narrative transportation: action and setting.

4.2. Imagery of actions and settings lead to more effective persuasion

Some kinds of imagery are more powerful than others. The idea of mental imagery is closely connected to that of "mental rehearsing."[95] That is, our minds imitatively rehearse or simulate the actions being described.[96] In other words, a story-experiencer who has been narratively transported engages in a simulation of what is happening inside the story.

Neuroimaging studies show that mental simulation through imagery lights up the same areas of our brain used for the actions being described.[97] Even a single word representing action can cause activity in the same brain region responsible for the person engaging in that action. For example, reading about a soccer player scoring a goal activates the area of the brain associated with the actions involved with running and kicking.[98]

The cognitive studies have essentially been confirmed by applied studies in the field of marketing. Narrative transportation has been hailed

94 Sorry about the spoilers.

95 Green & Brock, *In the Mind's Eye*, *supra* note 21.

96 Escalas, *Imagine Yourself*, *supra* note 23, at 37–38. The phenomenon is also termed "mental simulation."

97 Nicholas K. Speer et al., *Reading Stories Activates Neural Representations of Visual and Motor Experiences*, 20 No. 8 Psych. Sci. 989 (2009).

98 *Id.* at 990, 994–95.

as an effective way to approach audiences with product placement and advertising.[99] In one of the most-recent studies, researchers concluded that the ability of internet influencers to promote products on platforms like Instagram will be markedly improved when the influencer posts a selfie of herself using a product rather than simply showing the product in the selfie.[100] The confirming study was set up specifically to measure narrative transportation by virtue of the amount and level of audience interaction with the posted image.[101] The researchers correlated posted comments with narrative transportation. Study participants were shown different photographs and asked two sets of questions: how close was the model to fulfilling the intended action (drinking from a bottle of water or eating a piece of bread), and how likely was the test participant to post a comment? The water bottle and bread examples were chosen because they are neutral objects, i.e., non-branded, and also well-known categories of products. In each run of the study, the participants responded that they were more likely to comment on photos of models who were very close to the intended action, i.e., about to eat the bread or about to drink from the water bottle. From these results, the researchers concluded that (a) the viewers were more likely to be narratively transported when the image showed the product in action and (b) narrative transportation appeared to depend on the action of using the product.[102]

Thus, the audience's sense of action—of movement—creates narrative transportation. But, as a corollary, for narrative transportation to happen, the story-experiencer must have a place to be transported *to*. Even the studies concentrating primarily on the importance of action-description all presented the actions with a sense of their location. The setting was neutral in the selfie study: an indoor room.[103] As small an action as eating bread is, it nevertheless must occur in a physical space; there can be no narrative transportation without that sense of setting.[104] Actions exist in a setting. Thus, this article's readers should take away the duality of action and setting as key to making stories come alive in the minds of the story-experiencer, including those of a legal audience. In legal analysis, setting

99 *See, e.g.,* Jae-Eun Kim et al., *Narrative-Transportation Storylines in Luxury Brand Advertising: Motivating Consumer Engagement*, 69 J. Bus. Res. 304 (2016); Lien & Chen, *supra* note 23.

100 Stefanie Farace et al., *Assessing the Effect of Narrative Transportation, Portrayed Action, and Photographic Style on the Likelihood to Comment on Posted Selfies*, 51 Eur. J. Mktg. 1961 (2017).

101 *Id.* at 1966, 1968–99.

102 *Id.*

103 *Id.* at 1966, 1968 (images).

104 Dr. Gerrig writes of a metaphorical "rented apartment" that provides the setting for narrative transportation. Van Laer, *supra* note 23, at 799.

always plays a natural part: jurisdiction matters greatly. And, additionally, the specific setting matters greatly to the specific facts.

The duality of action and setting can be shown with some very easy statements. Consider:

- Cathren was talking.

That sentence contains action but little context to create a setting. This action could be happening anywhere. There is no way for the audience to narratively transport because there is no set place for the audience to go. Now consider:

- Cathren was baking.
- Cathren was barbequing.

Each of these two simple sentences show action, and the action also creates some context. The writer has left the reader to author the setting but relies upon a shared knowledge to shape some of the setting. In the first, the reader will likely construct a setting indoors with an oven. In the second, the reader will likely construct an outdoor setting with a grill.

4.3. Sufficient imagery to launch narrative transportation can occur in a few words

While, arguably, a simple statement like "Cathren was baking" might create narrative transportation, a few more details can make the imagined setting more definite. Consider:

- Cathren pulled the baking sheet out of the oven with her functioning hand.

Additional details add the vividness that translates to further audience engagement with the scene. This engagement translates into narrative transportation.

And this kind of vivid imagery can easily become part of a legal story. Suppose that Cathren is suing her neighbor for his failure to trim dead tree branches hanging over her property, claiming that the branches caused significant damage to her fence. The description might become something like this:

- Cathren remembered hearing the loud crack of the neighbor's tree branch snapping. She had just pulled a baking sheet out of the oven with her functioning hand and the loud sound startled her so much that she temporarily lost control, tipping the sheet and spilling hot chocolate-chip cookies on to her clean kitchen floor.

The description shows us the actions of Cathren hearing, of her pulling a baking sheet out of the oven, and of her tipping that sheet so that cookies fall to the floor. The actions in that description drive forward the story.

At the same time, the setting is apparent to us. The word "kitchen" appears only at the very end of the description, but it is superfluous at that point. The audience will have already constructed and transported to a place, and that place is most likely some sort of kitchen. Which kitchen? There is no requirement other than it must be in the range of sound of the backyard, and it must contain an oven and a clean floor. The audience is free to think of a kitchen that has meaning to them—unless of course the author needs to trigger the audience to construct a specific mental image about some other key detail.

While the action and the setting are critical to the transportation, this scene also includes objects, which help construct the scene for the audience. Objects help create scenes and convey a sense of action.[105] These objects still permit the audience to engage in the mental creation of the scene, but with some constraints. There are cookies and they are chocolate chip. The kitchen floor is clean. The clean kitchen floor is what Professor James P. Eyster terms an obtuse object—an object that through its unexpected or precise description creates a feeling of reality and credibility.[106]

Finally, although not critical to the narrative transportation, there is also a flavor of character in the sentence—Cathren is physically impaired in some way. In a different scene, a description of character may actually be part of the scene-setting, details being filled by virtue of the audience's memories and storehouse of mental images. For example,

- Our mail carrier arrives on our porch a few minutes before 11 am each day.

Notice how "mail carrier" creates the scene for us. We have a clear sense of who is arriving and why. Using a proper name would not convey the same information and would leave more of the scene open to the audience's own interpretation. While that might be fine for many details, if the writer needs the audience to know that "Mr. Jones" is regularly on the porch every day, then "mail carrier" will do more to tap into the audience's shared experiences. "Mr. Jones arrives on our porch a few minutes before 11 am each day" leaves open enough information that it is harder to transport into the scene.

Conveying story in a very few number of words has become something of a cottage industry thanks to the famous six-word story, "For sale, baby shoes, never worn." The story is driven not by character but by

105 Recall that in the selfie study, the narrative transportation depended on the influencer posting a selfie of herself engaged in using the product. The action necessarily depended on the object. Farace, *supra* note 100.

106 James Parry Eyster, *Lawyer as Artist: Using Significant Moments and Obtuse Objects to Enhance Advocacy*, 14 Legal Writing 87, 102 (2008).

objects and (in)action that set the scene.[107] A Google search for the precise phrase "six-word stories" will net almost 200,000 results including a robust website devoted entirely to the topic[108] and guidelines for submission in a large online journal.[109] Relatedly, the genre "Hint Fiction" has people writing short stories, twenty-five words or fewer, which suggest a more complex series of events taking place in a larger story. Thus, Hint Fiction is characterized by a form that requires readers to notice and then fill in blanks with their own imaginations.[110] Multiple websites now explain the concept and even offer to write one for a fee.[111] To work, six-word stories and Hint Fiction require action and a sense of setting.

5. Applying the science in legal storytelling

Understanding the connection of description and narrative transportation opens the idea of being aware of these twin concepts in telling case facts and even in the process of legal reasoning when that reasoning is based in narrative comparisons. That is, description is key to lawyers' identifying, selecting, and then telling facts as part of constructing legal advocacy. Lawyers engaging in persuasive storytelling are using a strategy similar to what we all do when we construct stories about ourselves. Psychologists can point to evidence suggesting that we form our individual histories by selecting and ordering personal memories to build our "coherent representation of self." [112] In litigation and in policy-advocacy, the stories we tell as lawyers assist the audience to reach reasoned judgments flavored by the experience of those stories.[113]

107 This story, apocryphally attributed to Ernest Hemingway, was not authored by him. Garson O'Toole, Hemingway Didn't Say That: The Truth Behind Familiar Quotations 183–91 (2017).

108 Six Word Stories, http://www.sixwordstories.net/ (last visited June 20, 2020).

109 *Six-Word Story Guidelines*, Narrative, https://www.narrativemagazine.com/sixwords (last visited June 20, 2020).

110 Based on Robert Swartwood, Hint Fiction: An Anthology of Stories in 25 Words or Fewer (2010). The author has conducted two contests. *See New Hint Fiction Contest,* Robert Swartwood (Mar. 4, 2019), https://www.robertswartwood.com/blog/category/new-hint-fiction-contest. Roxanne Gay judged the second contest.

111 *See e.g.*, *How to Write Hint Fiction*, Custom Essay Meister (Dec. 17, 2019), https://www.customessaymeister.com/blog/how-to-write-hint-fiction#meaning-of-hint-fiction-what-is-hint-fiction.

112 Raymond A. Mar, *The Neuropsychology of Narrative: Story Comprehension, Story Production and their Interrelation*, 42 Neuropsychologia 1414, 1415 (2004).

113 *Id*. The cited studies looked at the impact of narrative on jurors rather than judges. The researchers found that jurors base verdicts upon the creation and coherence-testing of the multiple stories presented at trial. For a study of judges relying on story, see Kenneth D. Chestek, *Judging By the Numbers: An Empirical Study of the Power of Story*, 7 J. ALWD 1 (2010). Professor Chestek used two sets of briefs for each party in his fictionalized appeal. In one set of two briefs, his arguments were based strictly on a presentation of rules without cause-and-effect connective tissue. In the other set of two briefs, he used the cause-and-effect structure of narrative reasoning. The large majority of judges, career clerks, and experienced lawyers found the narrative briefs more persuasive. The only group that wavered was the newer lawyers (0–4 years' experience), and even they were split fairly evenly.

In the legal literature and textbooks, the idea of narrative transportation in legal analysis, persuasion, and writing has started to appear and hopefully will be more fully explored in subsequent dialogue. To date, most other scholars have taken the position that the concept is important mostly for the telling of the case facts, i.e., the client's story, although some scholars have taken the position that narrative transportation is important across the whole of narrative advocacy.[114] One scholar suggests, though, that narrative transportation cannot occur with circumstantial evidence because that type of evidence is more abstract, making it rhetorical instead of narrative: "[A]n argument, no matter how well-crafted, simply doesn't generate such convergence."[115] But that one sentence generalizes a broad topic. Putting aside circumstantial evidence, some types of legal arguments can transport audience members into a story by the very nature of the arguments themselves. Analogical reasoning works by comparing facts, which automatically implicates narrative aspects.

5.1. Narrative transportation with the client's story

Clearly, a lawyer telling a persuasive and effective story about the client's facts depends on narrative transportation to a specified place and perspective. Much of the Applied Legal Storytelling scholarship to date that addresses the telling of a client's story relies on an assumption that narrative transportation to that place and perspective is happening—even if those scholars were not aware of the assumption.[116] But the science tells us more than that. It tells us that narrative transportation matters, and that action and setting matter to *it*. It also tells us that the storyteller should have a sense of the audience's relative position on an issue—the existing beliefs—and to tell the legal story keyed to the type of audience response needed—whether it is asking the audience to reinforce an existing belief system or to change currently held beliefs.

Take, for example, the much-lauded brief written by John Roberts (not yet Chief Justice Roberts) while defending the state of Alaska, which had adopted environmental emissions standards below those of the Environmental Protection Agency.[117] That brief is considered a testament to

114 Robbins, Johansen & Chestek, *supra* note 35, at 167–69; Linda L. Berger & Kathryn M. Stanchi, Legal Persuasion: A Rhetorical Approach to the Science 51–52 (2018) (including information about and conclusions from some of the psychological studies); Smith, *supra* note 87, at ch. 3.

115 Heller, *supra* note 25. In Professor Heller's defense, he also did not have access to all of the studies that are now available. So much of the narrative-psychology literature has been published in the past 15 years that it is unfair to hold Professor Heller to that knowledge in his 2006 law-review article.

116 By "much of," I mean most of the articles that can be found in the first Applied Legal Storytelling Bibliography, Rideout, *Applied Legal Storytelling Bibliography*, *supra* note 24.

117 Brief of Petitioner, Alaska Dep't of Environmental Conservation Docket 02-658 (2003).

the power of legal storytelling, in part because of this descriptive passage in the statement of facts:

> For generations, Inupiat Eskimos hunting and fishing in the DeLong Mountains in Northwest Alaska had been aware of orange-and red-stained creekbeds in which fish could not survive. In the 1960s, a bush pilot and part-time prospector by the name of Bob Baker noticed striking discolorations in the hills and creekbeds of a wide valley in the western DeLongs. Unable to land his plane on the rocky tundra to investigate, Baker alerted the U.S. Geological Survey. Exploration of the area eventually led to the discovery of a wealth of zinc and lead deposits. Although Baker died before the significance of his observations became known, his faithful traveling companion—an Irish setter who often flew shotgun—was immortalized by a geologist who dubbed the creek Baker had spotted, "Red Dog" Creek.[118]

This description transports the audience to the cockpit of Baker's plane, sitting next to the Irish setter, and looking down over the "orange and red-stained creekbeds." The setting matters greatly and in fact is critical to the entire case. And the described actions put the audience into the setting, flying the plane alongside Baker. The legal reader is transported as if inside a novel. The facts, as selected and presented, reveal the conclusion the writer hopes the audience will reach: that this is a case of federal overreaching in the activities of the local community. With his statement of the facts, Roberts primes the audience for the legal theory of the case. Setting here is key to the legal theory.

Writing for narrative transportation can happen in state opinions just as easily as in briefs written to the United States Supreme Court. Return to the *Palsgraf* case as a memorable example of state law: at its core, *Palsgraf* is a state-level decision about a personal-injury claim. Just as John Roberts did in the previous example, Chief Judge Cardozo primed the legal reader for the legal theory that informed the court's decision.

> Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was

118 *Id.* at 7; passage also reproduced, and the description analyzed in Ross Guberman, Point Made 59 (2d ed. 2014).

> dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues.[119]

In one paragraph, Chief Judge Cardozo provided enough facts to narratively transport the legal reader and to point towards accepting the narrative coherence of the court's ruling in the case—that a defendant owes no duty towards an unforeseeable plaintiff.[120] The scene and action are described in a specific way to emphasize—and de-emphasize—certain parts of the setting and certain actions simultaneously happening. The plaintiff is given no name and no context other than being in the wrong place at the wrong time. Character does not matter in Judge Cardozo's telling. The setting matters more as do objects such as a package and a scale. The package (a focusing object) is described as wrapped—emphasizing that the dangerous nature of the contents was unknown to the guards whose actions could then be more confidently accepted in the minds of the audience as helpful rather than dismissive or improper. Our perspective inside the story is with the guards, pulling the men onto the train—we can almost imagine the train just starting to move. As part of creating that perspective, the falling scales that ultimately injured the plaintiff are described as some distance away from the emphasized action.

119 *Palsgraf*, 248 N.Y. at 340–41. I realize that in choosing to use the infamous *Palsgraf* case I have placed myself inside the controversy that surrounds Justice Cardozo's facts section in the decision. There are multiple challenges to Cardozo's decision itself, which ignore facts about Mrs. Palsgraf's status as a passenger who was owed a higher duty of care, but for the purposes of this article, the material challenge I want to highlight and respond to involves his description of the setting. He set up the scene as one of distance between the explosion and Mrs. Palsgraf, "The shock of the explosion threw down some scales at the other end of the platform, many feet away." *Id.* That description has been challenged by commentators as beyond the scope of judicial discretion in opinion-writing. Richard A. Posner, Cardozo: A Study in Reputation 39 (1990); *see also* John T. Noonan Jr., Persons and Masks of Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Mask ch. 4 (1976) (discussing, among other things, the famous Prosser lecture at the University of Michigan, *Palsgraf Revisited*). The criticism of this scene, as we all imagine it, centers on the lack of testimony about the distance. Transcript of Trial Testimony at 10–12, Palsgraf v. Long Island Railroad, Co., 248 N.Y. 339 (1928), https://www.law.berkeley.edu/files/Palsgraf_Record.pdf (hereinafter *Palsgraf* Record). A contemporary news story about the event mentions a distance of ten feet, which may have influenced Justice Cardozo. *Bomb Blast Injures 13 in Station Crowd*, N.Y. Times, Aug. 25, 1924, at 1. Or, he may have simply made an inference of distance from Mrs. Palsgraf's testimony that she had enough time to call out to her daughter. *Palsgraf* Record, *supra* this note, at 11–12. While "several feet away" might be a reasonable inference, the same cannot be said for placing her "at the other end of the platform." The very liberties taken by Cardozo in his crafting of the facts demonstrates the power of description in setting the scene. His choice to create distance narratively transports readers to a particular place on a train platform and permits readers to see why the case was decided at it was. Was he unethical in doing so? There's good argument for it. And that anchors the point that setting description matters. That the *Palsgraf* decision continues to fascinate scholars underscores just how critical it is for advocates to deliberately and carefully set the scene (within the limitations of the evidence) because the place where the audience transports within the story matters enormously to how we perceive the entire story of the case.

120 *Palsgraf*, 248 N.Y. at 340–41.

If the court had ruled oppositely, that Long Island Railroad did have a duty to this plaintiff, the story would have been told differently. One professor imagined it this way, changing the emphasis to being more about character, although the setting still plays a significant role:

> On a hot Sunday in August, Helen Palsgraf decided to escape her basement flat and take her two younger children, Elizabeth and Lillian, to the Rockaway Beach. A janitor and single parent with an annual income of $416, she chose the most economical means of transportation, the Long Island Railroad, a subsidiary of the Pennsylvania Railroad. After buying the tickets, Mrs. Palsgraf led her children onto the crowded station platform, 12 to 15 feet wide.
>
> A train stopped at the station bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, seemed unsteady as if about to fall. In his hurry, he hit a woman in the stomach. A guard on the moving car held the door open and reached forward to help him in. Another guard on the platform pushed from behind. In this act, the package was dislodged and fell upon the rails. The package was a round or oval bundle, 15 to 20 inches in diameter. In fact, it contained fireworks or some sort of explosive. When the package fell, it exploded.
>
> The Palsgraf family stood near an ordinary penny scale of the type often found on railroad platforms. The explosion either knocked it over or the stampede of the panicked crowd caused it to fall. According to Mrs. Palsgraf: "Flying glass—a ball of fire came, and we were choked in smoke, and I says, 'Elizabeth, turn your back,' and with that the scale blew and hit me on the side." She testified: "Well, all I can remember is I had my mind on my daughter, and I could hear her holler, 'I want my mama!'—the little one (Lilian)."
>
> Mrs. Palsgraf was hit by the scale on the arm, hip, and thigh. About one week later, she began stuttering and stammering. Dr. Graeme Hammond, a prominent neurologist, attributed her condition to traumatic hysteria. According to Dr. Hammond, "It was with difficulty that she could talk at all." [121]

Where the audience goes via narrative transportation is quite different in this version of the story. In this version the action and perspective focus on the plaintiff, who is now named and developed as a character. The setting also has changed as has the action. The writer deliberately places

121 Adapted from Louis J. Sirico Jr., *Cardozo's Statement of Facts in* Palsgraf*, Revisited*, 6 Persps. 122 (1998). Until his passing, Professor Sirico was a friend and mentor. He was the first person to interview me for a full-time academic position, and he was one of the early group of professors who encouraged me to keep writing about legal storytelling. I am delighted that this article provides an opportunity to cite something he wrote.

the audience elsewhere on the platform than where Chief Judge Cardozo placed the audience in his storytelling about the case. The writer of this version wants the audience to shadow the plaintiff and identify with her perspective of the day's events. In doing so, the description of the action shifts away from the guards helping two men onto a train, and instead becomes the action of a mother trying to keep her children safe from harm. An audience reading this version of the facts would be steered towards an outcome to the legal story that favors Ms. Palsgraf prevailing.

In a more modern context, I have seen narrative transportation memorably work in domestic-violence restraining-order cases, where the description of just a few more setting details changed the feel of the scene entirely. In one representation, a woman described an escalating child-visitation exchange with her former boyfriend. She explained that she was in her car with the child and with her father, trying to leave, but that she felt trapped because her ex-boyfriend and his family were trying to block her departure by standing around the car. Described this way, the setting frees the audience to construct a mental image of the scene that might not look intimidating enough to justify a restraining order. That scene shifts, however, when one more detail is included—a single detail can cause the "shoe to drop," to speak. When her clinic-student lawyers asked the client how many family members this involved, she replied, "twenty." The description now requires the audience to mentally see the scene in a much more controlled way, one that does come across as sinister and intimidating.

Similarly, in another restraining-order case, the situation centered on the plaintiff, lying ill on a couch when she was verbally accosted by her estranged husband who had entered the house, contravening the terms of their separation. The entirety of the case centered on the setting and in particular the location of that couch. The student-lawyers handling the case as part of a clinic representation had their client, the plaintiff, describe in her testimony the actions it took to reach her while she was lying immobile on the couch. Her description conveyed the sense of threat she felt. The couch was located in a family room at the back of the house, requiring someone to walk a hallway, through the kitchen, down a few steps, and across the family room. Having the client describe the setting to the hearing judge mattered in that case, because the action of a defendant traversing that far into the house was much more ominous than a scene in which a defendant could see the couch from the front door.

5.2. Narrative transportation in legal reasoning

Beyond the telling of the client's story, narrative transportation plays—or should play—a role in the legal-analysis portions of persuasion

when the reasoning includes narrative. Scholars have debated whether narrative plays a role in the dialectical forms of reasoning,[122] but they will at least agree that narrative plays a key role in analogical reasoning.[123] As the Red Dog Creek story vividly demonstrates, narrative also plays a role in policy-based reasoning because that type of reasoning depends on the audience's envisioning a future world under the proposed policies.[124]

In analogical reasoning, lawyers compare critical facts that lead to a legal ruling that the lawyer wishes to liken to or distinguish from their client's situation. Necessarily, the process of analogy rests on a comparison of selected details and the related description. The same processes used to select and describe things in a statement of facts applies equally in a description of precedent.

As the *Palsgraf* facts demonstrate, an audience can be narratively transported in a few sentences. The illustration of a case used for analogy or distinction purposes could similarly create narrative transportation in just a few words. Case facts can be condensed to a few sentences or even a parenthetical phrase. Consider this paragraph of rule illustration in a slip-and-fall situation.

> Oregon courts cast a wide net when contemplating what constitutes a pavement hazard that gives rise to a commercial landowner's duty of care for their premises. Beyond a duty to remove snow and ice, courts have deemed a number of other situations foreseeable and dangerous, giving rise to a duty of care to pedestrians walking by who tripped and fell. *Gardener v. Portland Nursery*, 321 P.3d 622 (Or. 2004) (overgrown rosebushes partially blocking the sidewalk); *MacTarnahan v. McMenamin*, 814 P.2d 802 (Or. 1982) (beer keg left on the pavement by the driveway entrance); *Blumenauer v. Wyden*, 409 P.3d 112 (Or. Ct. App. 2010) (spilled recycling can in the parking lot); *Beard v. Ringside Restaurant, Inc.*, 248 P.3d 624 (Or. App. 2002) (20-lb. bag of root vegetables placed in front of entryway as a decoration).[125]

122 *But see* Linda H. Edwards, *The Convergence of Analogical and Dialectic Imagination in Legal Discourse*, 20 Legal Stud. F. 7 (1996). In Professor Edwards's article, "analogical" refers to reasoning grounded in story and metaphor, whereas "dialectic" refers to formal logic grounded in theses and antitheses. *Id.* at 9. Professor Edwards adeptly argues that there is only imagined, not true polarization of narrative versus systematic reasoning. She demonstrates that narrative appears in the many forms of legal reasoning used by legal decisionmakers and concludes that there is room for the concept of "narrative reasoning" as part of the discourse of the dialectic.

123 Linda H. Edwards, *Speaking of Stories and Law*, 13 Legal Comm. & Rhetoric 157, 176–77 (rejecting in the legal context the post-Enlightenment definition of "reasoning" which included only "systematized, rationalized, formal and semi-formal thought" and which excluded narrative as part of "reasoning").

124 Robbins, Johansen & Chestek, *supra* note 35, at 235.

125 This entire example is from the imagination of Steve Johansen, who was poking some light fun at the New Jersey pantheon of premises liability cases. The original version of this example can be found in *id.*, at 335.

The action described here appears before the parenthetical list—the action of a pedestrian walking and then tripping and falling. The parenthetical descriptions create the settings for the legal reader's mental imagery. The parentheticals themselves focus on action and setting—the latter through the description of objects. No character description appears. Yet, even without it, the reader can walk into the story and beside the plaintiff who is slipping or tripping.

In legal reasoning that relies on—or that creates—legislative history, lawyers can likewise create narrative transportation by describing actions and settings related to the proposed passage of a statute or an amendment.[126] Part of the advocacy may involve the use of story, told either to illustrate why the legislation is needed (as in the case of lawyer acting as lobbyist or legislator) or to explain the reasons for existing legislation's enactment (as in the case of a lawyer-as-litigator, arguing for a specific statutory interpretation). Using story as part of the policy-based advocacy helps contextualize the social–political milieu in which a piece of legislation is needed or was enacted. For example, in sponsoring what became the New Jersey Distracted Driving statute,[127] New Jersey Assembly members who sponsored the bill issued a news release and in it spoke of three stories of victims injured or killed by motorists texting while driving.[128] The stories of the accidents were focused on the setting of a car accident and the action—a driver doing something other than keeping eyes on the road.

6. There are always cautions

The idea of narrative transportation is not a panacea for all legal advocacy. Only certain situations will permit it—those that include a communication that is crafted as a story. Those include a descriptive telling of a character's efforts over time to reach a goal. Not every legal-writing document is written with a cause-and-effect structure.[129] And in turn that means that not every legal-writing situation can provide a narrative transportation moment.

126 I am speaking of lawyers in two different situations. The first involves the lawyer working in a legislative setting, whether externally as a lobbyist or internally as a member of legislative staff (or as a legislator). The second involves the lawyer in a litigation setting who is building an argument around legislative history.

127 N.J. Stat. 39:4-97.3 (2013).

128 *"Kulesh, Kubert & Bolis' Law" Cracking Down on Reckless Drivers on Cell Phones Signed into Law*, N.J. Assembly Democrats, https://www.assemblydems.com/kulesh-kubert-bolis-law-cracking-down-on-reckless-drivers-on-cell-phones-signed-into-law/ (last visited May 25, 2021).

129 *See supra* section 3.3; Green & C. Brock, *In the Mind's Eye, supra* note 21.

Moreover, any communication must be strategized carefully to send the audience where the lawyer intends, while also keeping the audience engaged by having them "author" some of the details. The propensity for an audience member to be transported is also affected by the audience member's own attributes—for example, the ability to create mental imagery. But one need not be an expert at mental imagery. Studies show that those who have even a small capability will be transported.[130]

Even the best-described story can fail, however, when the timing is wrong. Whether the audience is open to the story at all depends in part on the rhetorical concept of *kairos*: the opportune moment.[131] That is, the story must be told at a moment in time when the audience is ready to receive it. The power to persuade an audience always depends on the audience's receptivity.[132] And receptivity depends on many factors, ranging from the mundane (whether the audience is alert and hydrated) to the global (societal expectations or significant recent events).

As one might expect, the quality of the writing also matters. The story must also be a *good* story, one that evokes images and emotions. The medium and context of the narrative also matter. In law as in other contexts, the communication medium matters to the way the message should be created.[133] Naturally, the better the story is crafted, the easier the transport (it should be a *good* story).[134]

Moreover, certain legal documents are purposefully designed to convey the outcome of a negotiated story but not be, or include, stories themselves. A legal document may even contain key aspects of setting but still not effectuate narrative transportation. A property deed focuses on place and maybe even setting. But a property deed has no action. Nor does the technical nature of the property's description lend itself to mental imagery. Nor do transactional conveyance documents easily create narrative transportation. A negotiated contract of sale and a testator's will are both the product of stories and the outcome of narrative reasoning and narrative decisionmaking. But the four corners of these documents are designed as a structured series of entries—numbered in many cases—

130 Green & Brock, *In the Mind's Eye, supra* note 21, at 327.

131 Carolyn R. Miller, *Kairos in the Rhetoric of Science*, *in* A Rhetoric of Doing: Essays on Written Discourse in Honor of James L. Kinneavy 312 (Stephen P. Witte, Neil Nakadate & Roger D. Cherry eds., 1992).

132 Linda L. Berger, *Creating Kairos at the Supreme Court:* Shelby County, Citizens United, Hobby Lobby*, and the Judicial Construction of Right Moments*, 16 J. App. Prac. & Process 147 (2015); Ruth Anne Robbins, *Three 3Ls, Kairos, and the Civil Right to Counsel in Domestic Violence Cases*, 2015 Mich. State U. L. Rev. 1359 (2015).

133 Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, 12 Legal Comm. & Rhetoric 1 (2015).

134 Green & Brock, *In the Mind's Eye, supra* note 21, at 327–28. There is no empirical, just observational data for good versus bad stories. This also begs the question of what makes a story "a good story." Humans have been chasing that idea for multiple millennia. If that were fully quantifiable, we would all be best-selling authors.

that act as an instructive checklist for parties to effectuate the outcomes dictated in the document. Although some of the items in the list may contain some narrative elements, the documents themselves cannot be a vehicle of narrative transportation because they are not designed to flow from one image or action to another in a way that would permit the readers to fall into and remain inside the story. That is not to say story is not present—it very much is in the background to the document's creation and, of course, in any subsequent litigation that may arise.[135]

Description can also go too far, with overuse creating cognitive overload. We all have finite cognitive limits, even when it comes to story. There is a double-edged sword to a highly visualized description. The more the creator shows the audience visually, the less mental imagery the audience creates for themselves and presumably this means less holistic engagement.[136] There must be a balance. Not every part of the legal story can be described in abundant detail—that would exhaust the audience. Instead, the legal storyteller must choose where to emphasize the level and specificity of details.

Too many—and the wrong—details can also wander into the realm of distraction from the details that matter most to the legal outcomes. The legal writer who uses detail to draw readers into a scene must be careful to avoid including what amounts to irrelevant noise. In the kitchen example, the type of cookie Cathren was baking—chocolate chip—and the cleanliness of the floor might set a scene with a taste of detail. But any more than that might tip the balance. A legal advocate who includes too many facts irrelevant to the precise legal issue under review likewise risks transporting the audience to a scene that has little connection to the attitude shift the lawyer seeks.

A different kind of problem arises when a story's reader sees its film adaptation. The reader will compare the movie to the mental imagery the reader has already "authored." This helps explain why producers of movie adaptations of best-selling books must walk a fine line. The more elaborate the storyworld imagined by the reader, the greater the possible tension with the movie version's narrative fidelity. Fantasy and Science Fiction are among the hardest to adapt because the audience will have engaged more deeply with the many opportunities to imagine the scenes and actions in the books.[137]

135 *Contra*, Chesler & Sneddon, *supra* note 25. The authors take the position that a will is a story and therefore that it can achieve narrative transportation. I appreciate the argument but fundamentally disagree with it because narrative transportation happens within the four corners of the document itself. Documents that are created in the background to support the main piece of legal writing are called "shadow documents." Robbins, Johansen & Chestek, *supra* note 35, at 141–48 (*citing* Interview with Victoria L. Chase).

136 *Id.*

137 Raymond A. Mar et al., *Bookworm Versus Nerds: Exposure to Fiction Versus Non-Fiction, Divergent Associations with Social Ability, and the Simulation of Fictional Worlds*, 40 J. Rsch. Personality 694 (2006). A film can rise or fall based

For persuasive legal storytelling in written format, scene-building is likewise a balancing act. The writer wants the audience to engage in some mental imagery, but also wants to provide guidance that keys to the legal story's theme and case theory. The writer must choose carefully and leave behind what will clutter a narrative, especially because we all possess a finite capacity when we process legal texts—we can do only so much with too much.[138] When we read narratives, we mentally rehearse their scenes. Whether this ultimately affects persuasion has something to do with the detail given to us, and, of course, how engaged we are to begin with.

Finally, as with any technique used for persuasion, a legal storyteller must be careful about professionalism and ethical obligations. Legal stories are meant to be told from a particular perspective but lawyers are prohibited from engaging in deliberate and nonconsensual deception.[139] Stories are sometimes termed "necessary but dangerous," a caution based on a fear that advocates will appeal to emotion over intellect.[140] Advocates need to remember that legal storytelling is a way to organize and convey discovered facts. The whole genre of legal storytelling as a category of nonfiction narrative must be more grounded in truth and realism than fictional stories may dwell.

Conclusion

It is not enough for a legal advocate to tell a story—that story must be strategic. It should create a pathway for the audience to form mental imagery of action and place. My objective here has been to open readers' minds to new avenues in Applied Legal Storytelling. I have succeeded if reading this article creates connections for lawyers and scholars in their own work. As a form of legal advocacy, legal storytelling works most effec-

on the navigation of those tense waters. One example from media comes from Harry Potter movies. In 2001 when Warner Brothers' vision of Hogwarts was first revealed to audiences, news reports were written about people sighing with relief—Chris Columbus, the director, didn't ruin what the book readers had formulated in their minds. Kenneth Turan, *Magic by the Book*, L.A. Times, Nov. 16, 2001, https://www.latimes.com/archives/la-xpm-2001-nov-16-et-turan16-story.html ("It is the film's success in re-creating that world that points out its happiest accomplishment, the ability to remind us of what we loved about the book."). For more about narrative fidelity in law as a substantive concept focusing on a story as ringing true with what we already know or think we know to be true, see J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 Legal Writing 53, 69–78 (2008).

138 Andrew Carter, *The Reader's Limited Capacity: A Working-Memory Theory for Legal Writers*, 11 Legal Comm. & Rhetoric 31 (2014). For more about a reader's limited capacity in a narrative advertisement setting, *see* Lien & Chen, *supra* note 23, at 518 (stating that a reader has limited capacity to process information, so they will normally gravitate towards the most attractive information).

139 That sentence was very specifically phrased because deception, also known as redirection, is not always nonconsensual in law. Melissa H. Weresh, *Wait, What? Harnessing the Power of Distraction or Redirection in Persuasion*, 15 Legal Comm. & Rhetoric 81, 112 (2018) (explaining that when a mediator withholds confidential information from one side in the mediation, that is a "consensual deception, agreed upon by the parties").

140 Brian J. Foley, *Applied Legal Storytelling, Politics, and Factual Realism*, 14 Legal Writing 17, 45–46 (2008).

tively as persuasion when the audience is narratively transported into the story and experiences it from a specifically chosen perspective. For that to occur, legal storytellers must make careful choices about the mental imagery of action and setting. While previous advice from scholars have exhorted legal advocates to "show" rather than "tell," what it is to do so has not been made clear. This article provides a foundation for the type of "show" that persuades.

ESSAY

Editing and Interleaving

Patrick Barry*

This essay suggests that a powerful learning strategy called "interleaving"—which involves strategically switching between cognitive tasks—is being underused. It can do more than make study sessions more productive; it can also make editing sessions more productive.

Introduction

A learning technique called "interleaving" has helpfully started to make its way into the study tips that law students receive. Journal articles promote interleaving.[1] Popular websites promote interleaving.[2] And at the University of Michigan Law School, where I teach, every J.D. student—along with every L.L.M.—is introduced to the concept even before classes start, during the initial days of orientation.

This essay, however, suggests that interleaving has an additional application, one that can help not just law students but also associates, partners, judicial clerks, judges, and anybody else whose professional success depends on efficiently managing multiple writing projects. Just as interleaving can make study sessions more productive, it can also make editing sessions more productive.

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1 *See, e.g.*, Jennifer M. Cooper & Regan R. Gurung, *Smarter Law Study Habits: An Empirical Analysis of Law Learning Strategies and Relationship with Law GPA*, 62 St. Louis U. L.J. 361, 373 (2017); Jennifer M. Cooper, *Smarter Law Learning: Using Cognitive Science to Maximize Law Learning*, 44 Cap. U. L. Rev. 551, 570–72 (2016).

2 *See, e.g.*, Matt Shinners, *Master the LSAT with Learning Science*, Above the L. (Apr. 13, 2017, 11:34 AM), https://abovethelaw.com/2017/04/master-the-lsat-with-learning-science/?rf=1; Academic Support, *More Memory Advice for the Bar Exam*, Law Sch. Acad. Support Blog (June 17, 2020), https://lawprofessors.typepad.com/academic_support/2020/06/more-memory-advice-for-the-bar-exam.html.

Section I offers a short overview of interleaving. Sections II and III show how it can help you produce better briefs.

I. Learning and forgetting

The leading proponent of "interleaving" is the psychologist Robert Bjork, who runs the Learning and Forgetting Lab at UCLA. "Particularly when one has several different things to learn," explains his lab's website, "an effective strategy is to interleave one's study: Study a little bit of history, then a little bit of psychology followed by a chapter of statistics and go back again to history. Repeat (best if in a blocked-randomized order)."[3]

A key aspect of this approach is a concept Bjork calls "desirable difficulty."[4] There is something helpfully hard about following up a study session on, say, Constitutional Law with a study session on Contracts, instead of just doubling up on Constitutional Law. The cognitive work it takes to switch subjects has been shown to produce much deeper and longer-lasting comprehension.[5] You can think of it as a form of intellectual cross training, where your mental muscles become stronger and more flexible because they are regularly stretched in different ways.

A related idea is called "spacing," which involves strategically planning out your study sessions so that there are significant breaks between them.[6] That way, your brain can put in a useful amount of effort to remember what you previously covered, a process that helps lay down more powerful—and more permanent—neural pathways to the information.[7] Here's how Bjork explains the payoff, "When we access things from our memory, we do more than reveal it's there. It's not like a playback. What

3 UCLA Bjork Learning & Forgetting Lab, *Research*, UCLA, https://bjorklab.psych.ucla.edu/research/ (last visited Aug. 25, 2020).

4 Elizabeth L. Bjork & Robert Bjork, *Making Things Hard on Yourself, But in a Good Way: Creating Desirable Difficulties to Enhance Learning*, *in* Psychology and the Real World: Essays Illustrating Fundamental Contributions to Society 56 (Morton Ann Gernsbacher et al. eds., 2009), https://bjorklab.psych.ucla.edu/wp-content/uploads/sites/13/2016/04/EBjork_RBjork_2011.pdf.

5 *See, e.g.*, Robert Bjork & Judith Kroll, *Desirable Difficulties in Vocabulary Learning*, 128 Am. J. Psychol. 241, 245–47 (2015); Henry L. Roediger & Kathleen McDermott, *Remembering What We Learn*, Cerebrum (July 19, 2018), https://www.dana.org/article/remembering-what-we-learn/.

6 *See, e.g.*, Harry P. Bahrick et al., *Maintenance of Foreign Language Vocabulary and the Spacing Effect*, 4 Psychol. Sci. 316, 316–21(1993); Michael J. Kahana & Marc W. Howard, *Spacing and Lag Effects in Free Recall of Pure Lists*, 12 Psychonomic Bull. & Rev. 159, 159–64 (2005), https://memory.psych.upenn.edu/files/pubs/KahaHowa05.pdf; John J. Shaughnessy, *Long-Term Retention and the Spacing Effect in Free-Recall and Frequency Judgments*, 90 Am. J. Psychol. 587, 587–98 (1977).

7 *See, e.g.*, Haley A. Vlach & Catherine M. Sandhofer, *Distributing Learning over Time: The Spacing Effect in Children's Acquisition and Generalization of Science Concepts*, 83 Child Dev. 1137 (2012); Robert Bjork, *Memory and Meta-memory Considerations in the Training of Human Beings*, *in* Metacognition: Knowing About Knowing 185 (Arthur Shimamura & Janet Metcalfe eds., 1994).

we retrieve becomes more retrievable in the future. Provided the retrieval succeeds, the more difficult and involved the retrieval, the more beneficial it is."[8]

For this reason, students of all kinds should spend *less* time simply re-reading their notes or highlighting material, and *more* time quizzing themselves; tools like flash cards push you beyond just recognizing material and move you toward the more useful task of retrieving it.[9] Students might even consider reducing the amount of notes they take in class and instead waiting to take notes after class. Recalling content you've been taught is more effective than thoughtlessly copying down everything the teacher says.

II. The poet is working

The more I learned about interleaving and spacing, the more I began to wonder whether these techniques—and interleaving in particular—might be usefully applied to writing and editing. If there are cognitive benefits and productivity gains to switching between study subjects, might there also be cognitive benefits and productivity gains to switching between writing projects?

A visit to one of my classes by Jeffrey Fisher, the co-director of the Supreme Court Litigation Clinic at Stanford Law School and one of the most accomplished appellate-advocacy lawyers in the country, encouraged me to pursue that hunch.[10] He told the students that he regularly works on three briefs at once. Going back and forth between cases, he said, really helps him spot and correct the errors in each brief.

An article in *The Chronicle of Higher Education* called "The Habits of Highly Productive Writers" supports Fisher's approach.[11] Along with observations about how highly productive writers "leave off at a point where it will be easy to start again" and "don't let themselves off the hook," the author of the piece, Rachel Toor, suggests that highly productive writers also work on multiple projects at once. [12] "Some pieces need time

8 Garth Sundem, *Everything You Thought You Knew About Learning is Wrong*, Wired (Jan. 29, 2012), https://www.wired.com/2012/01/everything-about-learning/.

9 Ralf Schmidmaier, Rene Ebersbach, Miriam Schiller, Inga Hege, Matthias Holzer & Martin R. Fischer, *Using Electronic Flashcards to Promote Learning in Medical Students: Retesting Versus Restudying*, 45 Med. Educ. 1101–10 (2011); Jonathan M. Golding, Nesa E. Wasarhaley & Bradford Fletcher, *The Use of Flashcards in an Introduction to Psychology Class*, 39 Teaching Psych. 39, 199–202 (2012).

10 To read more about Jeffrey Fisher, see *Jeffrey L. Fisher: Biography*, Stan. L. Sch., https://law.stanford.edu/directory/jeffrey-l-fisher/#slsnav-featured-video (last visited July 15, 2019).

11 *See* Rachel Toor, *The Habits of Highly Productive Writers*, Chron. Higher Educ. (Nov. 17, 2014), https://www.chronicle.com/article/The-Habits-of-Highly/150053.

12 *Id.*

to smolder," she explains. "Leaving them to turn to something short and manageable makes it easier to go back to the big thing. Fallowing and crop rotation lead to a greater harvest."

Another benefit of the interleaving Fisher does is nicely articulated by something Toor notes earlier in her piece: a lot of writing gets done when you're not actually writing. She uses a passage from the novel *The End of the Affair* by Graham Greene to illustrate what she means:

> So much in writing depends on the superficiality of one's days. One may be preoccupied with shopping and income tax returns and chance conversations, but the stream of the unconscious continues to flow, undisturbed, solving problems, planning ahead: one sits down sterile and dispirited at the desk, and suddenly the words come as though from the air: the situations that seemed blocked in a hopeless impasse move forward: the work has been done while one slept or shopped or talked with friends.[13]

But perhaps an easier, more playful way to remember this idea is through an anecdote that the French writer André Breton tells about a fellow poet. The poet apparently used to hang a notice on the door of his house every evening before he went to sleep. The notice stated, "THE POET IS WORKING."[14]

The implication: My brain is working on things even when the rest of me is asleep.

III. Blocking vs. Interleaving

Of course, if you do not start projects, the parts of your brain that could help you out while you are sleeping or are off doing something else will not have any material with which to work. Those parts will also have less overall time to come up with ideas and solutions.

Consider Jeffrey Fisher again. Suppose he has three briefs to write in the same thirty-day month. He could focus entirely on the first brief during the initial ten days, entirely on the second brief during the second ten days, and entirely on the third brief during the last ten days.

But that "blocking" strategy would limit the amount of time he gives his subconscious to help with each brief to just ten days.[15] By instead

13 *Id.* (quoting Graham Greene, The End of the Affair 19 (1951)).

14 André Breton, *Manifesto of Surrealism (1924)*, 391 Issues, http://391.org/manifestos/1924-manifesto-of-surrealism-andre-breton/ (last visited July 15, 2019).

15 For more on the difference between "blocking" and "interleaving" strategies, see Paulo Carvalho & Robert Goldstone, *Effects of Interleaved and Blocked Study on Delayed Test of Category of Learning Generalization*, 5 Frontiers Psych. 936 (2014).

interleaving and periodically switching between the three briefs over the course of the whole month, he increases the help he gets. His subconscious now has closer to the full thirty days to tinker, strategize, reverse course, rearrange arguments, generate new ideas, and do all the other mental work that good editing requires. He also enjoys the added bonus of not getting so wrapped up in one brief that he loses the ability to step back and revise it with some helpful cognitive distance.

The psychologist Adam Grant highlights a related set of benefits in "Why I Taught Myself to Procrastinate," an essay he published in the *New York Times* in 2016.[16] The youngest professor to earn tenure at the Wharton Business School, Grant is the kind of person who, in college, completed his senior thesis four weeks before it was due and, in graduate school, submitted his dissertation two years in advance.[17] "For years," he explains in the essay, "I believed that anything worth doing was worth doing early."

His perspective changed, however, when he began collaborating with Professor Jihae Shin, who now teaches at the University of Wisconsin School of Business.[18] Through a combination of experiments and survey data, Shin assembled a range of evidence showing that procrastination can actually lead to a boost in creative thinking—at least when done in a certain way.[19] You don't get the boost if your procrastination prevents you from starting a task in the first place.[20] You only get it if you do your procrastinating sometime between when you start and when you finish.[21]

"Our first ideas, after all, are usually our most conventional," explains Grant, who eventually teamed up with Shin to publish a related set of findings.[22] "My senior thesis in college ended up replicating a bunch of

16 Adam Grant, *Why I Taught Myself to Procrastinate* N.Y. Times: (Jan. 16, 2016), https://www.nytimes.com/2016/01/17/opinion/sunday/why-i-taught-myself-to-procrastinate.html.

17 *Id.*

18 *Id.*

19 Jihae Shin & Adam M. Grant, *When Putting Work Off Pays Off: The Curvilinear Relationship Between Procrastination and Creativity*, Acad. Mgmt. J. (Apr. 3, 2020), https://doi.org/10.5465/amj.2018.1471.

20 *Id.*

21 In a critique of Grant's essay, the psychologist Tim Pychyl distinguishes between "delay" and "procrastination":

> [Grant's] notion of "the right kind of procrastination . . ." is the thesis and main error of the essay. The right kind of *delay* may make you more creative. I agree that being too quick off the mark for all of your tasks may be an ineffective strategy when careful thought is necessary first. But, please, let's not play in this semantic cesspool. All delay is not procrastination, and it's important to know the difference. When you figure that out, you'll probably use delay more effectively, and you'll probably be more creative.

Tim Pychyl, *Procrastination as a Virtue for Creativity: Why It's False*, Psych. Today (Jan. 18, 2016), https://www.psychologytoday.com/us/blog/dont-delay/201601/procrastination-virtue-creativity-why-its-false. For an additional critique, see Piers Steel, *The Original Myth*, Psych. Today (Apr. 8, 2016), https://www.psychologytoday.com/us/blog/the-procrastination-equation/201604/the-original-myth#:~:text=The%20punchline%3A%20%E2%80%9CThe%20procrastinators,What%20is%20this%20creativity%20scale.

22 Grant, *supra* note 16.

existing ideas instead of introducing new ones. When you procrastinate, you're more likely to let your mind wander. That gives you a better chance of stumbling onto the unusual and spotting unexpected patterns."[23]

Grant then shares how Shin's research prompted him to tinker with his previously hyper-focused approach to writing and editing. Instead of single-mindedly pursuing one project until it was completely finished, he intentionally put the project aside once he got through a first draft. Soon after returning to the draft, three weeks later, the payoff was clear. "When I came back to it, I had enough distance to wonder, 'What kind of idiot wrote this garbage?' To my surprise, I had some fresh material at my disposal."

Three weeks may seem like a long time to leave a document dormant, especially if court deadlines are soon approaching. But even taking a few days—or simply a couple hours—can help. The point is to free up the mental space needed to view your writing through a more creative and discerning set of editorial eyes.[24]

Plus, the beauty of interleaving is that taking a break from one document can be done by working on a different document. "Most mornings I'll spend time on two or three different writing projects," the prolific constitutional-law scholar Cass Sunstein has said of his own writing habits. "I like to go back and forth—if I'm stuck on one, I'll jump to the other."[25]

I encourage my students to try something similar. Multi-tasking, I tell them, remains a bad idea. Study after study has demonstrated that our brains are not good at doing two things simultaneously.[26] But there can be some real benefits to "multi-projecting." When done strategically, interleaving at least one writing assignment with a second might mean that both turn out significantly better in the end.

23 *Id.*

24 For other endorsements of this kind of spacing, see Tonya Kowalski, *Toward a Pedagogy for Teaching Legal Writing in Law School Clinics*, 17 Clinical L. Rev. 285, 338 (2011); Terry Jean Seligmann, *Why Is a Legal Memorandum like an Onion? A Student's Guide to Reviewing and Editing*, 56 Mercer L. Rev. 729, 731–32 (2005); Christopher M. Anzidei, *The Revision Process in Legal Writing: Seeing Better to Write Better*, 8 Legal Writing 23, 30 (2002).

25 Noah Charney, *Cass Sunstein: How I Write*, Daily Beast (July 11, 2017), https://www.thedailybeast.com/cass-sunstein-how-i-write.

26 *See, e.g.*, Melina R. Uncapher & Anthony D. Wagner, *Minds and Brains of Media Multitaskers: Current Findings and Future Directions*, 115 Proc. Nat'l Acad. Sci. 9889 (Oct. 2, 2018), https://doi.org/10.1073/pnas.1611612115.

ARTICLE

The Power of Connectivity

The Science and Art of Transitions

Diana J. Simon*

I. Introduction

"I think, therefore I am."[1] Just imagine if "therefore" had been replaced with "however" or omitted entirely. Descartes's thought would be forever changed, and some lawyer or legal writing professor might have commented that this was an improper fragment. Transitions matter.

This article explores why transitions matter and how to use them. It does so from three different perspectives: First, the science behind transitions is addressed, proving that transitions can speed processing time and improve comprehension, and that some transitions are better than others. Second, the art of transitions is addressed through a song and a stand-up comedy act to explore whether these genres can teach legal writers lessons about transitions—specifically point headings and rhetorical questions. Third, the use of transitions in legal writing is addressed with a special emphasis on the magic of three and the use of first, second, and third as transitions.

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1 René Descartes, Discourse on Method (1637).

II. The science behind transitions

While lawyers have been busy writing briefs using transitions, psycholinguists and cognitive psychologists, among others, have been studying the effects of "connectives"[2] on comprehension and reading times.[3] Indeed, the literature reveals that the use of transitions improves processing time and assists in comprehension.[4] Any lawyer trying to convince a judge that an argument should be understood quickly and then adopted should care about this.[5]

For example, in one study, the authors found that two sentences that were connected to each other using the word "because" led to faster recognition times than the same two sentences without that word.[6] The experiment was designed to test aspects of the "Connective Integration Model." Under this model, when there are two clauses of a sentence that contain a word like "because," the reader first places the first clause in working memory. When the reader encounters the word connecting the clauses, the reader knows the clauses must be integrated. When the reader then reads the second clause and puts that in the reader's memory, the reader then combines both clauses into an integrated representation. If

2 Scientists use the word "connectives"; legal writers use the word "transitions." Keith K. Millis & Marcel A. Just, *The Influence of Connectives on Sentence Comprehension*, 33 J. Memory & Language 128, 128–29 (1994) (using the word "connective" to refer to the word "because"); Judith Kamalski, Len Lentz & Ted Sanders, *Effects of Coherence Marking on the Comprehension and Appraisal of Discourse* (2006), https://www.academia.edu/18329261/Effects_of_Coherence_Marking_on_the_Comprehension_and_Appraisal_of_Discourse (referring to the importance of connectives such as "because" and "therefore"). *Compare, e.g.*, Christine Coughlin, Joan Rocklin & Sandy Patrick, A Lawyer Writes 271 (3d ed. 2018) (listing "because" as a transition) (citation omitted); Bryan Garner, The Redbook, A Manual on Legal Style 235–37 (4th ed. 2013) (defining a conjunction as joining "two or more words, phrases, clauses or sentences" and listing "because" as a subordinating conjunction that shows a logical connection to the main clause). Further, the word transitions, as used in this article, should be interpreted broadly to include words such as "and," "because," "including," "but," and "so," and transitional devices such as point headings and rhetorical questions. In fact, legal writing expert Ross Guberman lists all of these words and 85 other transition words and phrases in one of the top blogs on legal writing. Ross Guberman, *90 Transition Words and Phrases*, Legal Writing Pro, https://legalwritingpro.com/pdf/transition-words.pdf (last visited Mar. 20, 2021). Further, because the intended audience for this article is lawyers and not psycholinguists or cognitive psychologists, the word transition will be used instead of words such as "connectives" or "coherence markers." Interestingly, however, Bryan Garner has referred to transition words and phrases as "explicit connectives." Bryan A. Garner, Legal Writing in Plain English 83–85 (2d ed. 2013).

3 *See generally* Jean Caron, Hans C. Micko & Manfred Thüring, *Conjunctions and the Recall of Composite Sentences*, 27 J. Memory & Language 309 (1988); Kamalski et al., *supra* note 2; Millis & Just, *supra* note 2, at 130; Ted J. M. Sanders & Leo G.M. Noordman, *The Role of Coherence Relations and Their Linguistic Markers in Text Processing*, 29: 1 Discourse Processes 37 (2000); Jan H. Spryridakis & Timothy C. Standal, *Signals in Expository Prose: Effects on Reading Comprehension*, 22 Reading Res. Q. 285 (1987).

4 See the authorities cited *supra* note 3.

5 At first blush, it might seem like the less time and effort it takes to read something, the less the reader will absorb the information. The opposite is true. "Relevance theory" is a theory that posits that perceptions of relevance vary with effort, and if more effort (and, in theory, time) is taken to process information, the reader will find the information less relevant and less worthy of attention. Elizabeth R. Baldwin, *Beyond Contrastive Rhetoric: Helping International Lawyers Use Cohesive Devices in U.S. Legal Writing*, 26 Fla. J. Int'l L. 399, 424 (2014). In contrast, if information is easy to interpret, that information has an "initial degree of plausibility." *Id.* (citation omitted).

6 Millis & Just, *supra* note 2, at 134.

there is no connecting word, however, there is no explicit cue to integrate the statements, leading to a possible inability to integrate and comprehend the two clauses.[7]

In one of three experiments, subjects read two pairs of statements—one pair not joined by a transition and another pair joined by the word "because."[8] The sentence pairs were all the same length; the only difference was in the use of the connecting word.[9] Here is an example:

> **Version One**: The elderly parents toasted their only daughter at the dinner. Jill had passed the exams at the prestigious university.
> **Version Two**: The elderly parents toasted their only daughter at the dinner *because* Jill had passed the exams at the prestigious university.[10]

In each sentence pair, the first statement of the pair conveyed a possible consequence of the action or event expressed in the second statement.[11] The subjects were provided with 72 pairs of sentences.[12] The subjects were presented with the sentence pairs on a fast moving computer screen, and then a "probe word" would appear; in the example above, the probe word would have been the word "toasted."[13] They were then told to press "true" if the word had appeared in the sentence pairs and "false" if it had not.[14] The authors of the study then measured word reading times, probe word recognition times, and the time to answer.[15] Timing was measured in milliseconds.[16]

The result was as hypothesized—the versions of the statements with the word "because" led to faster recognition times of the probe word than the statements without that connection.[17] In addition to being faster, the answers were more accurate.[18]

Unlike the study above where the researchers used *related* sentences, in another experiment, the researchers used *unrelated* sentence pairs to assess recall performance comparing, among other conjunctions, "because" and "and" inserted between the clauses.[19] Sentence pairs were also used without any connection. The sentences had a single subject and predicate and were all in past tense.[20] Subjects were provided with

7 *Id.*

8 *Id.* at 130.

9 *Id.* at 131.

10 *Id.* at 128.

11 *Id.*

12 *Id.*

13 *Id.* at 131–32.

14 *Id.* at 131.

15 *Id.* at 132.

16 *Id.* While the difference of a few milliseconds might not seem significant for lawyers (or any other person for that matter), in this area of research, that is the unit of measurement.

17 *Id.* at 134.

18 *Id.*

19 Caron et al., *supra* note 3, at 311.

20 *Id.*

a booklet of the sentence pairs, one pair on each page, and were told to turn the page every 7.5 seconds.[21] Subsequently, they were told to write down what they could remember of the second clause or sentence.[22] Recall performance was better for the "because" sentences than the "and" sentences or unconnected sentences.[23]

Finally, when scientists studied the impact of transitions on readers' comprehension of longer passages, they found that when transitions were added, students scored higher on tests designed to test their understanding of the materials.[24] The materials consisted of four essays on technical topics, such as nitrates, corrosion, and algae control.[25] After reading the passages, students took a ten-question multiple choice test.[26] Although the results were dependent on the content of the material, the use of the transitions helped readers "retain more subordinate and superordinate content and make inferences from that content."[27] The authors thus concluded that "logical connectives" appear to aid readers in understanding "expository prose."[28]

Thus, there is a scientific basis for using transitions in writing, as they improve processing times and comprehension. And some transitions work better than others.

III. From science to the art: Justin Timberlake's "SexyBack" and Brian Regan's Walk on the Moon

It is not only scientists that can help legal writers understand why transitions improve reader comprehension. Artists too can help inform legal writers about their own use of transitions. With the help of singer-songwriter Justin Timberlake, and stand-up comedian Brian Regan, legal writers can learn about point headings, the importance of variety, and the use of rhetorical questions as transitions.

21 *Id.* at 312.

22 *Id.*

23 *Id.* at 315. Similarly, in a study comparing a "problem-solution" format with a "list relation," the authors found that the problem-solution format caused a stronger link in the representation than a list structure. Sanders & Noordman, *supra* note 3, at 51.

24 Spyridakis & Standal, *supra* note 3, at 290–92. For this study, different methods were used to help signal or preview comprehension: headings, previews of the material, and "logical connectives" in the form of transitions such as "for example," "therefore," "also," "additionally," and "in the meantime." *Id.* at 288–89. Because the focus of this article is on transitions, only that part of the study is addressed.

25 *Id.* at 288.

26 *Id.* at 289.

27 *Id.* at 292. In one passage that was long and at a relatively low reading level (Grade 9), the signals used had less value, leading the authors to conclude that if the passage is easy enough to understand, signals may be of less value. *Id.* at 293.

28 *Id.*

A. What Justin Timberlake can tell us about point headings

The link between music and the law is known to be strong.[29] Music has even impacted how legal writing is taught to law students: professors have used flamenco rhythm and music to get law students thinking about legal writing[30] and the beats and rhythm of hip hop to teach plagiarism and citation.[31]

Even the word used to describe transitions in writing and music is the same—"bridge."[32] While the word "bridge" in legal writing refers to transitions in general, the word in music is used to refer to a specific type of transition in a song.[33] Regardless, both legal writing and music use transitions to move from one section to another and assure continuity of the whole.

Let's take the song "SexyBack"[34] by Justin Timberlake, a singer-songwriter, actor, dancer, and record producer.[35] He has been the recipient of many Grammy, Emmy, and other awards and is well known throughout the world.[36] "SexyBack" was his first number-one single on the Billboard Hot 100 and was certified three-times platinum.[37] In that song, not only does he *make* effective transitions between different parts of the song, but he also actually *announces* each one, as in this excerpt:

29 *E.g.*, Charles R. Calleros, *Reading, Writing, and Rhythm: A Whimsical, Musical Way of Thinking about Teaching Legal Method and Writing*, 5 Legal Writing 1 (1999); Kim D. Chanbonpin, *Legal Writing, the Remix: Plagiarism and Hip Hop Ethics*, 63 Mercer L. Rev. 597 (2012); Karl Johnson & Ann Scales, *An Absolutely Positively True Story: Seven Reasons Why We Sing*, 16 N.M. L. Rev. 433, 444–45 (1986) (discussing the use of song to increase the scope of a legal education); Alex B. Long, *[Insert Song Lyrics Here]: The Uses and Misuses of Popular Music Lyrics in Legal Writing*, 64 Wash. & Lee L. Rev. 531 (2007); Bret Rappaport, *Using the Elements of Rhythm, Flow, and Tone to Create a More Effective and Persuasive Acoustic Experience in Legal Writing*, 16 Legal Writing 65 (2010). On using flamenco music to understand the process of legal writing, the undersigned author was fortunate enough to have been a participant in Professor Calleros's flamenco demonstration at the plenary session at the Nineteenth Annual Rocky Mountain Writing Conference in March of 2019 entitled "Reading, Writing, and Rhythm: Thinking about Teaching and Learning in a Collaborative Exercise." It was truly inspiring and memorable.

30 Calleros, *supra* note 29, at 3, 5.

31 Chanbonpin, *supra* note 29.

32 *E.g.*, Teresa J. Reid Rambo & Leanne J. Pflaum, Legal Writing by Design: A Guide to Great Briefs and Memos 219 (2d ed. 2013) (legal writing); Beth McCormack, *Moving Beyond Furthermore and Additionally: Ways to Brighten Your Transitions and Paragraph Bridges*, Vt. B. J. 20 (Winter 2017) (legal writing); Rappaport, *supra* note 29, at 15 (legal writing). In music, the bridge is a contrasting section that prepares for the "return of the original material section." *Bridge (music)*, Wikipedia, https://en.wikipedia.org/wiki/Bridge (last visited Mar. 20, 2021).

33 See authorities cited *supra* note 29; Jason Blume, *The How and Why of Building Bridges in Your Songs*, MusicWorld (Feb. 23, 2017), https://www.bmi.com/news/entry/the-how-and-why-of-building-bridges-in-your-songs (explaining that like "bridges constructed with concrete and steel, bridges made of melody and lyric are links intended to connect one element to another").

34 Justin Timberlake, SexyBack (Jive Records 2006).

35 *List of Awards and Nominations Received by Justin Timberlake*, Wikipedia, https://en.wikipedia.org/wiki/List_of_awards_and_nominations_received_by_Justin_Timberlake (last visited June 14, 2020).

36 *Id.*

37 *SexyBack*, Wikipedia, https://en.wikipedia.org/wiki/SexyBack (last visited June 14, 2020).

I'm bringing sexy back
Them other boys don't know how to act
I think you're special, what's behind your back?
So turn around and I'll pick up the slack
Take 'em to the bridge
Dirty babe
You see these shackles
Baby I'm your slave
I'll let you whip me if I misbehave
It's just that no one makes me feel this way
Take 'em to the chorus
Come here girl
Go ahead, be gone with it
Come to the back
Go ahead, be gone with it[38]

Letting the listeners know what is coming up, Justin Timberlake spells out the relationship between one part of the song and the next explicitly. While he might have disregarded the preference of legal writers for the seamless transition,[39] in this song, spelling out the transitions clearly for the listener apparently works, judging by its success (although its success is no doubt attributable to factors beyond the explicit transitions).

Just as Timberlake announces where he is heading, legal writers announce their organization through point headings—a common type of transitional device.[40] Indeed, point headings serve as "transition points" to alert judges to arguments coming up.[41] Point headings also help advocates organize their arguments.[42] One analogy often used about the purpose of point headings is that they are key signposts to help navigate difficult twists and turns in the road.[43] Thus, while Timberlake's announcement that the chorus is coming up is rare in musical lyrics, it is very much like

38 *SexyBack Lyrics*, Genius Lyrics, https://genius.com/Justin-timberlake-sexyback-lyrics (last visited June 14, 2020).

39 *See infra* notes 73–79 and accompanying text.

40 Gerald Lebovitz, *Getting to the Point: Pointers About Point Headings*, 82 N.Y. St. B. Ass'n J. 64, 50 (2010) (pinpoint pages from Westlaw version); *see also* Marie Buckley, A Lawyer's Guide to Writing (Nov. 7, 2011), https://mariebuckley.com/category/legal-memoslegal-writing/transitions-in-legal-writing/ (explaining that the transition in legal writing goes after the heading because "the heading itself is a form of transition").

41 Lebovitz, *supra* note 40, at 49.

42 *Id.*

43 *Making Connections between Sections of Your Argument: Road Maps and Signposts*, Student Learning Ctr., https://slc.berkeley.edu/writing-worksheets-and-other-writing-resources/making-connections-between-sections-your-argument (last visited Dec. 27, 2020); *see also* Kimberly Y.W. Holst & Charles R. Calleros, Legal Method & Writing II, Trial and Appellate Advocacy 19 (2018) (noting that the bold letters and indentation in headings provide "conspicuous road signs for the reader"); Sylvia H. Walbolt & D. Matthew Allen, *The Ten Commandments of Writing an Effective Appellate Brief*, Carlton Fields, www.carltonfields.com/appellate (last visited Mar. 20, 2021) (explaining that headings provide both transitions and "mapping").

a lawyer's announcement, in a point heading, that "[t]he motion to quash the subpoena duces tecum should be granted because Defendant has standing to assert privileges over decedent's medical records."[44]

B. What Brian Regan can tell us about variety and rhetorical questions

Another genre that can help inform a legal writer about the use of effective transitions is stand-up comedy.[45] In contrast to the close relationship between music and the law, there appears to be no expert in legal writing who has written an article comparing the tools used by successful stand-up comedians to those used by effective legal writers. Nonetheless, as anyone who has seen stand-up comedy knows, successful comedians move seamlessly from one topic to another. In comedy, what we call transitions are described as "short conversational bridges that connect one joke to the next,"[46] or a "segue" giving the audience time to "catch their breath, while guiding them to the next subject."[47]

To illustrate how effective transitioning can allow a listener to move from topic to topic without even realizing it, listen to a clip of a bit called "I Walked on the Moon," by comedian Brian Regan.[48] Regan is a stand-up comic who uses observational and self-deprecating humor.[49] What stands out about him is that his performances are clean: he does not use profanity, and he does not use off-color humor.[50]

If you listen to the clip, you probably will not notice the transitions. Because of Regan's comic timing, facial expressions, and bodily movements, the listener does not even realize that she has been transported from a tooth extraction to a trip on the moon. But if you read a portion of a transcript of Regan's bit, you can identify the transitions. Because so much of humor is about delivery, my guess is you might not laugh when you read it on the following page:

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44 Lebovitz, *supra* note 40, at 50.

45 Judd Apatow, *How to Write Stand-Up Comedy in 6 Easy Steps*, Masterclass (July 2, 2019), https://www.masterclass.com/articles/how-to-write-stand-up-comedy-in-6-easy-steps#what-is-a-standup-comedy-set; John Greathouse, *Public Speaking Secrets from the World of Stand-up Comedy*, Forbes (June 23, 2019), https://www.forbes.com/sites/johngreathouse/2019/06/23/public-speaking-secrets-from-the-world-of-stand-up-comedy/#3e9fe62c2664.

46 Apatow, *supra* note 45.

47 Greathouse, *supra* note 45.

48 Brian Regan, *I Walked on the Moon*, YouTube, https://www.youtube.com/watch?v=f713tLbdlu4 (last visited Mar. 20, 2021); *The Greatest Brian Regan Classic Bits as Decided by New York Comedians*, The Interrobang (Sept. 20, 2015), https://theinterrobang.com/the-greatest-brian-regan-classic-bits-as-decided-by-new-york-comedians. Brian Regan is well known. He has won many awards, has appeared with Jerry Seinfeld, and has done specials on the show "Comedy Central." Patrick Bromley, *A Biography of Brian Regan* (Mar. 24, 2017), https://www.liveabout.com/brian-regan-biography-801497.

49 *Brian Regan (comedian)*, Wikipedia, https://en.wikipedia.org/wiki/Brian_Regan_(comedian) (last visited Mar. 20, 2021).

50 *Id.*

> I'm actually kind of quiet offstage. A lot of people don't realize that. I was at a dinner party recently with a bunch of people I don't know. One guy talking plenty for everybody, "me, myself, right and then I and then myself and me, me."
>
> I couldn't tell this one about I because I was talking about myself and then me. "Me! Me! Me! Me! Me!"
>
> *Beware the me monster.*
>
> So I tried to jump in with a little story I don't want to just sit there the whole night. Right when I'm done with my story this guy goes "*that ain't nothing*." Oh, well, I didn't mean to waste everybody's time telling my *nothing story*. . . .
>
> *My story ain't nothing.*
>
> [here, he tells a story about getting two wisdom teeth out and then gets one-upped by someone who tells a worse story about getting four wisdom teeth out]
>
> *Why do people need to top other people?*
>
> I've never understood it, and I see it all the time. Obviously people get something out of it . . . .
>
> *What is it about the human condition [that] people get something out of that?*
>
> That's why I have a social fantasy: I wish I was one of the twelve astronauts who have been on our moon. They must love knowing they can beat anybody's story, whenever they want. They can sit back quietly at a dinner party while some other person, some me monster's doing his thing and let him go let him run with the line. While you be quiet. . . . Let him have his moment . . . .
>
> [Pause]
>
> "I walked on the moon." [Applause] [51]

Exploring this excerpt, Regan uses a variety of techniques, and variety is the spice of life, even when it comes transitions. As legal writing professors have put it, "Try for variety both in the transitions you choose and when you place them. Your reader will be hypnotized and lose interest in your journey if you constantly use typical repetitive transition words in a monotonous pattern."[52]

One type of transition Regan uses is the "repetition transition," where he repeats a word or words to connect two points.[53] For example, after saying "me, me, me," he then says, "Beware the me monster." He repeats

51 Brian Regan, *Dinner Party*, YouTube (Feb. 1, 2011), https://www.youtube.com/watch?v=cRdjDTMSTtY (transcript on file with author).

52 Ellen B. Zwiebel & Virginia McRae, Point First Legal Writing Acad., http://pointfirstwriting.com/edit-your-own-work/transition-words.html (last visited Dec. 27, 2020). In one of his blog posts entitled, "25 Ways to Write Like John Roberts," Guberman advises to use interesting and "varied" transitions. Ross Guberman, *25 Ways to Write Like Justice Roberts*, Legal Writing Pro (Dec. 3, 2017), https://www.legalwritingpro.com/blog/25-ways-write-like-john-roberts/.

53 *See infra* notes 79–81.

the word "me." He uses this same device later in the bit when, after talking about his "nothing story," he then says, "My story ain't nothing." Legal writers applaud these types of transitions, as they are seamless, and, as a result, the reader (or in this case, the listener) never notices them.[54]

He also uses rhetorical questions, almost like point headings, to transition the reader. He first asks, "Why do people need to top other people?" And later, he asks, "What is it about the human condition [that] people get something out of that?"

While it may be prevalent in comedy, the use of rhetorical questions to transition your reader in legal writing is generally discouraged. As legal writing expert Ross Guberman has pointed out, rhetorical questions in briefs are "pompous, if not offensive."[55] In general, a rhetorical question is a question asked not as an actual question but rather to suggest something or make a point.[56] As a legal writing professor for over 25 years, I have often told students who try to use rhetorical questions in a brief that "you might not like the answer to your question." Another reason not to use them is that a declarative statement, as opposed to a question, is a more concise and effective way to state a point.[57]

However, attitudes seem to be changing slowly, and some experts now advise using rhetorical questions, especially in the courtroom. For example, Mr. Guberman, who used to eschew them as mentioned above, has done an "about-face," and has seen advocates use rhetorical questions effectively in briefs.[58] Similarly, a jury trial and strategy consultant has opined that a rhetorical question, which "in the spirt of Hansel and Gretel" can lay breadcrumbs along the way for the jury, can be used effectively to persuade in both oral *and* written communications.[59] In fact, she says, "[H]eads up appellate lawyers: don't be afraid to use a couple in your briefs now and then."[60] And, in oral argument, using rhetorical questions is perfectly acceptable.[61] As one senior litigation consultant has advised,

54 *See infra* notes 71–78 and accompanying text.

55 Ross Guberman, *Talk to Yourself: The Rhetorical Question*, Legal Writing Pro, https://www.legalwritingpro.com/articles/talk-rhetorical-question (last visited Mar. 21, 2021); *see also infra* note 61 and accompanying text (stating that rhetorical questions are better suited to oral argument than written arguments).

56 *Rhetorical Question*, Wikipedia, https://en.wikipedia.org/wiki/Rhetorical_question (last visited Dec. 27, 2020); Shane Bryson, *Avoid Rhetorical Questions*, Scribbr (Mar. 27, 2017), https://www.scribbr.com/academic -writing/avoid-rhetorical questions/.

57 Bryson, *supra* note 56.

58 Guberman, *supra* note 55.

59 Kacy Miller, *Are Rhetorical Questions Effective?*, Courtroom Logic (Apr. 23, 2019), https://courtroomlogic.com/2019/04/23/rhetorical-questions/.

60 *Id.*

61 In the blog Law Prose, another leading legal writing blog and a key provider of training for legal writing (headed up by Bryan Garner), one lesson entitled "A rhetorical stratagem for oral presentations," states that the "posing and answering of

rhetorical questions should be used in an opening statement because they are like "argumentative headings," and it is more engaging to make those headings questions.[62] He also recommends the device for oral arguments because it activates the "frame of inquiry" rather than the "frame of advocacy."[63] They also serve as a framework for organizing information into chunks or chapters.[64]

Brian Regan's use of rhetorical questions works well because he is a comedian, not a legal writer, and a stand-up routine is more like an oral argument than a brief. For legal writers, rhetorical questions might help lay breadcrumbs much like point headings, but they should be used sparingly.

In conclusion, Justin Timberlake can teach legal writers about the use of point headings to effectively transition an audience, and Brian Regan can teach legal writers about the benefit of using a variety of techniques to transition your audience, as well as the use of rhetorical questions.

IV. Transitions in legal writing

While some of us may harbor fantasies about writing hit songs or being successful stand-up comics, sadly, most of us must settle for writing briefs. And using transitions thoughtfully to achieve that purpose is probably why legal writing experts have devoted so much time and space to addressing that topic.[65] There are many kinds of transitions, and some are better than others.

A. Linking and substantive transitions

Transitions have been categorized into two species: *linking* transitions and *substantive* transitions.[66] A linking transition links one thought to the next and shows a causal relationship.[67] This would include using

questions can be especially effective in oral argument before a cold bench" but is "better suited to oral advocacy than written arguments." Bryan Garner, *LawProse Lesson #250: A rhetorical stratagem for oral presentations*, LawProse, https://www.lawprose.org/lawprose-lesson-250-a-rhetorical-stratagem-for-oral-presentations (last visited Mar. 21, 2021).

62 Ken Broda-Bahm, *Should You Ask Rhetorical Questions? Yes, You Should*, Persuasive Litigator (Aug. 4, 2016), https://www.persuasivelitigator.com/2016/08/should-you-ask-rhetorical-questions-yes-you-should.html.

63 *Id.*

64 *Id.*

65 *See, e.g.*, Linda H. Edwards, Legal Writing and Analysis 280–81 (4th ed. 2015); Richard K. Neumann, Jr., Ellie Margolis & Kathryn M. Stanchi, Legal Reasoning and Legal Writing 205–07 (8th ed. 2017); Laurel Oates, Anne Enquist & Jeremy Francis, The Legal Writing Handbook, § 27.3.1 (7th ed. 2018); Rambo & Pflaum, *supra* note 32, at 219–25.

66 Rambo & Pflaum, *supra* note 32, at 221–24. Substantive transitions are also called "echo links." Bryan Garner, Legal Writing in Plain English 83–85 (2d ed. 2013). In addition to these more technical terms, one legal writing author described them aptly as "the cream in between the two sides of an Oreo cookie that makes the whole thing work." Maureen B. Collins, *A Time of Transition: Logical Links to Move the Reader Forward*, 17 Persps. 185 (Spring 2009).

67 Rambo & Pflaum, *supra* note 32, at 222.

words such as "because" and "therefore."[68] Linking transitions can advance the discussion through words and phrases such as "further," "in contrast," or "for example."[69] They can also show a sequence of events through words such as "first," "second," and "third."[70]

Substantive transitions are substantive links between ideas.[71] Legal writing experts show a strong preference for the substantive transition, calling such transitions the "Golden Gate Bridge,"[72] the "heavy-lifters" of transitions,[73] and "dovetailing transitions,"[74] among other labels.

Substantive transitions have been called dovetail transitions because carpenters use dovetail joints to fasten wood without nails or screws, allowing them to fit together seamlessly, just like a substantive transition is designed to hold ideas together seamlessly.[75] "Dovetailing" is a concept often used in legal writing, and it is a simple one.[76] Essentially, it is a method of joining "old information" in a sentence to "new information" that follows.[77] In other words, there is overlap of some language and points between sentences.[78]

Within the category of substantive transitions, there are various subcategories, such as the "repetition" transition, the "restatement" transition, and the "roadmap" transition.[79] Legal writers use repetition frequently, as when citing a case for a proposition and then following that up with, "in [case name]."[80] In other words, a repetition transition repeats either the same or a similar term to connect two sentences.[81]

The restatement transition, instead of repeating information, puts an idea in a similar light.[82] For example, read these statements from a case

68 *Id.* at 502.

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 Tenielle Fordyce-Ruff, *Connections Count Part II: Orienting and Substantive Transitions*, The Advocate 48 (Sept. 2017).

74 Oates et al., *supra* note 65, at 288; Fordyce-Ruff, *supra* note 73, at 48.

75 Fordyce-Ruff, *supra* note 73, at 26; *see also* Greg Johnson, *Write On, Assessing the Legal Writing Style of Brett Kavanaugh*, 44 Vt. B. J., Fall 2018, at 30 (assessing Judge Kavanaugh's writing style and, using examples, commending him for using substantive transitions effectively).

76 Oates et al., *supra* note 65, at 288, 562–65; Anne Enquist, *Dovetailing: The Key to Flow in Legal Writing*, 8 The Second Draft 3 (Nov. 1992); *see, e.g.*, Collins, *supra* note 66, at 187 (referring to a more sophisticated transition when phrases mentioned in one sentence reverberate in another, called "dovetailing"); Fordyce-Ruff, *supra* note 73, at 48.

77 Enquist, *supra* note 76, at 3.

78 *Id.*

79 Rambo & Pflaum, *supra* note 32, at 221–29.

80 *Id.* at 503.

81 *Id.* at 502.

82 *Id.* at 504.

illustration involving the sufficiency of a notice of claim made against a public entity:

> The claimant also demanded "[a]ll economic damages . . . [of] approximately $35,000.00 per year or more going forward over the next 18 years" and "[g]eneral damages . . . in an amount of no less than $200,000."
>
> Based upon the claimant's *use of qualifying language*, the Court concluded that the claimant failed to identify any specific amount.

The words, "use of qualifying language," summarize the specific wording of the notice of claim letter into one manageable topic.[83]

Finally, the roadmap transition is used to introduce an idea or alert the reader to a shift in thought, such as in these examples:

> **Preview idea**: The final reason Defendant's claim for fraud should be dismissed is that the element of reliance is missing.
> **Shift in thought**: The Defendant argues that there was no contract because there was fraud in the inducement. *This argument is flawed* for several reasons.

Thus, there are two main categories of transitions—substantive and linking. While substantive transitions are preferred, both types improve flow and readability.[84]

B. The magic of three—sequencing using first, second, and third

There seems to be some magic associated with the number three when advocating,[85] and interestingly, the magic of three is a recurring theme in culture in general.[86] From the story of "Goldilocks and the Three Bears," to ad slogans such as "snap, crackle, and pop," to the Holy Trinity,

83 *Id.* at 505. This illustration is from the Arizona Supreme Court's decision in *Deer Valley Unified School District Number 97 v. Houser*, 152 P.3d 490, 491–93 (Ariz. 2007).

84 Of course, transitions can be overused (or misused), and the result is that, instead of clarifying ideas, they can interrupt the flow and result in poor writing. *E.g.*, Baldwin, *supra* note 5, at 425–26 (noting that where cohesive devices are misused, overused or underused, "they risk causing readers this extra effort, annoyance, or frustration, which can result in a reader's assessment that the writing is irrelevant"); Collins, *supra* note 66, at 186.

85 *See* Patrick Barry, *The Rule of Three*, 15 Legal Comm. & Rhetoric 247, 247–48 (2018) ("Judges use the Rule of Three, Practitioners use the Rule of Three. And so do all manner of legal academics."); Bryan A. Garner, *Good Headings Show You've Thought Out Your Arguments Well in Advance*, ABA J. (2015), https://www.abajournal.com/magazine/article/good_headings_show_youve_thought_out_your_arguments_well_in_advance/ ("Arguments come in threes. . . . A mathematician once told me that there are really only four numbers in the world: one, two, three and many."); Suzanne B. Shu & Kurt A. Carlson, *When Three Charms but Four Alarms: Identifying the Optimal Number of Claims in Persuasion Settings*, 78 J. Marketing 127 (2014).

86 *E.g.*, David Trottier, The Screenwriter's Bible 5–7 (1998); Kurt A. Carlson & Suzanne B. Shu, *The Rule of Three: How the Third Event Signals the Emergence of a Streak*, 104(1) Org. Behav. & Hum. Decision Processes 113 (2007); Andy Newman, *Blessed in Triplicate*, N.Y. Times (Oct. 10, 2008), https://www.nytimes.com/2008/10/12/fashion/sundaystyles/12three.html; *Three-act Structure*, Wikipedia (last visited May 4, 2020), https://en.wikipedia.org/wiki/

to lucky number three,[87] to "life, liberty, and the pursuit of happiness,"[88] the number three is magical.[89]

But the three reasons approach is not just magical; it is backed by science, as the number three is important in "human learning and cognition."[90] For example, when learning a new word, people can generalize its definition to new objects after three examples of the word.[91] As another example, in an interesting study on persuasion in marketing messages, the authors concluded that three is optimal, while four is less positive in persuading.[92] In one of the experiments, the authors studied the relationship between the number of positive claims made about a person and the impression others had about that person.[93] In that experiment, a friend was talking up her rekindled relationship with an old boyfriend.[94] Each message had as few as one or as many as six reasons to buy in to the rekindled relationship.[95] On the four reasons scenario, the hypothetical friend says, about her old boyfriend, "He's intelligent, kind, funny, and cute."[96] At the fourth word, the subjects' eyebrows popped upward, indicating their skepticism.[97] Given four reasons, the subjects were more likely to answer that the friend was "kidding herself about how great John is," than they were to conclude, at three reasons, that "John is a real catch."[98] Based on this and other experiments in the study, the authors consistently

Three-act_structure. In an interview that Bryan Garner conducted of writer David Foster Wallace about how to argue persuasively, Mr. Wallace referenced the three-part structure of argumentative writing as "three tragic acts." Bryan A. Garner, *David Foster Wallace's Advice on Arguing Persuasively*, ABA J. (Dec. 1, 2013), https://www.abajournal.com/magazine/article/david_foster_wallace_gives_advice_on_arguing_persuasively.

87 In China, three is a lucky number because it sounds like the word that means life, while the word four is unlucky because it sounds like the word for death. Newman, *supra* note 86.

88 Interestingly, although the first draft of the Declaration of Independence was heavily edited, no one ever tried to rework those words, sticking to the "Rule of Three." Barry, *supra* note 85, at 252.

89 *E.g.,* Marie Jones, *The Perfect Number—Trinity Symbolism in World Religious Traditions* (Feb. 25, 2016), https://www.ancient-origins.net/human-origins-religions/3-perfect-number-trinity-symbolism-world-religious-traditions-005411; Newman, *supra* note 86.

90 Carlson & Shu, *supra* note 86, at 114, 120 (finding that the third repeat event in a sequence is pivotal to the subjective belief that a streak has emerged); Shu & Carlson, *supra* note 85, at 137 (finding that impressions conformed to the "charm of three" because consumers viewed three claims as positive but four or more as less positive).

91 Shu & Carlson, *supra* note 85,at 137 (citing J.B. Tenenbaum & F. Xu, *Word Learning as Bayesian Inference*, Psychol. Rev., 114(2), 245–72 (2000)).

92 *Id.* at 137–38.

93 *Id.* at 130.

94 Susannah Jacob, *The Power of Three*, N.Y. Times (Jan. 3, 2014), https://www.nytimes.com/2014/01/05/fashion/Three-Persuasion-The-Power-of-Three.html; Shu & Carlson, *supra* note 85. Note that some of the information about this study comes directly from the study itself, but some of the details come instead from a *New York Times* article reporting on the study in which the authors were interviewed. Some of the information in the article is not in the published study itself, so both sources are listed here.

95 Jacob, *supra* note 94.

96 Shu & Carlson, *supra* note 85, at 139.

97 Jacob, *supra* note 94.

98 *Id.*

found that when making positive claims, "the optimal number of claims is three, a result we refer to as the charm of three."[99] Of course, advertisers are not bound by the same code of ethics as lawyers trying to persuade a court, but the same techniques can be used to persuade.

The magic of three, reflected in the use of *first*, *second*, and *third*, is a powerful and prevalent transitional device used in legal writing by judges and lawyers alike. In fact, in my 25 years of writing briefs and arguing cases, it seems as if first, second, and third have always been in the standard arsenal of transitions, while fourth, fifth, and beyond are rarely used.

One recent example is *Nielsen v. Preap*,[100] a Supreme Court case dealing with the detention of legal immigrants with criminal histories, where the device appears in both the concurring and dissenting opinions.[101] The Court ruled that the government has the power to detain immigrants at any time that have committed certain crimes that could lead to their deportation, even if those crimes occurred long in the past.[102] Interestingly, in the majority opinion, the justices use the transition "first" in two different parts of the opinion but never follow that up with a second or third.[103] In their concurrence, however, Justices Thomas and Gorsuch use first, second, and third as a means to transition their points.[104] Below are the statements which include the transitions:

> First, [the statute] bars judicial review of "all questions of law and fact . . . ."
>
> Second, [the statute] provides that "[n]o court may set aside any action or decision . . . under this section . . . ."
>
> Third, [the statute] deprives district courts of "jurisdiction or authority to enjoin or restrain the operation of [the statute] . . . ."[105]

Similarly, Justices Breyer, Ginsburg, Sotomayor, and Kagan, who dissented, not only used these linking transitions, but they also emphasized them with italics as follows:

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99 Shu & Carlson, *supra* note 85, at 138.

100 139 S. Ct. 954 (2019); *see also, e.g.*, Dep't of Rev. v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 734, 746–47 (noting that "[f]irst *Puget Sound* invalidated the Washington tax on stevedoring," "[s]econd," *Carter & Weekes* supported its reaffirmance of *Puget Sound*, and "[t]hird," *Carter & Weekes* reaffirmed *Puget Sound*).

101 *Nielsen*, 139 S. Ct. at 964, 974.

102 *Id.* at 959.

103 *Id.* at 964, 969.

104 *Id.* at 974–75 (Thomas, J., concurring in part).

105 *Id.*

> *First*, "Congress often drafts statutes with hierarchical schemes . . . ."
> *Second*, consider the structural similarities between [subsections] . . . .
> . . .
> *Third*, Congress' enactment of a special "transition" statute strengthens the point.[106]

Likewise, in dissent in *Parents Involved in Community Schools v. Seattle School District Number 1*,[107] Justices Breyer, Stevens, Souter, and Ginsburg also used only the three linking transitions:

> First, there is a historical and remedial element: an interest in setting right the consequences of prior conditions of segregation.
> Second, there is an educational element: an interest in overcoming the adverse educational effects produced by and associated with highly segregated schools.
> . . .
> Third, there is a democratic element: an interest in producing an educational environment that reflects the "pluralistic society" in which our children will live.[108]

This pattern is not limited to judicial opinions. Brief writers also follow this pattern. For example, in a brief co-authored by the Attorney General and Solicitor General for the State of Vermont submitted to the Supreme Court, the three linking transitions are used as follows:[109]

> First, and crucially, the Solicitor General recognizes that "the Vermont reporting requirements" have "an entirely different focus" from ERISA's . . . requirements. . . .
> Second, the Solicitor General agrees that the "mere fact that a state-law reporting obligation encompasses information about the operation of an ERISA plan does not suffice for preemption." . . .

106 *Id.* at 980–81 (Breyer, J., dissenting) (emphasis in original).

107 551 U.S. 701 (2007).

108 *Id.* at 838–40 (Breyer, J., dissenting).

109 Gobeille v. Liberty Mut. Ins. Co., 2015 WL 3486603 (June 1, 2015); *see also* CMC Heartland Partners v. Union Pac. R.R. Co., 1997 WL 33557885 (Jan. 3, 1997) (brief submitted to the Supreme Court using first, second, and third as linking transitions). Interestingly, this use of three points seems to extend to advice given on oral arguments at well. *See* Mike Skotnicki, *Make Your Argument Stronger with the "Power of Three,"* Briefly Writing (Dec. 5, 2013), https://brieflywriting.com/2013/12/05/make-your-argument-stronger-with-the-power-of-three/ (noting that the human mind quickly recalls no more than three things from a list, and so when making oral arguments to a court, make sure to include only three arguments or reasons for the ruling); Duke Law, *Tips on Oral Advocacy*, https://law.duke.edu/life/mootcourt/tips/ (last visited Mar. 29, 2021) (instructing moot court participants to identify two or three but *no more than three* issues she will discuss). Similarly, when Bryan Garner wrote an article giving advice on persuasive point headings, he recommended that advocates try to distill arguments down to three main points. Garner, supra note 85. Obviously, however, it is not always possible to make three main points. For example, if a claim has only two elements or has four elements, there would probably be no reason to divide those arguments into three parts.

> Third, the Solicitor General, like the dissenting judge below, finds no basis in this record to hold that Vermont's law is preempted.[110]

Thus, if you can distill your arguments down to three main points, use first, second, and third, and, if possible, eliminate arguments after that point if you want your audience to fully absorb your points.[111]

V. Conclusion

As a lawyer for 25 years, I did not pay enough attention to transitions, and, as a legal writing professor, I have seen students struggle with transitioning their reader between sentences, between paragraphs, and between sections. Like my students, lawyers know what information they are trying to convey, but they are not always able to make the connections between those ideas transparent for their audience. If lawyers realized that the use of transitions could help busy judges process information faster and more accurately, perhaps we would pay more attention to this facet of legal writing and improve the quality of our writing. While we might not win any awards like Justin Timberlake, we can nonetheless take a small step toward improving our chances of making our briefs sing and, in the process, win in court where it counts.

110 *Gobeille*, 2015 WL 3486603, at *4–6.

111 This advice might seem contrary to the suggestion made earlier to use a variety of transitions instead of sticking to the same old, same old. *See supra* note 52 and accompanying text. However, like the law in general, where exceptions abound, this is one such exception.

ARTICLE

Making Your (Power)Point

An Introductory Guide to Digital Presentation Design for Lawyers

Jonah Perlin*

We live in a digital presentation generation.[1] Information once conveyed in writing through memos, letters, and emails or orally delivered in meetings and speeches presented without demonstratives is now increasingly (and sometimes exclusively) delivered using digital presentations created in software programs like PowerPoint, Keynote, and Google Slides.[2] These digital presentations are used by conference presenters, consultants, clergy, entrepreneurs, executives, engineers, marketing professionals, military commanders, sales associates, students,

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1 *See, e.g.*, Nancy Duarte, Slide:ology: The Art and Science of Creating Great Presentations xviii (2008) ("Presentations have become the de facto business communication tool."); Rachel G. Stabler, *Screen Time Limits: Reconsidering Presentation Software for the Law School Classroom*, 23 Legal Writing 173, 173 (2019) ("PowerPoint is ubiquitous. If anything, it is now ubiquitous even to say that PowerPoint is ubiquitous.").

2 This article uses the phrase "digital presentation" to mean any file created using digital presentation software. The primary reason it adopts such a broad definition is that when a law student or lawyer is asked to "make a PowerPoint" or "put together a slide deck," that request can mean many different things. It could mean build a slide presentation to be shown while giving a talk or leading a meeting. It could mean prepare a set of slides that are used during a presentation *and* shared as a summary following that presentation. It could mean create a lengthy printed document created in "slideware" but consumed by the audience as a written report. Or it could mean prepare a one-page infographic to be shared with a supervisor or client. But all of these requests come in a similar form: make me a "PowerPoint" or "slides." As a result, for some of these deliverables the term "digital presentation" may feel like a misnomer given that they are never presented at all. They are instead documents created using presentation software for desktop publishing. That said, the principles and approaches outlined in this article apply equally to creating all of these different documents.

teachers, and many others.[3] Sometimes these digital presentations supplement or accompany oral speeches. Other times they are stand-alone documents consumed independently by their audience on screen or in print. In fact, by some estimates there are over 500 million users of PowerPoint alone and more than thirty-five million PowerPoint presentations given every day.[4]

Lawyers are no exception to this fundamental shift in how we communicate.[5] For example, trial lawyers rely on digital presentations to display key evidence to judges and juries—and judges and juries often expect lawyers to use visuals or presentations when making their case.[6] Transactional lawyers use digital presentations at each stage in the business lifecycle: to present and propose complex deal structures, to make recommendations on strategies to mitigate tax liability, and to outline restructuring approaches to corporate boards in the event that a business fails. Regulatory lawyers use digital presentations to convey advice to trade organizations and lobby government officials. Non-profit lawyers use digital presentations to pitch ideas to potential donors and document success for the media. Clinical students use digital presentations to make recommendations to their underrepresented pro bono clients. Law professors use digital presentations to present their research to students and peers.[7] And lawyers from all practice areas use digital presentations to solicit business as well as teach and consume Continuing Legal Education classes.

Yet despite this ubiquity, lawyers are rarely trained how to efficiently create effective digital presentations. Perhaps this should not come as a surprise. Although "[l]awyers operate in an increasingly and almost exclusively, digital world,"[8] they "are often the last to wake up to trends."[9] But

3 *See, e.g.*, Stephen M. Kosslyn, Clear and to the Point: 8 Psychological Principles for Compelling PowerPoint Presentations 1 (2007) ("Whatever business we're in . . . we are very likely to suffer through frequent PowerPoint presentations."); Chris Kolmar, *50 Jobs That Use Powerpoint The Most*, Zippia (Jan. 1, 2017), https://www.zippia.com/advice/what-jobs-use-powerpoint/.

4 *10 Little-Known Facts about PowerPoint*, Poll Everywhere Blog, https://blog.polleverywhere.com/powerpoint-infographic/(last visited Mar. 21, 2021).

5 *See, e.g.*, Cliff Atkinson, Beyond Bullet Points 1 (4th ed. 2018) (discussing the dueling uses of PowerPoint during an important 2005 products liability trial); G. Christopher Ritter, Creating Winning Trial Strategies and Graphics 6–7 (2d ed. 2015); Adam L. Rosman, *Visualizing the Law: Using Charts, Diagrams, and Other Images to Improve Legal Briefs*, 63 J. Legal Educ. 70, 70 (2013); Jeff Bennion, *How To Present Beautiful Evidence*, Above the Law (Feb. 9, 2016), https://abovethelaw.com/2016/02/how-to-present-beautiful-evidence/.

6 *See* Ritter, *supra* note 5, at 6–7; Steve Johansen & Ruth Anne Robbins, *Art-iculating the Analysis: Systemizing the Decision to Use Visuals as Legal Reasoning*, 20 Legal Writing 57, 61 (2015) (noting that judges are calling for lawyers to use visuals); Ellie Margolis, *Is the Medium the Message?*, 12 Legal Comm. & Rhetoric 1, 26 (2015) ("It has long been accepted that images are useful at the trial level, in presenting information to juries.").

7 *See, e.g.*, Deborah J. Merritt, *Legal Education in the Age of Cognitive Science and Advanced Classroom Technology*, 14 B.U. J. Sci. & Tech. L. 39, 40 (2008); Stabler, *supra* note 1, at 173–74; Paul Wangerin, *Technology in the Service of Tradition: Electronic Lectures and Live-Class Teaching*, 53 J. Legal Educ. 213, 220 (2003).

8 Margolis, *supra* note 6, at 1.

at the same time it is important to remember that digital presentations are neither new nor novel. PowerPoint was introduced in 1987,[10] Apple's competing product, Keynote, came out in 2003,[11] and Google Slides debuted in 2007.[12]

At this point, lawyers have been creating (and writing about) digital presentations for more than a quarter of a century.[13] Yet too many lawyers still do not see digital presentations as a distinct genre of legal communication that can and must be learned. Instead, many lawyers seem to believe that creating effective digital presentations requires little more than copying-and-pasting paragraphs of text from a legal document onto slides or translating complex legal analyses into a series of one-to-two-word, business-speak bullet points. Worse, many lawyers continue to see the creation of digital presentations not as a "content task" requiring legal expertise but instead as a purely "design task" that should be delegated to junior attorneys and paralegals or, if they can afford it, outsourced to professional designers that specifically service legal clients.[14]

The reality is that lawyers and law students are regularly expected to communicate using digital presentations and, more importantly, are expected to accomplish this task themselves. But those lawyers who want to learn to succeed at this task—and law professors who want to teach them how to do it—lack sufficient introductory materials to do so.[15] That is the purpose of this article: to provide an introduction to creating digital presentations for lawyers with a specific focus not only on *what* legal presentations should look like but also *when* lawyers should use digital presentations, *why* they should use them, and the process for *how* they can make them better.

To accomplish this task, the article relies on sources from the robust and evolving academic literature on visual rhetoric in the law. Critically, it

9 Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. ALWD 108, 113 (2004).

10 James Robinson, *The History of PowerPoint*, Buffalo 7 (May 22, 2018), https://buffalo7.co.uk/history-of-powerpoint/.

11 *Apple Unveils Keynote*, Apple Newsroom (Jan. 7, 2003), https://www.apple.com/newsroom/2003/01/07Apple-Unveils-Keynote/.

12 Gina Trapani, *Google Docs Adds Presentations*, Lifehacker (Sept. 18, 2007), https://lifehacker.com/google-docs-adds-presentations-300825/.

13 *See, e.g.*, Molly Warner Lien, *Technocentrism and the Soul of the Common Law Lawyer Essay*, 48 Am. U. L. Rev. 85, 104–05 (1998–1999); Wanda McDavid, *Microsoft PowerPoint: A Powerful Training Tool*, 5 Persps. 59, 59–60 (1997).

14 A simple Google search for "trial graphics" brings up numerous professional graphic designers focused primarily, if not exclusively, on lawyers. Many large law firms now even have in-house graphics teams for this purpose.

15 There are, of course, more comprehensive textbook-length guides for specific practice areas and topical skills that overlap with this more general overview of legal presentation design. For example, those who wish to learn about trial graphics can refer to Christopher Ritter's Creating Winning Trial Strategies and Graphics, *supra* note 5, and those who want to better understand the role of images and visuals in law more broadly can refer to Richard K. Sherwin's textbook, Visualizing Law in the Age of the Digital Baroque: Arabesques & Entanglements (2011).

also introduces and relies heavily upon the voices of presentation design experts from outside the legal community. These presentation-design experts teach digital presentation skills based on their backgrounds in business, marketing, data visualization, and cognitive science. Although the advice and approach they offer is neither specific to legal audiences nor articulated in uniquely legal idioms, they are targeted at an audience of non-designers asked to share technical knowledge in digital presentation form. This makes their advice particularly valuable to lawyers who simply do not know how to create digital presentations or who generally know how to create digital presentations but also know that they can do the task better, faster, and with far less frustration.

To be clear, this article is neither a complete guide to graphic design for lawyers nor a nuts-and-bolts guide to specific presentation software. It will not magically turn you into a PowerPoint (or Keynote or Google Slides) whiz.[16] It is instead intended as a practical introduction to a creative process for building legal presentations and a primer on the basic skills necessary to complete each step in that process.

The article proceeds in three sections. In section 1 the article lays the foundation for this conversation by exploring why digital presentations are an increasingly important and uniquely effective communication tool for lawyers despite the many critiques of the genre from inside and outside the legal community. Section 2 then offers a start-to-finish, six-step workflow for any lawyer faced with the task of creating a digital presentation. This section relies on (1) the academic and popular literature on the subject, (2) my prior experience as a new lawyer who was asked to convey legal analysis using digital presentations despite not having any formal training, and (3) my current experience as a law professor who has taught legal presentation design to hundreds of law students (both in first-year legal practice courses and upper-class clinical settings). Finally, section 3 concludes by offering some suggestions for the future study and practice of the genre of legal presentations.

1. Why legal presentations?

There is little debate that lawyers across the profession are increasingly using digital presentations to convey legal analysis. For example, according to the 2020 ABA Legal Technology Survey Report,

16 As Nancy Duarte explains in the context of her own book on presentation design, "This book covers how to create ideas, translate them into pictures, display them well, and then deliver them in your own natural way. It is NOT a PowerPoint manual. You'll find no pull-down menus or application shortcuts, instead there are timeless principles to ingest and apply. It's a reference book that you'll want to open often. This book will teach you 'why.'" Duarte, *supra* note 1, at xviii. This article is intended to serve a similar purpose.

17% of trial lawyers reported using presentation software at trial (with 79% responding that PowerPoint is their software package of choice).[17] And almost 36% percent of trial lawyers report using presentation software in their practice. The same is true in many other practice areas where digital presentations have become one of, if not the primary, medium for communicating legal analysis.[18] As a result of this shift, an increasing number of graphic-design consultants specifically serve legal clients, and many large firms employ full-time graphic designers. And yet it is important to remember that lawyers are often asked to create these presentations themselves.

As a young lawyer starting at a large law firm, I was shocked when I was regularly asked to communicate using digital presentations instead of more traditional genres of legal communication. These presentations were geared toward many different legal and non-legal audiences including adjudicators (bankruptcy trustees, judges, and special masters), clients (sales associates, C-suite executives, and clients of clients), other attorneys at my own firm and collaborators at other firms, and even the press. I also hear from my students that they are regularly asked to convey legal analysis using digital presentations in their summer jobs and internships. Some of these students are even asked about digital presentation design at networking events and job interviews. This reality shows that it is important to see digital presentations as a genre of communication that lawyers must learn and that law schools should teach. After all, lawyers are in the advocacy and client business and are therefore subject to their audience's expectations not only about what information to convey, but also the medium or genre in which to convey it.

That said, just because we know that digital presentations are an increasingly important part of the practice does not mean that as lawyers we should ignore the many critiques of digital presentations from both inside and outside the legal community. To the contrary, these critiques—and responding to them—must be the starting place for our discussion. Accordingly, this section considers some of these critiques head-on and argues that although there are certainly times when the use of digital presentations by lawyers may not be the most prudent choice, digital presentations are a useful and increasingly important tool in the contemporary lawyer's toolbox. This is true not only because legal audiences increasingly expect them but also because this genre offers certain distinct advantages over more traditional genres of legal communication.

17 Stephen Embry, *2020 Litigation & TAR*, Am. Bar Assoc. (Nov. 30, 2020), https://www.americanbar.org/groups/law_practice/publications/techreport/2020/litigationtar/.

18 *See infra* section 2.1.

1.1. The blessing and curse of bullet points

The first and often loudest critique of digital presentations is that they are too conclusory and, as a result, stifle creativity and inhibit deep thinking. As Franck Frommer colorfully put it in his book, *How PowerPoint Makes You Stupid*, the so-called "bullet-point" rhetoric common to many digital presentations "favors a mode of communication in which words seem emptied of any substance."[19] One prominent member of this school of thought is Amazon founder Jeff Bezos who famously banned the use of PowerPoint at internal company meetings replacing them with "six-page memo[s] that[] [are] narratively structured with real sentences, topic sentences, verbs, and nouns."[20] At the beginning of each meeting, participants are given thirty minutes to read the memos and then, and only then, the meeting can begin.[21] The reason for this approach is perhaps that digital presentations are simply too conclusory and therefore not suited to conveying rich, nuanced, and complex analysis.[22]

Similar critiques have been offered by top military commanders such as Former Secretary of Defense James Mattis who opined that "PowerPoint makes us stupid"[23] and former National Security Advisor H.R. McMaster who publicly argued that digital presentations are "danger[ous] because [they] can create the illusion of understanding and the illusion of control [because] . . . some problems in the world are not bullet-izable."[24] Even Steve Jobs, who was famous for his use of digital presentations during keynote speeches to the media and customers, once exclaimed, "I hate the way people use slide presentations instead of thinking. People confront problems by creating presentations. I want them to engage, to hash things out at the table, rather than show a bunch of slides. People who know what they're talking about don't need PowerPoint."[25]

Arguably the loudest critic of digital presentations in this vein is Edward Tufte.[26] Tufte is a professor emeritus of political science,

19 Franck Frommer, How PowerPoint Makes You Stupid: The Faulty Causality, Sloppy Logic, Decontextualized Data, and Seductive Showmanship That Have Taken Over Our Thinking loc 851 (Kindle ed. 2012) (e-book).

20 Carmine Gallo, *Jeff Bezos Banned PowerPoint in Meetings. His Replacement Is Brilliant*, Inc., (Apr. 15, 2018), https://www.inc.com/carmine-gallo/jeff-bezos-bans-powerpoint-in-meetings-his-replacement-is-brilliant.html.

21 *Id.*

22 *See id.*

23 Elisabeth Bumiller, *We Have Met the Enemy and He Is PowerPoint*, N.Y. Times (Apr. 26, 2010), https://www.nytimes.com/2010/04/27/world/27powerpoint.html.

24 *Id.*

25 Geoffrey James, *The Real Reason Steve Jobs Hated PowerPoint*, Inc. (Feb. 5, 2020), https://www.inc.com/geoffrey-james/steve-jobs-hated-powerpoint-you-should-too-heres-what-to-use-instead.html (emphasis added). As James notes, Steve Ballmer, the former CEO of Microsoft, has offered similar critiques.

26 *See* Stabler, *supra* note 1, at 179.

statistics, and computer science at Yale who travels the country and the world presenting on the most effective ways to visualize data.[27] A common theme in his lectures and writings is that the reductive nature of PowerPoint and other digital presentation tools is not just unhelpful, it is dangerous. From his viewpoint, digital presentations reflect a "distinctive, definite, well-enforced, and widely-practiced cognitive style that is contrary to serious thinking."[28] In his view, PowerPoint presentations "too often resemble a school play[—]very loud, very slow, and very simple."[29] And, among his many other criticisms of the genre, he argues that they have "low spatial resolution" (the fact that only a limited amount of information can be displayed at any moment) and use unhelpful "rapid temporal sequencing" (the fact that the viewer must take in individual slides one after the other without sufficient time or opportunity to process or think in less structured ways).[30] Worst of all in Tufte's view, the over-reliance on bullet points leads to "generic, superficial, [and] simplistic thinking" which has real world implications.[31] He even goes so far as to argue that the use of PowerPoint was one of the causes of the crash of the Space Shuttle Challenger because the "[m]edieval . . . preoccupation with hierarchical distinctions" in PowerPoint led to critical and ultimately fatal mistakes.[32]

This critique—that digital presentations are somehow less substantive or overly reductive, and as a result less valuable—is also present in the law. "Words" have long been considered the "lawyer's primary tool."[33] As a result, as legal documents become less tied to the detailed textual and narrative conventions of traditional legal writing, there is a concern that they will "create more gloss but less substance in legal discourse,"[34] or worse that this use of more visual media will "vitiate legal discourse by sacrificing depth for flash—turning legal arguments into memes."[35] As a result, some lawyers argue that there is damage done to legal analysis when lawyering is done by bullet point. This is especially true when lawyers

27 *See* Joshua Yaffa, *The Information Sage*, Wash. Monthly (May/June 2011), https://washingtonmonthly.com/magazine/mayjune-2011/the-information-sage/.

28 Stabler, *supra* note 1, at 179 (citing Edward R. Tufte, The Cognitive Style of PowerPoint 26 (2003)).

29 Edward Tufte, *PowerPoint Is Evil*, Wired (Sept. 1. 2003) *archived at* http://mcgeef.pbworks.com/f/Wired%2011.09_%20PowerPoint%20Is%20Evil-1.pdf.

30 Edward R. Tufte, The Cognitive Style of PowerPoint: Pitching Out Corrupts Within 2 (2d ed. 2006).

31 *Id.* at 5.

32 *Id.* at 10.

33 Rosman, *supra* note 5, at 70; *see also* Ritter, *supra* note 5, at 143 (describing lawyers as living in "Wordland" unlike jurors who do not).

34 Elizabeth G. Porter, *Taking Images Seriously*, 114 Colum. L. Rev. 1687, 1774 (2014).

35 *Id.* at 1694.

create "teleprompter presentations" that are "text-dense, bullet-pointed slides on conservative, firm-branded backgrounds with minimal, often simplistic clip art. The presenter often reads the slide text with little elaboration. The text font is often too small for audience members to read," and the audience's focus unhelpfully shifts "from the speech and the speaker to the slides."[36] Lawyers also need not look far to find presentations that include overly-complex graphics and diagrams, use unprofessional images and clip art, and which include nothing more than a series of corporate-speak, contextless bullet points. None of these approaches help to convey analysis effectively to legal audiences.

On their face, these critiques may seem compelling. After all, lawyers are trained to craft effective legal analysis in written form by showing the reader the details of the analysis at each step as opposed to relying solely on conclusory assertions. In fact, the failure to show one's work in legal writing deprives the legal reader of the ability to test the validity of the proposed conclusions based on established analytical paradigms.

And yet these categorical critiques of legal presentations are misplaced for several reasons. First, just because digital presentations *can* be conclusion-based does not mean that they are not analytically rigorous. Digital presentations are a blank canvas on which any level of depth can be conveyed using any number of visual modalities such as words, images, diagrams, audio, and video. As a result, "[t]he software isn't at fault. It's an empty shell, a container for our ideas. It's not a bad communication tool unless it's in the hands of a bad communicator."[37] Or as legal technologist Dennis Kennedy put it, "[M]ost complaints about PowerPoint are like blaming modern hammers for poorly built houses. It's not the tool, but how the user uses the tool."[38] That is why studies like the one conducted at Harvard which concluded that "PowerPoint was rated (by online audiences) as no better than verbal presentations with no visual aids" rendering the use of PowerPoint "worse than useless,"[39] say far more about presentation designers then they do about the genre writ large. As cognitive psychologist Steven Kosslyn puts it, "[T]here's nothing fundamentally wrong with the PowerPoint program as a medium; rather, . . . the problem lies in how it is used."[40]

36 *See* Dennis Kennedy, *Bite the Bullet Point*, ABA J. (Oct. 1, 2010), https://www.abajournal.com/magazine/article/bite_the_bullet_point.

37 Nancy Duarte, HBR Guide to Persuasive Presentations 95 (2012).

38 Kennedy, *supra* note 36.

39 Geoffrey James, *Harvard Just Discovered That PowerPoint Is Worse Than Useless*, Inc. (Aug. 9, 2019), https://www.inc.com/geoffrey-james/harvard-just-discovered-that-powerpoint-is-worse-than-useless.html).

40 Kosslyn, *supra* note 3, at 2.

This problem, at least in the law, is also self-fulfilling. If we as a profession continue to refuse to view digital presentations as a distinct genre of legal communication and fail to train lawyers how to create effective presentations, then poorly organized, poorly researched, and poorly designed presentations will not just happen, they should be expected. But there is another way. As described in *infra* section 2, a digital presentation that is cognizant of its purpose and audience and consciously employs consistent substantive and stylistic conventions can simultaneously convey conclusions as well as the reasons for reaching those conclusions when required—at times even more effectively than narrative text.

The second reason that this critique is misplaced is that the conclusion-based nature of *some* legal presentations actually makes them more valuable communicative tools to lawyers, not less. As Ellie Margolis explains, this is nothing new when it comes to emerging technologies:

> Each new writing technology—the printing press, the typewriter, the computer—brought new concerns about the value and credibility of texts they produced. Each new development raised concerns about whether writers would make more errors, and lose clarity, precision, and rigorousness. Yet as each new technology took over and became the norm, people learned to trust and depend on them until they became . . . integrated into our daily lives; it is difficult to imagine writing without them.[41]

The most recent example of this shift in how lawyers communicate was the transition from formal memoranda to informal memoranda prepared for and sent by email. As Kristen Tiscione explained in relation to that transition, the more conclusion-based medium of email memoranda changed the underlying message as compared to traditional formal memoranda because "new technologies act as extensions of man that have 'psychic and social consequences' [and] '[a]s they amplify or accelerate existing processes' they change 'designs or patterns' of thought."[42] And yet, different did not mean less effective. "If an attorney is competent, the analysis will be competent regardless of differences in medium, pace, and pattern of thought."[43] Although "the memorandum and the email are different, they accomplish the same goal, leading to the same ultimate conclusion" and they do so "without the loss of any significant information."[44]

41 Margolis, *supra* note 6, at 2.

42 Kristen Konrad Robbins-Tiscione, *The Rhetoric of Email in Law Practice*, 92 Or. L. Rev. 101, 102 (2013) (citing Marshall McLuhan, Understanding Media 7 (1964)).

43 *Id.* at 116.

44 *Id.* at 115 (emphasis omitted).

More than that, the idea that lawyers are not in the business of conclusion-based communication is simply not true. Trial lawyers are required to make their case in great detail, but they are also required to give opening statements that preview key evidence for judges and juries. Transactional lawyers are required to draft complex contracts and agreements but are also called upon to first prepare memorandums of understanding that memorialize high-level agreements. And regulatory lawyers are tasked with not only reviewing and analyzing lengthy pieces of legislation, they are also responsible for providing actionable summaries of specific portions for their clients and colleagues.

The same is true with digital presentations. The ability to convey a set of conclusions—along with the justifications and data behind those conclusions when necessary—without requiring the time-consuming task of putting those conclusions into narrative prose is a feature, not a bug of the genre. As lawyers learned from the transition to legal email memoranda there is "growing client demand[] for quick response time and simple, straightforward advice."[45] Digital presentations are another effective way to provide legal analysis or supplement traditional legal documents. This is not to say that digital presentations can always be created quickly or that they are always the best communicative choice. But by the same token, the mere fact that they can and sometimes do offer conclusions should not disqualify them as a valid communication tool. Conclusion-based genres of communications are critical tools in the lawyer's toolbox, and they need not be any less rigorous in the analysis that underlies them.

1.2. The visual nature of digital presentations

A separate yet related critique often made against digital presentations is that because of their visual nature, they push the limits of appropriate modalities for legal communication. This is what Elizabeth Porter calls the "stylistic straitjacket"[46] of legal analysis; namely, that traditionally "text typically is the starting point and ending point"[47] of legal documents, a reality demonstrated by, among other examples, the exclusion of images from legal documents when displayed on commercial research databases like Westlaw and LexisNexis.[48] For some this argument is little more than nostalgia—this is not how it has always been done—

45 Kristen Konrad Robbins-Tiscione, *From Snail Mail to E-mail: The Traditional Legal Memorandum in the Twenty-First Century*, 58 J. Legal Educ. 32, 34 (2008).

46 Porter, *supra* note 34, at 1690.

47 *Id.* at 1690 n.11 (quoting Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 Stan. L. Rev. 509, 534 (1992)).

48 *Id.* at 1691.

but for others the critique is more pointed. They argue that non-textual modalities may "mislead and confuse" audiences because, among other reasons, the "legal uses of images rely on the ability of images to persuade without seeming to persuade."[49]

But, as Porter wrote in 2014, "To rising generations of young lawyers, images are the vernacular of modern communication" and this shift is the result of "[t]echnological advances [that] have opened the door to integrating video, audio, and other technology into" legal documents.[50] Seven years later this is even more true. And as Ruth Anne Robbins and Steve Johansen conclude, "the question of whether visuals should be used in legal documents has been asked and answered,"[51] and "[v]irtually all scholars who have examined the question conclude that visuals make legal documents more persuasive."[52]

For lawyers, visuals serve a number of different functions.[53] For example, "documentary visuals" that are evidentiary in nature show the audience something that exists in the world as opposed to just forcing the audience to take the author's word for it,[54] and "analytical visuals" "help to explain" legal analysis and provide organizational structure by helping make clear "difficult or ambiguous concepts."[55] This makes sense. Why would a lawyer present the complex, intertwined structure of a pending transaction in words alone when a flow chart depicting the relationship between various agreements is so much easier to see and understand? Why would a lawyer in a copyright dispute not show opposing counsel the illegally reproduced image and the original image side-by-side as opposed to making a conclusory statement that the two images are the same? Why would a trial lawyer tell a jury what a key witness said when they can show the text of the actual deposition transcript, or better yet show a video clip of the witness speaking the words? Simply put, lawyers explain and

49 Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 Harv. L. Rev. 683, 696 (2012). Michael D. Murray also discusses the ethics of using visuals in law in depth:

> The power of visual rhetorical devices to communicate comes bundled with a very real potential for harm: while the devices can communicate powerfully on an intellectual and emotional level, they also can be manipulated to deceive. Visual media are ethically neutral. There is nothing inherently deceptive about a particular visual medium, but the ethics of the advocate using the visual medium are immediately implicated by the decision whether or not to employ a visual form of communication in the particular rhetorical situation of the case.

Michael D. Murray, *The Ethics of Visual Legal Rhetoric*, 13 Legal Comm. & Rhetoric 107, 111 (2016).

50 Porter, *supra* note 34, at 1693.

51 Johansen & Robbins, *supra* note 6, at 62.

52 *Id.* at 61.

53 Steve Johansen & Ruth Anne Robbins offer a helpful taxonomy of legal images. *See* Johansen & Robbins, *supra* note 6, at 66–67.

54 *Id.* at 63–64.

55 *Id.* at 67.

persuade—and when doing so they ought to use the best tools available to them to accomplish that task.

In fact, digital presentations take the benefits of visual rhetoric and extend them a step further by allowing a lawyer to jump back and forth seamlessly between different media and modalities *in the same document*. One slide might include statutory text (or a bullet-point summary). Another slide an image. A third slide an audio clip. A fourth slide a video. And a fifth slide a mix of all four. It is this multi-modal approach that really demonstrates the power of digital presentations. As Chris Anderson, the Curator of TED, puts it well: "Often the best explanations happen when words and images work together. Your mind is an integrated system. . . . If you want to really explain something new, often the simplest, most powerful way is to show and tell."[56] This is of course particularly true in a profession where time is of the essence to both client and lawyer (not to mention often charged by the tenth of an hour).

To be sure, digital presentations are not perfect legal tools. This article does not attempt to argue otherwise. But just because the quality or strategic benefit in particular circumstances is suspect, that does not mean that lawyers gain no benefit from using digital presentations—whether requested by their audiences or not. As a result, lawyers should learn to communicate using digital presentations. As presentation expert Nancy Duarte explains, "Making bad slides is easy, and it will negatively impact your career."[57] It is therefore necessary not only to "[i]nvest in your slides, but invest in your own visual skills as well."[58] Section 2 provides a concrete approach for doing just that.

2. The legal presentation playbook

Lawyers often fear the blank page. The same fear exists for lawyers tasked with creating digital presentations albeit in the form of a fear of the blank slide. In fact, this fear is often magnified when creating digital presentations because the effectiveness of these presentations is judged not solely on their content but also on their organization, design, and aesthetic quality. I propose that the best response to this fear is process—a systematic, intentional, and repeatable workflow to move from idea to final presentation no matter one's purpose, practice area, or level of technical expertise. This section offers just such a process for legal presen-

56 Chris Anderson, TED Talks: The Official TED Guide to Public Speaking 115 (2016).

57 Duarte, *supra* note 1, at 3.

58 *Id.*

tation design. To be sure, the process it outlines is not *the* approach to creating legal presentations, but it is certainly *one* way that is efficient, effective, research-based, and battle-tested.

The process includes six steps:

- Step One is to identify the specific **purpose and audience** (or purposes and audiences) for both the digital presentation and any other document or oral presentation that the digital presentation supplements or summarizes.
- Step Two is to research, analyze, and outline the **content** (the law, the facts, and the application of the law to those facts) for the presentation.
- Step Three is to transform the content from Step Two into discrete visual units using a **storyboard** and **common slide types** with an eye toward a presentation that is organized, convincing, and visually meaningful in light of the content outlined in Step Two and the purpose(s) and audience(s) identified in Step One.
- Step Four is to create a **"presentation brand"** that uses color, typography, images, transitions, and animations in intentional and consistent ways that specifically respond to the purpose(s) and audience(s) identified in Step One.
- Step Five is to convert the storyboard from Step Three into **slides** in ways that are consistent with the presentation brand in Step Four using presentation software.
- Step Six is to **edit, strengthen, and streamline** the slides created in Step Five by refocusing on the purpose(s) and audience(s) of the digital presentation identified in Step One and the content from Step Two.

On its face, this six-step process should not seem particularly foreign to those accustomed to crafting legal analysis. It is intentionally based on the traditional approach to drafting and creating other legal documents: identify the purpose and audience, outline the content, draft the content, integrate that content into the form and format the audience expects, and edit, edit, edit. At the same time, this process is distinct from other genres of legal communication in its points of emphasis and, in some cases, the different skills necessary to accomplish each step.

To be clear, this approach is not simply about making presentations that look better (although following this advice will result in better-looking presentations). The objective is crafting presentations that better serve the lawyer's purpose(s) for their audience(s). This is an important distinction often lost on new legal presentation designers who either focus

so much on the aesthetics that the content is lost, or do a thorough job preparing the content but do not think critically about how to display that content in compelling and intentional ways. This process seeks to bridge that gap. The key to effective presentation design is finding the right balance between content and design elements so that the sum is greater than the whole of its parts. As one presentation design expert, Jonathan Schwabish, puts it, "[C]reating better slides is not about 'making things pretty,' but about recognizing how to communicate and how conscious—and oftentimes simple—design choices can help you do so."[59] As a result, as another recognized presentation design expert Garr Reynolds notes,

> [P]reparing a presentation is an act requiring creativity . . . . [It] is a "whole-minded" activity that requires as much right-brain thinking as it does left-brain thinking. . . . [W]hile your research and background work may have required much logical analysis, calculation, and careful evidence gathering using left-brain thinking, the transformation of your content into presentation form will require that you exercise much more of your right brain.[60]

Finally, although digital presentations require lawyers to use digital software, learning how to use that software is a relatively small part of the process. Most digital presentations that lawyers create can and often are built using a very limited set of tools: text, shapes, automatic diagrams (called "SmartArt" in PowerPoint) that put words in shapes, and images. That's it. Although learning the intricacies of specific presentation software will not hurt a lawyer who aspires to create better presentations, it will not be discussed in the sections that follow for two reasons. First, believing that one can create better legal presentations just because one knows more about how to use a particular software package is like believing that one can write better briefs simply because one knows more words (or worse, because they know more about Microsoft Word). The truth is quite different. It is important to think of presentation design software as a tool to execute a vision that the lawyer should be able to sketch on a post-it note or describe orally to a colleague. Knowing how to transform that vision using software is far less important than having the tools to come up with the vision in the first place. Second, presentation design software has become more intuitive and user-focused in recent years and, as a result, a lack of experience with the software really is no longer the primary gating item to the creation of good legal presentations.

59 See Jonathan Schwabish, Better Presentations: A Guide for Scholars, Researchers, and Wonks 3 (2017).

60 Garr Reynolds, Presentation Zen 32 (2d ed. 2012).

If necessary, there are many places to find good advice on these ever-changing software packages including books, blogs, and online videos. Lawyers must keep their eyes on the real challenge: learning a tailored creative process for building digital presentations in the first place.

2.1. Step one: Purpose(s) and audience(s)

Step One of the digital presentation creation process is to identify the purpose and audience for the presentation. Nancy Duarte refers to this as identifying the presentation's "transformation."[61] Before beginning, the presentation creator must "map out that transformation—where your audience is starting, and where you want people to end up."[62] This admonition should be familiar to lawyers as the starting place for all forms of legal communication. In crafting legal analysis, it is never enough to know just the law and facts of a case. It is just as important to understand the purpose and audience for that legal analysis. That is why lawyers start every assignment with two questions: (1) *what* information am I trying to convey and (2) *to whom* am I trying to convey it.[63] Digital presentations are no exception. Just like written and oral legal analysis, digital presentations can be predictive or persuasive, can be targeted at legal or non-legal audiences, can be formal or informal, and can be detailed or high-level. Determining the audience and purpose is an integral first step.

In fact, this step is arguably more important and more nuanced than identifying the purpose and audience for other forms of legal communication for two reasons. First, although some legal presentations are freestanding documents that have a singular, clearly identifiable purpose, legal presentations are often tied to other documents or oral speeches that have their own distinct audiences and purposes. It is critically important not to conflate the purpose and audience for the digital presentation and the purpose and audience of the work product that the presentation accompanies, summarizes, or supplements.

For example, when a digital presentation accompanies an oral speech it is particularly important not to create text-heavy slides that compete with the speaker. Your audience will "either listen to you speak or read your slides—they won't do both simultaneously (not without missing key parts of your message, anyway)."[64] The purpose of the digital presentation deck

61 Duarte, *supra* note 37, at 19.

62 *Id.*; *see also* Kosslyn, *supra* note 3, at 4 ("A presentation must be built from the outset around your takehome message; every aspect of the presentation should be relevant to what you want the audience to know and believe when they walk out the door.").

63 *See, e.g.*, Alexa Z. Chew & Katie Rose Guest Pryal, The Complete Legal Writer 5–7 (2016).

64 Duarte, *supra* note 37, at 113; *see also* Kosslyn, *supra* note 3, at 6; Schwabish, *supra* note 59, at 65.

is therefore not to repeat what the speaker is saying (and thereby distract the audience) but rather to contextualize the oral presentation and orient the audience to what is being discussed, why it is being discussed, the key takeaways from that discussion, and what will be discussed next. By contrast, when a digital presentation is primarily a stand-alone document that the audience is expected to review on its own, the digital presentation may need to use more words in order to make both its arguments and conclusions explicit.

The second reason that identifying the purpose and audience of a presentation specifically is so important is that the same digital presentation can serve very different purposes and audiences at different times. For example, a single digital presentation might be used to supplement a live oral presentation, then later be shared by email with the same audience, who then forward it on to others who were not present for the initial presentation. These multi-purpose presentations are uniquely challenging. For example, a lawyer who plans to use a digital presentation as part of an oral speech and then share those slides after the fact needs to make sure that the slides assist in the delivery of the presentation and can stand alone for the audience after the fact.

Several examples from different practice areas illustrate the interplay between these two dynamics and how they can (and should) impact the presentation-creation process.

Tax attorneys.[65] For outside counsel or legal consultants who provide tax recommendations to clients on new transactions, it is common that the first deliverable created is a digital presentation. This digital presentation is not created in addition to another written deliverable; it is the written deliverable consumed by its audiences. It does not accompany a formal memorandum nor is it presented orally by its drafters. The digital presentation is typically created by consulting with attorneys from each relevant jurisdiction who craft textual bullet points about the tax consequences in their jurisdictions as well as a team of attorneys responsible for managing the project and making the ultimate recommendations that are proposed in the form of visual diagrams. The specific format and icons used in these visual diagrams are standard in the industry and therefore easy for those in the field to follow. The audiences for this digital presentation are often relevant stakeholders at the client, and corporate attorneys (either in-house counsel, outside counsel, or both) who are responsible for creating the transactional documents necessary to complete the proposed deal. The purposes of these digital presentations are (1) to make sure that all of these different audiences agree on the approach and its tax conse-

65 This description is based on discussions with an international tax planning attorney.

quences, and (2) to make sure that there are no unforeseen jurisdictional tensions or misunderstandings before the deal documents are drafted. After the presentation has been reviewed individually, there is often a meeting between supervisory stakeholders to confirm that no significant changes are necessary (and if there are, a new presentation is created). Then after the final decisions are made, the tax lawyers use the presentation to put together a formal written opinion or memo documenting the expected tax consequences of the transaction. Unlike the digital presentation that helps document the decisionmaking process, the memo that follows is primarily geared toward explaining the expected tax consequences of the transaction to the client and its financial auditors.

Presentation to a litigation client. For a lawyer asked to meet with a client and present information or recommendations, a digital presentation often serves multiple purposes and audiences. Take, for example, a face-to-face meeting or videoconference with a tenant about an ongoing dispute with their landlord. The audience for that meeting is the client in the room, and the purpose of the presentation in that moment is to help the lawyer walk through the client's options, make recommendations about how to proceed, and answer any questions in real time. It also allows the attorney to display relevant evidence about the case as they are presenting. For this purpose, the digital presentation need not (and in fact, should not) contain everything the attorney plans to say aloud. After all, the point of having this meeting is to give oral advice, not read that advice off a screen. But, if after the meeting the lawyer shares those slides with the client, they serve a different purpose and audience. The digital presentation now must emphasize the legal elements of the cause of action and crystalize the relevant choices the client needs to make in a way that is understandable without the lawyer present. More than that, unlike the use of the presentation in the meeting, the presentation now needs to self-narrate. As a result, the digital presentation requires more detail given that the client will have an opportunity to view it without the ability to ask questions in real time.

Policy advocate. A third example is an attorney who works for a nonprofit who is meeting with a legislator to lobby for changes to a statute. In this situation, the attorney might choose not to use a digital presentation at all during the meeting in order to encourage a more free-flowing conversation. The only document the lawyer might bring into the meeting is a page of notes for personal use including, for example, statistics that the lawyer hopes to convey. But the lawyer might nevertheless choose to create a short digital presentation (perhaps a single-page infographic) to print out and leave with the legislator or legislative staffer after the meeting. In this situation, the digital presentation's purpose is related to

but separate from the notes the lawyer brought into the meeting. Instead of specific details, the digital presentation seeks to quickly communicate the high-level summary of what is wrong and how to fix it. The audience is also significantly wider than the single person with whom the lawyer met because the infographic presentation can be shared. This digital presentation therefore must be geared toward those who were not part of the face-to-face meeting. Although the research and preparation for both the meeting and the digital presentation are the same, the audience and purpose are different.

Bankruptcy lawyer.[66] Bankruptcy attorneys also use digital presentations in several systematic ways including for boards of directors, creditor groups, and hearings. As one bankruptcy lawyer explains it,

> [B]ankruptcy attorneys use digital presentations to support, clarify, and frame important decisionmaking at various points in a restructuring process. In counseling a board of directors of a distressed company, digital presentations also serve as a vital tool to create a record of the board's deliberations, which is intended to preserve the board's ability to benefit from the business judgment rule.

It is important to get the process right and "board [presentations] are *the* way to show that the board complied with its fiduciary duties. As a result, there are a lot of conversations about what text should be in the [presentation] deck and what should be voiced over."

Patent attorneys. A final example is patent attorneys. Patent attorneys often use digital presentations and other forms of graphics in briefs and at trial to display information and images to the judge and the jury.[67] These demonstratives are essential to the case because they often show the patent application and the invention at issue. And yet when those same patent attorneys argue a legal issue on appeal to the Federal Circuit they rarely do so with any demonstratives at all. The reason for this shift is that the audience is now judges who have the relevant diagrams available to them in briefs as opposed to a jury who does not have that benefit.

And these are just a few representative examples. Together what they demonstrate is the importance of identifying not only the purpose and audience for the presentation but also the purpose and audience of any document the presentation supplements or accompanies.

Before moving on though, it is equally important to emphasize who the audience of a legal presentation is not: the lawyer creating the

66 This description is based on discussions with a bankruptcy attorney.

67 This description is based on discussions with a patent attorney.

presentation. Digital presentations are not teleprompters. Using digital presentations as teleprompters rarely if ever supports the lawyer's purpose or audience.[68] Requiring (or even allowing) the audience to read along while the presenter reads from slides is a notoriously bad approach.[69] As Guy Kawasaki, former Chief Evangelist at Apple and recognized expert in presentation design, colorfully put it,

> If you start reading your material because you do not know your material, the audience is very quickly going to think you are a bozo. They are going to say to themselves "This bozo is reading his slides. I can read faster than this bozo can speak. I will just read ahead."[70]

This is not to say that presentations focused on conveying information to the audience do not help a lawyer presenting orally. After all, a list of bullet points that primarily serve the audience still can be good reminders of the key concepts the lawyer wants to cover and in what order. But this reality should not negate the rule: digital presentations are not teleprompters. Instead they are primarily if not exclusively created for the benefit of the audience. And, for the reasons discussed above, it is essential to start with who that audience is and what purpose *the presentation* specifically serves.

As a result, to accomplish this first step, one effective approach is asking five simple questions before designing any legal presentation:

1. What is the digital presentation? Is it a deliverable in and of itself or is it adjacent to another deliverable (oral presentation, meeting, written memo, etc.)? If it accompanies other deliverables, what *unique* role does the presentation play?
2. Who is the primary audience for the digital presentation (just those in a meeting, those after the fact who were not present, perhaps anyone with whom the client shares the presentation)? Are there other audiences that also should be accounted for?
3. When is the digital presentation going to be reviewed (in the moment, after the fact, years later, all of the above)?
4. Why is the audience viewing the digital presentation (to make a decision, to understand what happened, to be persuaded, to put in writing the decisionmaking process)?

68 Duarte, *supra* note 37, at 96 ("[D]on't project your entire document when you speak. No one wants to attend a plodding read-along. It's boring and people can read more efficiently on their own, anyway.").

69 *See id.* at 95–96.

70 Reynolds, *supra* note 60, at 244.

5. Where is the audience going to view the digital presentation (on a projector screen, on their own computer, on a cellphone, or in print)?

These questions help separate the purpose and audience for the presentation from any other purpose(s) or audience(s). After answering these questions—and only after answering these questions—is a lawyer ready to begin the content-creation process.

2.2. Step two: Content

The next step is both the most important step in the presentation creation process and often the most time consuming: content creation. And yet this step is also the easiest to explain to lawyers and law students. That is because this step is no different than that of any other legal document or legal deliverable. The same tools and approaches of legal writing, research, and analysis apply.

Yet the most common challenge when lawyers are asked to develop content for a digital presentation is not a lack of skills, it is a failure to use those skills because one is "just making a presentation." Put another way, too many presentation creators (lawyers and law students included) assume that just because analysis is conveyed in presentation form that they can simply open presentation software and start typing instead of using the research and analytical tools they have developed over years of education and legal practice.[71] This is a major mistake. Just because a digital presentation can be shorter, more visual, or more conclusion-oriented does not mean that the hard work of legal analysis or argument can be sidestepped.[72] After all, if a legal presentation is not well analyzed, is based on the incorrect law, or is simply too difficult to follow, no level of typography, graphic design, or flashy transitions can save it. A legal presentation is only as good as its content.

To be fair, not every digital presentation starts from scratch. Many legal presentations are created *from* or *based* on other work product (for example, a memo, a prepared argument, or a research email). In those circumstances this content step is substantially complete prior to the creation of the digital presentation and as a result may require only filling in gaps or reformulating this content for a different audience or purpose. That said, the process of creating a digital presentation from another legal

71 *See* Schwabish, *supra* note 59, at 11 ("When you begin creating your presentation, try to refrain from immediately opening the computer and starting on a slide deck.").

72 *See* Duarte, *supra* note 37, at 47 ("Because presentation programs such as PowerPoint are visual tools, we often jump too quickly into visually expressing our idea when we use them—before we've spent enough time arranging our thoughts and crafting our words.").

document often identifies significant gaps in research and analysis that require further content development. This alone is one of the reasons that I ask my first-year law students to create digital presentations during their first semester right after they turn in the first draft of a legal memo. It provides an opportunity to learn to convey analysis in a new genre of legal communication but it also helps illustrate what is missing from a student's analysis before turning in their next written memo draft.

If, however, the presentation is the first time the lawyer or law student is engaging with the relevant law and facts for a particular legal question, this content step requires the same level of detailed research and analysis required of any other genre of legal communication. Perhaps more. That is because although a presentation may only highlight or make explicit a piece of the analysis or argument, the audience trusts that the content is based on the same rigorous analysis necessary for all legal communication. For example, unlike a legal brief which walks through the facts and analysis of a prior case in written detail before using analogical reasoning to argue that the prior case is similar to or different from the current case, a presentation might only highlight the conclusion of that analogy. As a result, the audience has to take the presentation's conclusion as valid even if each step in that analysis is not shown explicitly—and that analysis must therefore be correct. Simply put, the content stage cannot be ignored, and the importance of doing this analysis and doing it well *prior* to starting a legal presentation cannot be overstated.

2.3. Step three: Storyboard using slide types

At Step Three, the lawyer or law student creating a digital presentation begins to move from content creation to designing the display of that content. This is an extremely important step because it is the moment when the work of creating content and identifying the purpose and the audience with precision come together and are ready to be transformed into a presentation. Although there are surely many ways to accomplish this step, many design experts recommend bridging this gap from content to design using a technique known as "storyboarding" using slide types. For the reasons discussed below, this approach allows for a systematic and effective transformation of ideas into discrete visual units.[73]

2.3.1. How and why to storyboard

A storyboard is nothing more than a visual outline. Like an outline, a storyboard helps a presentation creator "clarify what [they] want to say

73 *See, e.g.*, Reynolds, *supra* note 60, at 95.

and how [they] want to say it."[74] Much has been written about effective storyboarding techniques in different fields such as filmmaking,[75] visual analytics,[76] and software design.[77] It has also been mentioned by legal authors as an effective technique for building legal briefs.[78] At its core though, the idea of storyboarding is not complicated: it is a "short graphical depiction of a narrative."[79]

The tools for creating storyboards can be analog (3x5 cards or post-it notes) or digital (outlining software or the presentation software itself). Whatever the tool, the idea is the same: brainstorm one idea per slide and for each slide, outline how that idea will be visually displayed.[80] This allows ideas to be "captured, sorted, and rearranged as needed."[81] In this way, the process of storyboarding is flexible and can accommodate lawyers who prefer to brainstorm in more visual ways or in more word-based formats. For those with a more visual bent, a storyboard can consist of a set of post-it notes or index cards with some basic sketches of not only what information is going to be covered but how it will be depicted visually. For those less predisposed to visuals the easiest way to start is with that same stack of post-it notes or index cards. But instead of sketches, each card or post-it should include a few words or even a sentence about what content will be covered on the slide and a brief description of how that content might be displayed when it is moved into presentation software. Storyboarding also works well for lawyers writing in teams because different team members can quickly brainstorm individually before coming together to find the best narrative arc, or the group can together build that arc under the leadership of a senior team member.

How detailed should a storyboard be? On the one hand the storyboard need not include the final language or design for each slide ("[t]his is an ideation phase"[82]). Rather a description of what needs to be covered and how it might be illustrated is plenty. On the other, a single

74 Duarte, *supra* note 37, at 124.

75 *Id.* at 123; *How to Make a Storyboard for Video and Film: The Definitive Guide*, StudioBinder (July 12, 2019), https://www.studiobinder.com/blog/how-to-make-storyboard/.

76 *See, e.g.*, Rick Walker, et al., *Storyboarding for Visual Analytics*, 14 Information Visualization 27 (2015).

77 *See, e.g.*, Truong, Hayes & Abowd, *Storyboarding: An Empirical Determination of Best Practices and Effective Guidelines*, Proceedings of the Sixth Conference on Designing Interactive Systems 12 (2006).

78 *See, e.g.*, Stefan H. Krieger & Richard K. Neumann, Essential Lawyering Skills: Interviewing, Counseling, Negotiation, and Persuasive Fact Analysis 188 (2015).

79 Duarte, *supra* note 37, at 123 ("Basic storyboarding isn't hard, and it saves you more time than it takes."); Truong, *supra* note 77, at 12.

80 Anderson, *supra* note 56, at 115, 116 ("The key to avoiding [bad slides] is to limit each slide to a single core idea."); Duarte, *supra* note 37, at 123 ("Storyboard [o]ne [i]dea [p]er [s]lide.")

81 Duarte, *supra* note 1, at 28.

82 Duarte, *supra* note 37, at 123.

word or conclusory phrase like "elements" or "recommendations to the client," is often less helpful because it really does not allow the lawyer to think critically about what content will be portrayed to the audience and for what purpose. The only way the storyboard will allow the presentation creator to "visualize the sequential movement of . . . content, narrative and the overall flow and feel of the presentation"[83] is if it has *some* detail. But too much detail can actually prove an impediment to success. There is at least one study in the field of software development that shows including more detailed sketches at this storyboarding stage does not necessarily make the ultimate product better and can even prove detrimental because creating more detailed designs takes more time and the inclusion of extra detail at this stage may even "impede understanding."[84]

The key here is that the storyboard is not the final presentation. The storyboard is instead a part of the process to create a final presentation that effectively conveys information visually. Just as "[f]ilmmakers sketch out their shots *before* production begins to make sure they'll hang together structurally, conceptually, and visually, good presenters use a similar planning process before they sweat over their slides."[85] That is because "[a]s you storyboard, you'll be able to tell immediately which concepts are clunky or overly complex . . . . Eliminate them, and brainstorm new ways to communicate those messages."[86] Another benefit of storyboarding is that it makes clear what concepts will require multiple slides and what concepts will require just one (or can be excluded altogether). This helps simplify and distill what is displayed and "[s]implicity is the essence of clear communication."[87] Ultimately, this process allows the presentation creator to quickly and iteratively work through ideas about what to include, how to include it, and in what order to include it before wasting significant time and effort (not to mention money) in creating intricate slides.

2.3.2. Using slide types

The danger of telling inexperienced presentation creators to just start storyboarding is that they do not have enough context for what typically is included in a legal presentation or what kinds of slides they have at their disposal to tell that story. As a result, they often turn to built-in or firm-mandated templates for guidance. But these templates

83 *Id.* at 125; Reynolds, *supra* note 60, at 95.

84 Truong, *supra* note 77, at 16.

85 Duarte, *supra* note 37, at 123.

86 *Id.* at 125.

87 *Id.* at 128.

provide *design* guidelines—that is, they focus on the visual look and feel of slides—not *content* guidelines—that is, what to include and how to include it. Given that it is always easier to build something if we know the tools and materials we have at our disposal, identifying and describing common slide types helps lawyers avoid feeling that they are truly starting their storyboard from scratch. Many presentation experts use a similar approach albeit with various names for the different slide types. For legal presentations, the three most common categories of slides include (1) guide slides, (2) documentary slides, and (3) content slides. Each category is described in greater detail below.

2.3.2.1. ***Guide Slides***

Guide slides are the starting place for any presentation. They are organizational slides that help the audience consume a presentation and direct the audience's focus on the right things at the right time.[88] Guide slides do not themselves convey a significant quantity of content to the audience. Instead their primary role is to help the audience consume the content of the presentation and any other deliverable that the presentation accompanies or supplements. Some common guide slides include title slides, header slides, agenda slides, and background slides.

Title slides. Title slides (sometimes called "walk-in" slides[89]) are typically the first slide or "cover" of a digital presentation. They orient the audience to the topic and purpose of the presentation and serve the same role as the subject of an email, the heading for a memo, or the caption of a brief. Title slides can be very simple or very intricate depending on the purpose of the presentation and comfort level of the presentation designer. Especially at the storyboard stage it is important to focus on (1) whether to include a title slide, and if yes, (2) what textual information to display, and (3) what visual elements might provide useful context to that text. Title slides are common in legal presentations but not mandatory. For example, a one-page infographic slide likely will *not* include a Title Slide.

That said, for longer presentations, title slides are important because they are the first opportunity to connect with the presentation audience. Even if we are not supposed to judge a book by its cover, we often do. As a result, it is worth putting some time and thought into title slides at the storyboarding phase and throughout the creation process. In doing so it helps to focus on avoiding the three most common mistakes in crafting

88 For example, Jonathan Schwabish refers to these slides as "scaffolding slides." Schwabish, *supra* note 59, at 135 ("The purpose of scaffolding slides is to guide and focus your audience's attention as you transition from one section to another, and to drive home important points."). Nancy Duarte refers to these slides as "navigation slides." Duarte, *supra* note 37, at 117.

89 *See id.*

title slides. First, do not create textual titles that are too detailed (e.g., "A CAREFUL ANALYSIS OF THE MOST IMPORTANT DOCUMENTS OF THE 1,574 DOCUMENTS INCLUDING EMAILS AND WORD DOCUMENTS PROVIDED BY JOHN SMITH OF OUR CLIENT JOHNSON, JOHNSON, AND HIGHLAND LLP") or not detailed enough (e.g., "HOT DOCUMENTS")—and when you do, do not use all caps for the reasons discussed in *infra* section 2.4.1. Instead, just like the subject line of a formal memorandum, it is important to include just enough contextual information in the textual title but not so much that the audience ignores the title all together.

Second, do not include too much information in addition to the presentation title. For example, even experienced presentation designers often include a complete business card's worth of information on the title slide even when the name of the presenter is not even necessary or better yet, the fax number for the lawyer's office. The rule of thumb here is for the creator to ask: is the audience helped by the inclusion of this additional information on the title slide? If so, include it. If not, exclude it.

Third, use visuals, but make the visuals audience centered, not law firm or lawyer centered. This is a common mistake for legal presentations, perhaps because so many lawyers use firm-based templates. But as the example slides below show, a focus on the firm name as illustrated in Slide 1, distracts from the title of the presentation (the very purpose of the slide) as opposed to elevating it. By contrast, a simple full-screen image along with a clear textual title, as in Slide 2, primes the audience for exactly what the presentation is about as opposed to a title slide that says more about the presenter than the presenter.

Slide 1

Slide 2

Agenda slides. Agenda slides are the next most common type of guide slide. They serve a role similar to roadmap paragraphs, tables of contents, and introductions in other genres of legal writing. They allow the creator to prepare the audience for what is to come and why. That said, not every presentation needs an agenda slide, but the longer and more intricate the presentation, the more helpful it can be. As always, the presentation creator should ask, will my audience benefit from a preview of what's to come? If yes, it is worth including them.

Agenda slides can be designed in a number of different ways (as Slides 3 and 4 below demonstrate). At the storyboard stage, though, it is okay to focus only on putting together the high-level concepts that will be included and some potential ideas for the overall aesthetic.

Header slides. The third type of guide slide is a kind of mix between title slides and agenda slides: "header slides." Header slides are like title

Slide 3

Slide 4

slides for the sections identified in the agenda slide. They serve a similar purpose to point headings in other genres of legal writing. That is, they tell the audience that a new topic is being covered (and sometimes illustrate how that new topic connects to prior or later topics as well). Like agenda slides, not every presentation needs header slides. Yet, especially for longer presentations, they can be particularly helpful for the audience experience whether a presentation is presented orally or reviewed individually.

There are different ways to create header slides as illustrated below in Slides 5 and 6 (words, images, or even versions of the agenda slide). At the storyboard stage it is worth including placeholders for header slides even if they are ultimately omitted for organizational or stylistic reasons. They help order and organize the presentation for the presentation creator and

Slide 5

help ground the decisions both about what to include and how to include it.

Slide 6

Background slides. The final type of guide slides are "background slides." A background slide contains no text and is either completely blank or just a full-screen image. The idea behind background slides is that they tell the audience that it is not time to focus on the digital presentation. It is instead time to turn their focus somewhere else (typically to the speaker). As a result, these slides are used primarily in digital presentations that accompany an oral presentation.

There are two approaches to background slides. One technique for creating background slides is just using blank slides with the background color of your presentation. This signals to live- presentation audiences that it is time to focus on the speaker and only on the speaker. They also benefit the audience by giving them "a vacation from images [to allow them to] pay more attention to [the speaker's] words. Then, when [the presenter] go[es] back to slides, they will be ready to go back to work."[90] Although this is not an approach lawyers tend to use, it can be particularly powerful when presenting orally with slides.

The other kind of background slide is an image slide that primes the audience for what the presenter is saying out loud but which does not require the reader to read or review anything additional. These background slides are similar to "b roll" in a TV show or commercial—they are decorative images that give the audience something appealing to look at as they listen to the presenter but they also allow the presenter to retain the audience's complete attention.[91] For example, if a lawyer were discussing

90 Anderson, *supra* note 56, at 116.

91 Johansen & Robbins, *supra* note 6, at 70.

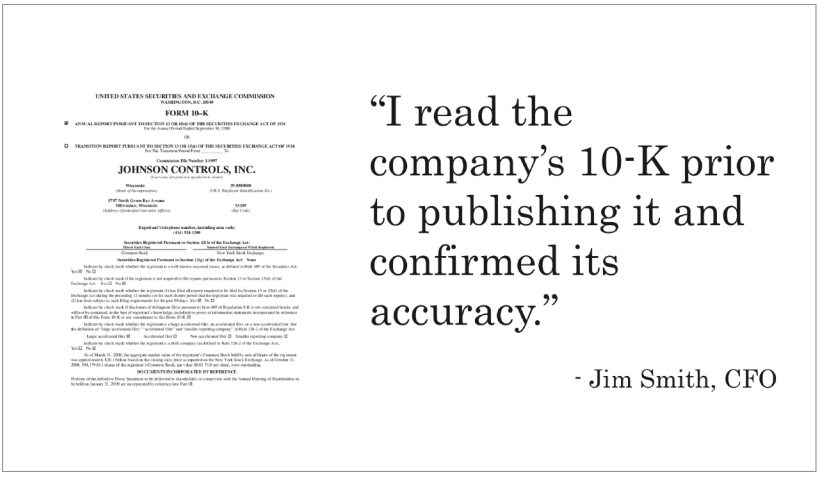
the protocol for collecting documents in response to a subpoena and needed a backdrop for that discussion, they could use the following full screen image.

Slide 7

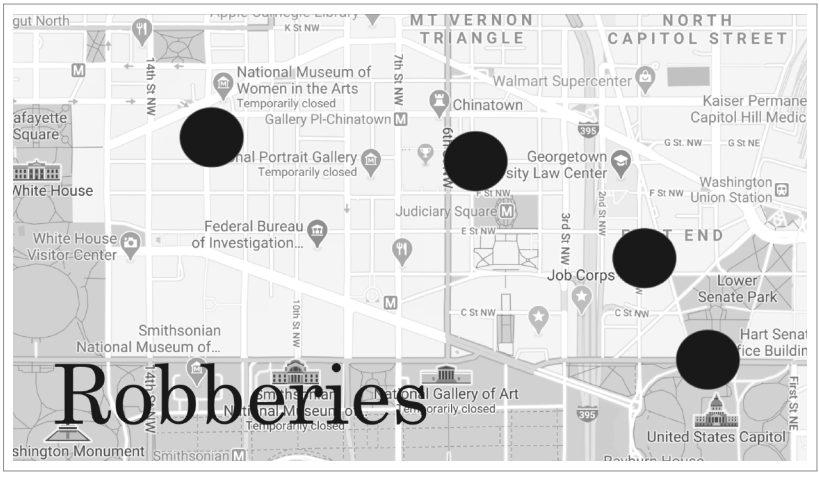
2.3.2.2. Documentary Slides

The next category of slides is documentary slides. These slides display extrinsic information, data, or evidence not created by the author. For example, a documentary slide might include a photograph of the location where an alleged crime was committed, a quotation from a public document filed with the SEC, or a video clip of a deposition. Documentary slides often play a very important role in all types of legal presentations—but especially in trials and document-heavy practices. When storyboarding a documentary slide a lawyer need only identify what evidence to display and what if anything they wish to use to help display it.

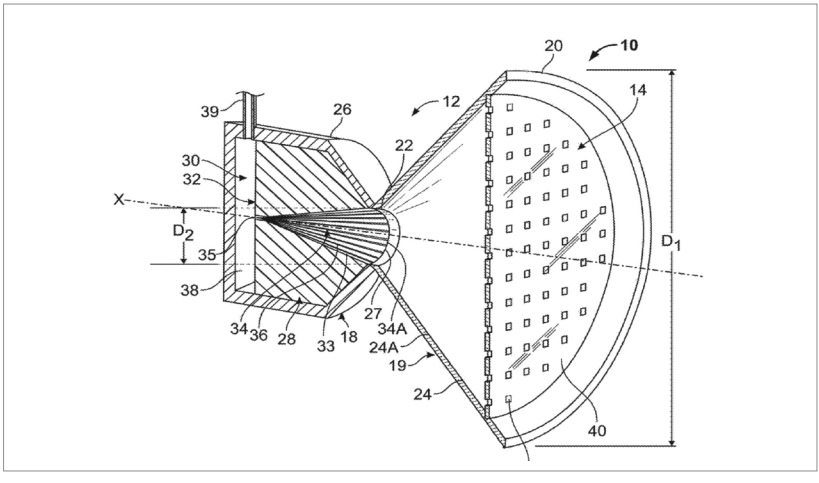
Slide 8



Slide 9



Slide 10



The power and benefits of documentary slides are difficult to overstate. Lawyering is, at its core, evidence-based argumentation and analysis and therefore displaying that evidence is often the most helpful to audiences and, incidentally, the least difficult to create. These slides allow the presentation creator to show the audience as opposed to tell, and all that is typically required to create them is copying-and-pasting the media onto a slide with only minimal additions.

2.3.2.3. Content Slides

The final slide type is content slides. These are the slides that convey independent legal analysis. This often comes in the form of textual bullet points but can also just as often come in the form of diagrams or other pictorial representations of that information or analysis. Although there can be some overlap, the difference between a diagram-based content

slide and a documentary slide is that the diagram-based content slide is created entirely by the presenter whereas a documentary slide is primarily displaying an image that exists in the outside world. At the storyboarding stage, the focus for content slides should be both the information the content slide needs to convey and some high-level thoughts on how visually it might be conveyed. More specifics on how to design these content slides are covered in *infra* sections 2.4 and 2.5.

2.4. Step four: Presentation brand

Step Four in the creation process is to create a visual brand for the presentation. The presentation brand is the set of presentation-wide design elements that provide a cohesive and easy-to-follow look and feel whether the presentation is a single slide or several hundred. Creating a strong, content-responsive, and audience-driven presentation brand is essential because "employing good design techniques is about unifying the various elements on the screen and focusing your audience's attention on your important points so that they can decide whether or not to buy into your ideas."[92]

If this concept is foreign to lawyers, it should not be. A consistent, cohesive, and appealing brand is essential for all legal documents. As Ruth Anne Robbins explains in the context of typography (one of the key elements of a presentation brand), design choices made by lawyers impact all three of the classical rhetorical appeals: pathos, logos, and ethos.[93] They impact pathos (emotion) because they set the "mood" and tenor of the document. They impact logos (logic) because they make sure the content is displayed so that the audience can understand and retain the information. And they demonstrate ethos (credibility) because they convey the expertise of the speaker.[94]

This section will focus on four of the most important components of any presentation brand: (1) typography, (2) color, (3) transitions/animations, and (4) images. But before diving into an introduction to each, it is necessary to briefly discuss those tools that serve as default presentation brands: built-in software templates and firm- or organization-created templates. Many presentation design experts dismiss the use of these templates out of hand but there is certainly a place for them. After all, especially as these templates have become more professional and more modern, they allow non-designers to implement a cohesive

92 Schwabish, *supra* note 59, at 29.

93 Robbins, *supra* note 9, at 110–11.

94 *Id.*

presentation brand with the click of a button and zero effort or design knowledge.

But at the same time it is important to know which template to use for a given presentation and to be careful not to rely too much on these templates. Built-in templates from software packages tend to be overused as well as overly intricate or busy (and at times even unprofessional or juvenile).[95] Relatedly, firmwide templates tend to offer a one-size-fits-all marketing solution as opposed to a brand that fits the specific presentation purpose and audience. One simple example of this reality is that most organization-wide presentation templates include the name of the law firm or organization *on every slide*. Although this might be a useful design choice for a presentation pitching the firm to a new client, that brand does not align with the purpose of presenting to a jury where the firm name is not the focus of the lawyer's presentation. Put another way, just as it would not make sense to put an appellate brief on firm stationery, the same is true for a digital presentation. Ultimately, a simple presentation brand that is created by a lawyer will often be a better choice than the busy, clip art filled designs popularized in presentation software. This is not to say that lawyers should never use them—but instead, if lawyers use them, they should use them intentionally and with care.

2.4.1. Typography

Legal presentations almost always include text and yet "[d]igital presentations are infamous for their terrible typography."[96] As a result, one of the first and most important design choices that a legal presenter must make is what typography to use.[97] As trained lawyer and professional font designer Matthew Butterick explains, "Typography is the visual component of the written word."[98] It "can help you engage readers, guide them, and ultimately persuade them. The more you appreciate what typography can do, the better a typographer you can become."[99] Typography is particularly important in digital presentations for the simple reason that even "seemingly minor changes" in typography "can affect the reader's perception of the document."[100]

95 *See* Schwabish, *supra* note 59, at 42.

96 Matthew Butterick, *Presentations,* Typography for Lawyers, https://typographyforlawyers.com/presentations.html (last visited Apr. 20, 2021).

97 *See* Schwabish, *supra* note 59, at 51; Robbins, *supra* note 9, at 110 ("[E]ven with text alone, legal writers can create a picture using typography as paint on the canvas of the page.").

98 Matthew Butterick, *What is Typography,* Typography for Lawyers, https://typographyforlawyers.com/what-is-typography.html (last visited Apr. 1, 2021) (emphasis omitted).

99 Matthew Butterick, *Why Typography Matters,* Typography for Lawyers, https://typographyforlawyers.com/why-typography-matters.html (last visited Apr. 1, 2021),

100 Margolis, *supra* note 6, at 16.

But making strong typographic choices is not as easy as it might seem. "Good typography," as designer Nate Kadlac puts it, is "a magic act. [Its] performance initially draws you in, but then quickly disappears into the background."[101] Performing this trick in legal presentations requires four effective choices: (1) quantity of typefaces, (2) choice of typefaces, (3) font size, and (4) emphasis.

Quantity of typefaces. As with so much of graphic design, when it comes to choosing the number of typefaces in a single presentation most experts agree fewer is better.[102] The reason to use fewer typefaces (one or two at most) is to help reduce the audience's need to decide why the typeface is changing. An audience will assume that a change in typeface is intentional—but it is very hard for the audience to visually see *what* that change means without further explanation. Just like a legal brief, memo, or book, it is better to use a single font or at most one font for headings and another for the primary text.

Typeface choice. There is never a single, perfect typeface choice.[103] But that does not mean that there are no bad choices. "Good typography," as Matthew Butterick explains, "is measured by how well it reinforces the goals of the text, not by some abstract scale of merit," and as a result "[y]our ability to produce good typography depends on how well you understand the goals of your text."[104] Good typeface choice is not about being "pretty," but about being effective given the purpose and audience of the presentation. The example that Butterick gives is highway signs.[105] The typeface used on most highway signs in the United States is not particularly pretty. But the purpose of that text is not to be seen as visually pleasing; it is "meant to be read quickly, from long distances, at odd angles, and under variable lighting and weather. It's good typography because it supports the goals of the sign."[106] By that metric the typeface choice is a resounding success.

Because legal presentations serve any number of goals, there is no one-size-fits-all approach to the most effective typeface choice. Nevertheless, there are some typefaces that simply have no place in legal

101 Nate Kadlac, *The Most Important Thing You Need to Know about Design*, Kadlac Design, https://www.kadlac.com/articles/the-most-important-thing-you-need-to-know-about-design (last visited Mar. 21, 2021).

102 *See, e.g.*, Duarte, *supra* note 37, at 114 ("Select one typeface—two at most—for the entire slide deck."); Schwabish, *supra* note 59, at 56 ("If you decide to use multiple font types, use them consistently and limit yourself to two or three—combining too many font types can be distracting and disorienting for your audience.").

103 Matthew Butterick, *What is Good Typography*, Typography for Lawyers, https://typographyforlawyers.com/what-is-good-typography.html (last visited Apr. 1, 2021).

104 *Id.*

105 *Id.*

106 *Id.*

presentations. This includes typefaces that are "goofy."[107] Again, to quote Butterick, "Distinctive is fine. Goofy is not. . . . Novelty fonts, script fonts, handwriting fonts, circus fonts . . . have no place in any document created by a lawyer. Save them for your next career as a designer of breakfast-cereal boxes."[108] Some examples of corny or goofy typefaces that simply have no place in legal presentations include: Noteworthy, Harrington, and the typeface that everyone loves to hate: Comic Sans.

Beyond that, most typefaces are fair game depending on the purpose and audience for the presentation. At this point, the primary choice a presentation designer must make is whether to use a serif typeface or a sans-serif typeface. Serif typefaces are those that include an extra line or "wing" on the bottom of each letter.[109] Sans-serif typefaces, as their name suggests, do not. Although "the popular view among graphic design experts is to use serif [typefaces]"[110] for "large blocks of texts," the prevailing wisdom is that "sans serif [typefaces] are best for presentations."[111] That is because "the letter forms [in sans-serif typefaces] are usually thicker than serif" and "serif [typefaces] can sometimes get lost in projectors with low resolution."[112] Serif typefaces by contrast "read more easily in blocks of print text" because they "'lead the eye from one letter to the next.'"[113]

That said, there is no hard and fast rule that a lawyer may not use serif typefaces in a legal presentation. It really is a matter of personal preference, and in many situations a legal presenter might choose to use a serif typeface instead of a sans-serif one because sans-serif typefaces tend to look a bit more contemporary and bold (two words that rarely describe lawyers) whereas sans-serif typefaces can add a more professional feel. For some lawyers and some presentations, the desire for the latter will outweigh the former.

Some sans-serif typefaces that work particularly well in legal presentations include Avenir, Century Gothic, **Futura**, and **Franklin Gothic**. Some serif typefaces that work particularly well in legal presentations include Century Schoolbook, Baskerville, and Didot. But again, the key here is to be intentional about what the typeface conveys to the audience.

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107 Matthew Butterick, *Goofy Fonts*, Typography for Lawyers, https://typographyforlawyers.com/goofy-fonts.html (last visited Apr. 1, 2021).

108 *Id.*

109 Robbins, *supra* note 9, at 119.

110 *Id.*

111 Schwabish, *supra* note 59, at 54.

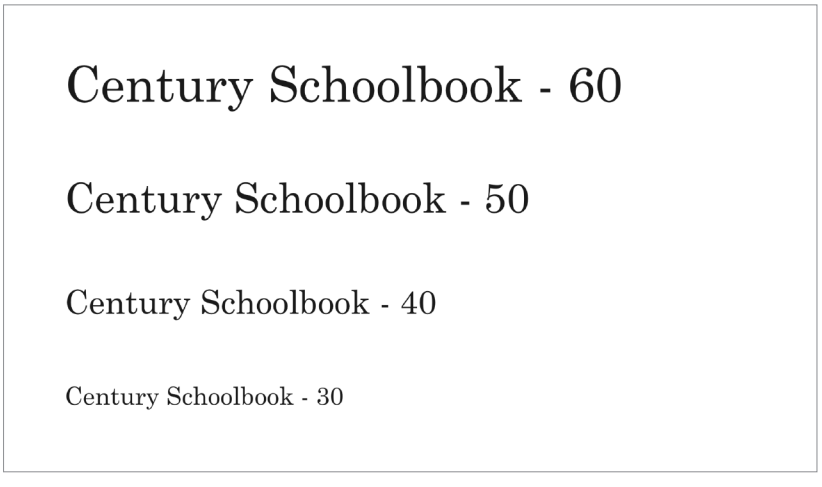
112 *Id.* at 56.

113 Robbins, *supra* note 9, at 120 (quoting Linda L. Lohr, Creating Graphics for Learning and Performance: Lessons in Visual Literacy 82 (2003)).

Text size. The third factor is far more important than the prior two. That is text size.[114] If your audience cannot read the text of the slide they are *worse off* than if you excluded the text all together. Just because a presentation with small text *looks* like a more conventional legal document does not mean that the audience will be able to process small text in presentation form unless it is only being read in print or on a screen (and even then a bigger text size is often preferable for ease of reading). The prevailing wisdom among presentation-design experts is to make the font larger than one would in a traditional word-processed document no matter how a presentation is viewed by its audience.

How large should the text be? Guy Kawasaki recommends at least 30-point font.[115] Jonathan Schwabish recommends at least 45-point.[116] That said, given the range of presentations that lawyers are asked to create, the best advice is to make the font as big as possible given the circumstances. For perspective, the Slide 11 below shows the same typeface at different sizes.

Slide 11[117]



The key rule here is that the presenter should "choose typography for [the] presentation based on the size and lighting conditions where it will be displayed" and not on conditions where the presentation is being created.[118]

114 *See* Schwabish, *supra* note 59, at 52–54.

115 Guy Kawasaki, *The 10/20/30 Rule of PowerPoint*, Guy Kawasaki (Dec. 30, 2005), https://guykawasaki.com/the_102030_rule/.

116 Schwabish, *supra* note 59, at 52.

117 The idea for this slide is drawn from *id.* at 53.

118 Butterick, *supra* note 96.

Slide 12

Battery

Size 22 Font
133 Words

- The tort of battery requires the plaintiff to establish three elements by a preponderance of the evidence. First, the plaintiff must show that the defendant is the one who acted. Second, the plaintiff must show that the defendant's act intended to cause harm or offensive contact. And third, the plaintiff must show that the plaintiff was harmed by the contact.
- But what must the defendant actually intend? According to the Third Restatement of Torts, a person acts with intent if (a) the person acts with the purpose of producing that consequence; or (b) the persona acts knowing that the consequence is substantially certain to result.
- But other cases disagree. Some courts have held that the defendant does not need to intend to cause the harm but instead must only intend the physical touching.

Slide 13

Battery

Size 36
60 Words

- The tort of battery requires the plaintiff to establish three elements by a preponderance of the evidence. First, the plaintiff must show that the defendant is the one who acted. Second, the plaintiff must show that the defendant's act intended to cause harm or offensive contact. And third, the plaintiff must show that the plaintiff was harmed by the contact.

Slide 14

Battery

Size 40
18 Words

- Defendant is the one who acted
- Defendant's act intended to cause harm or offensive contact.
- Plaintiff was harmed.

The other thing to remember about text size is the why. Legal presenters often use text that is too small not because they want to use small text intentionally but because smaller text allows for more text. This is not a good justification, and it is important for legal presenters to resist this temptation. Including less text per side not only allows the presenter to make that text bigger but that bigger text allows the audience to take it in more quickly and with less effort. For example, Slides 12, 13, and 14 each convey the elements of battery but with a different number of words and therefore are able to use different sized text.

Now, of course it is important not to take this recommendation to the extreme and simply display massive, one-word slides one after the other. But being intentional with text size can be the difference not only between a good presentation and great one—but it can also be the difference between a good presentation and a very bad one.

Emphasis. The final way to manipulate typography for the benefit of an audience is to emphasize or de-emphasize pieces of the text by making it look different from the rest of the text that surrounds it. Emphasis is a powerful tool because it allows the presentation designer to direct the audience's attention without losing the broader content or context of the slide. There are a number of different ways to emphasize or de-emphasize text, but some are more effective than others. The least effective tool for emphasis is ALL CAPS. ALL CAPS is an ineffective way to show emphasis (and candidly a poor typographic choice in any situation) because it slows down the audience's ability to read the text.[119] A slightly better but still not ideal approach in digital presentations is italics and underlining. Although these techniques work well when used sparingly in blocks of text being read at close distance, they are often too subtle for digital presentations.

The two approaches that tend to work better in the text of digital presentations are making text bold or using contrasting colors for emphasis. The benefit of bold text is that it is different enough from the other text on the slide to allow the audience to quickly focus on what the presentation creator wants them to focus on. And text in a different (typically brighter) color is the easiest of all because it is easy for the audience to see a different meaning or purpose. Of course, if a presentation is printed (especially in black-and-white), bold text will serve the author's goals more effectively than text in a different color.

119 Robbins, *supra* note 9, at 115–16.

2.4.2. Color

Lawyers often make arguments about grey areas but they typically communicate those arguments in black text on white backgrounds.[120] Digital presentations are different—or at least they can be. Unlike traditional legal documents, digital presentations use color systematically and intentionally to convey meaning to the audience and "[c]olor used well can enhance and clarify a presentation. Color used poorly will obscure, muddle, and confuse."[121] When thinking about using color for the purpose of creating legal presentations it helps to think about 3Cs: consistency, contrast, and context.

Consistency. Like using consistent typeface choices, using a consistent color theme (or palette) helps convey information and depth to the audience. The challenge is that when the full spectrum of color is available it is difficult to know which colors to use and when. Some presentation experts recommend simplifying this by using just two: black and white. This simplicity has its benefits. It "is easy to implement (it's the default), familiar to our eyes and brains (for example, most printed books), and has very high contrast (black text stands out clearly on a white page or slide)."[122] If it is good enough for Apple, surely it is good enough for lawyers too, right? But there are issues with this black-and-white approach as well (at least when presentations are viewed on screen). Specifically, a black-and-white color scheme "do[es] not tap into the natural appeal of color and . . . [its] utility."[123] As a result, using more than two colors is typically helpful in presentations, assuming that they will be viewed in color. Many novice presentation designers fall into one or the other extreme and use too many colors which can be more problematic than using too few. For example, some standard templates in presentation software include eight, ten, or even twelve colors. This is simply too much. The problem with using this many colors is that they start to lose any discernible meaning for the audience (if they had any intended meaning in the first place) and as a result they start harming the audience experience by requiring the audience to think about why a particular color is used as opposed to what the text says.

There is no magic number when using color in a legal presentation, but the approach I recommend is using five: (1) a dark main color, (2) a

120 *See* Elizabeth G. Porter, *Imagining Law: Visual Thinking Across the Law School Curriculum*, 68 J. Legal Educ. 8, 8 (2018) (referring to lawyers as having "a long tradition of black-and-white stodginess").

121 Maureen Stone, *Choosing Colors for Data Visualization*, Bus. Intelligence Network (Jan. 17, 2006), *archived at* https://www.perceptualedge.com/articles/b-eye/choosing_colors.pdf.

122 Schwabish, *supra* note 59, at 30.

123 *Id.*

light main color, (3) an accent color, (4) a highlight color, and (5) a lowlight color. Used consistently, this "five-color theme" provides enough colors to convey information and layers while also allowing the audience to understand the meaning of each of these colors without a legend or oral explanation.

Contrast. The next decision is deciding what colors to use in your five-color theme. To help in that process the key tool in the presentation designer's toolbox is contrast. Contrast is simply how one color stands out from other colors in the foreground, background, and nearby.[124] Contrast can be manipulated in three ways: hue, value, and saturation.[125] Hue is simply the "named description of color."[126] For example, "blue" and "yellow" are hues. Value "is adjusted by adding black or white."[127] As more black is added the color becomes darker and as more white is added it becomes lighter.[128] Saturation (also called chroma) is "the relative purity of the hue," or how bright or dull a color is.[129]

With presentation-design software you can manipulate any or all three of these components with exact precision. In choosing a color that provides a helpful contrast (as opposed to one that distracts or makes elements of the slides difficult to see), the keys are (1) to choose colors in the foreground and background with sufficiently different values (that is, colors that do not fade into the background color unless intentionally) and (2) choosing hues that work well together and are easy to understand for the audience.

Below are examples of the same three slides with different contrasts between foreground and background. Slide 15 uses a foreground color and a background color with the closest value. Slides 16 and 17 have progressively higher differences in value between foreground and background.

In terms of choosing specific hues, there are several different approaches that work. The first is to use a "monochromatic color scheme."[130] A monochromatic scheme uses different shades of the same color (e.g., dark blue, blue, and light blue) along with white and/or black. This creates a unified and visually appealing color scheme, but it is less effective at drawing attention to key points.[131] A complementary color

124 *See* Kosslyn, *supra* note 3, at 104; Schwabish, *supra* note 59, at 42.

125 *See* Schwabish, *supra* note 59, at 35–38.

126 *Id.* at 35.

127 *Id.* at 36.

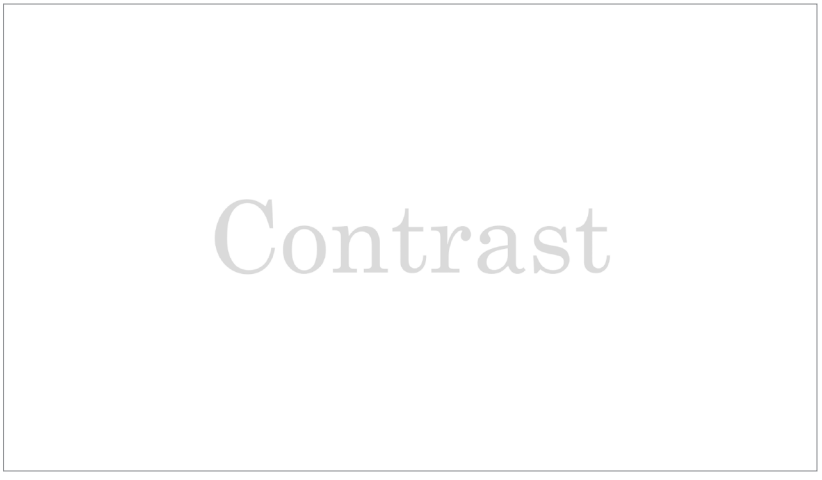
128 *Id.*

129 *Id.* at 38.

130 *Id.* at 42.

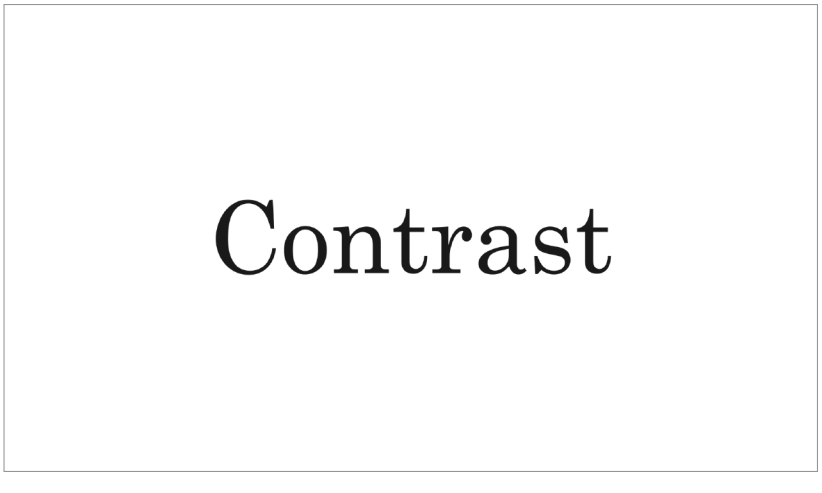
131 *See id.*

Slide 15



Slide 16

Slide 17



scheme that uses colors at opposite ends of the color wheel can also work.[132] These colors are, by definition, contrasting. That said, using complementary colors can at times be too strong, and must be balanced by "adjusting the value or saturation of the colors."[133] A third approach is to use "analogous colors" which "sit next to each other on the color wheel," such as red, brown, and yellow.[134] These colors are naturally unified because they are close in hue.[135] The other option is to use a mix (for example, a monochromatic color scheme using an analogous color for highlighting key text). The one set of colors to avoid using together is red and green. This can cause serious accessibility issues for those with color-blindness who cannot recognize the difference.[136] The answer here again is just to be intentional in making color choices.

Context. The final decision that a digital presentation creator must make in terms of color is deciding on the appropriate color scheme for the context of the presentation. This is very important, but too often ignored. If a presentation is displayed on a projector in a dark room, most presentation experts recommend using a dark background with light text. These slides not only look more professional, but they also work particularly well because the text stands out and because the presenter can be the focal point as opposed to the bright backlit screen.[137] This is equally true in presentations that are displayed for a videoconference. Test this out the next time you are viewing a projected digital presentation. If the background is white (or light) see whether your eyes gravitate towards the screen or the speaker. Then do the same with a dark background, and the difference will quickly become apparent. The brightly lit background screams to the brain "look at me," while the dark background basically gives the eye permission to focus on the speaker instead. That said, presentations that are printed work far better with dark text on a white background. Not only are they easier to print on white paper, but they also allow the audience to read in the way they are typically accustomed to. Presentations primarily viewed on a computer screen without the benefit of a presenter can really go either way.

132 *Id.* at 43.

133 *Id.*

134 *Id.* at 44.

135 *Id.*

136 *See* Kosslyn, *supra* note 3, at 101; Schwabish, *supra* note 59, at 46.

137 *See* David J.P. Phillips, *How to Avoid Death By PowerPoint*, TEDxStockholm 2014 (Apr. 14, 2014), https://www.youtube.com/watch?v=Iwpi1Lm6dFo; *see also* Butterick, *supra* note 96 ("When you're designing for reading in the dark, your goal is to get the words on screen using the fewest photons.").

But what about a presentation that has multiple audiences or modalities? For example, a presentation that is displayed on a screen during a client meeting and also printed out to share with the client for later review? In that circumstance the content of the presentation changes, but also the color scheme used should as well. The best practice in this situation is to actually prepare two versions of the presentation (one light text on dark background, one dark text on light background). If that is not possible given the circumstances, consider what the primary purpose of the presentation is and use that.

Finally, choosing colors that are appropriate to the context of the presentation is essential. This is not a pitch deck for a vacation to the Caribbean or a fifth-grade science experiment. This is a legal presentation. As a result, a professional (even if boring) color scheme typically works best for most legal presentations—unless the purpose of the presentation is to make it pop.

2.4.3. Animations and transitions

Digital presentations that are viewed on a screen (either a projector or individual computer monitor) often include animations and transitions. Animations (sometimes referred to as "builds") are the way that different elements on a single slide appear sequentially. Transitions are what the audience sees between two slides. For example, if a slide contains four bullets but they are revealed one at a time, that is an animation. If one slide swipes from left to right to the next slide, that is a transition.

Animations and transitions are easy to apply to legal presentations but they should only be used carefully and intentionally, if at all. As Chris Anderson argues, "Many presenters sink in the dreaded quicksand of excessive transitions. Rule of thumb: Avoid nearly all of them."[138] And as Nancy Duarte puts it, "It's tempting to include every feature and flashy effect that's available—but that would be like adding rhinestones to every outfit in your closet. You'd be blinded by all the bling when you opened the door, and you wouldn't know what to pick."[139]

That is not to say that animations and transitions are useless to legal-presentation designers. At their core, animations and transitions are just ways to control the audience's attention when moving from point to point or slide to slide. But if there is no specific reason to direct the audience's attention to this transition then it is just a distraction. This is why transitions are rarely useful for lawyers. After all, what does the audience learn when one slide spins into another as opposed to merely just advancing naturally?

138 Anderson, *supra* note 56, at 124.

139 Duarte, *supra* note 37, at 151.

Animations, by contrast, can work particularly well when presenting or viewing on a screen. Animations allow the presenter to control the audience's focus *on a single slide* and slowly reveal different components of a slide without losing the slide's larger context. The key to using animations effectively is (1) only using them when a slide should be viewed in pieces and (2) using specific animation types that call attention to the text and the connection to prior text, not to the animation itself. To accomplish this, the best animation is almost always labeled "appear." The "appear" animation is exactly how it sounds. The element appears on screen without any other flourish such as spinning, flying, or dancing. Again, the rule of thumb is, do not grab the audience's attention unless it specifically helps the audience.

Animations can be created automatically in most digital-presentation software tools. That said, a better approach is often a manual animation or what Jonathan Schwabish calls "layering."[140] This is where several individual slides are created which reveal one additional component (text, image, etc.) at a time, as opposed to a true animation which uses a single slide that just reveals one element at time. The benefit of layering is that the presentation creator can both emphasize what is being added but also de-emphasize what is no longer the focus. For example, the first set of slides below (Slide 18) presents three bullet points using an automatic animation (*see next page*). The second set of slides (Slide 19) presents the same three bullet points using manual layering. The second set more clearly directs the audience's focus by using layering across multiple slides.

Ultimately, the key for any animations (automatic or manual) is that the audience should understand their purpose without distraction. "Just like actors on a stage, elements can enter your slide, interact, and then leave the scene. But the movement should seem natural and controlled, not busy and frenetic."[141] And just like it would be both surprising and visually jarring to have an actor jump up and down in the corner, there is no reason to do that in a legal presentation.

2.4.4. Images

The final component of a presentation brand is the use of images. "Images," as Richard Sherwin notes, "do not merely add to words. They are transformative, both qualitatively and quantitatively, which is to say, both in terms of the content that they display and the efficacy of emotion and belief that they evoke."[142] Images are one of the reasons why digital presentations can be so much richer than more traditional legal documents.

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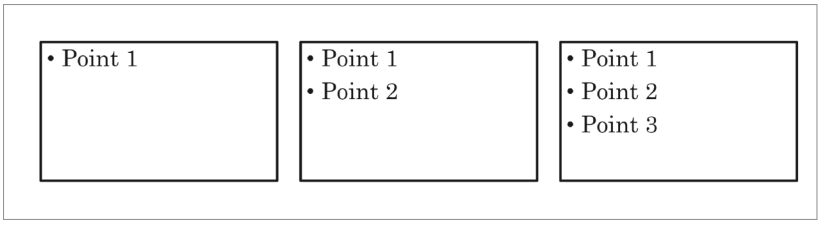
140 *See* Schwabish, *supra* note 59, at 73–78.

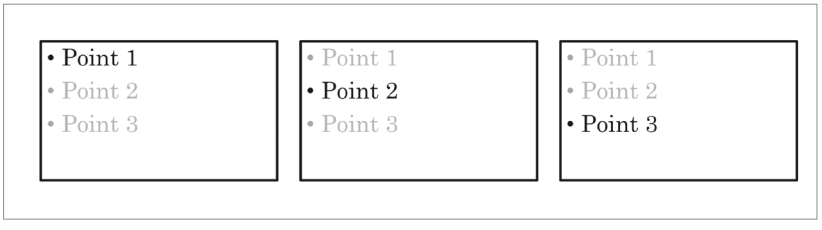
141 Duarte, *supra* note 37, at 152.

142 Richard K. Sherwin, *Visual Jurisprudence: Visualizing Law in the Digital Age*, 57 N.Y. L. Sch. L. Rev. 11, 15 (2012–2013).

Slide 18



Slide 19



But as Steve Johansen and Ruth Anne Robbins explain, there are different kinds of images in legal documents.[143] Some images are documentary—that is, they show something that exists extrinsically in the world.[144] Others are analytical—that is, they help explain the analysis.[145] And among analytical images, there are many different purposes that range from the decorative (visually interesting but with limited direct connection to the analysis) to the transformative (help change the way the audience "perceives an issue").[146] Presentations can use all of these image types effectively and in a number of different ways. The key point for purposes of the presentation brand, however, is *how* they are displayed. For that, the keys are to use (1) high-quality images, (2) laid out in a visually helpful way, and (3) that are properly licensed.

First, the importance of using "high-quality" images is both a matter of pathos (emotion) and logos (logic). A grainy or pixelated image or an image that includes details that are too small can have the same effect that sloppy citations can have for other types of legal documents. It indicates a lack of professionalism on the part of the presenter. More than that, if the audience cannot quickly and clearly see the image, the image is distracting from the content as opposed to supporting it.

Second, although there are many ways to lay out images in digital presentations, the size and placement of these images is critical to ensure

143 Johansen & Robbins, *supra* note 6, at 63.

144 *Id.*

145 *Id.* at 64.

146 *Id.* at 69.

the images enhance the audience's understanding, rather than detract from it. When deciding how large an image should be and how to crop the image, it is a good practice to think in terms of the rule of thirds.[147] The rule of thirds says that in designing any image (or here slide) you should mentally divide it into nine equal boxes by dividing it horizontally and vertically in three and then placing key focus points at the intersections of these lines. The underlying rationale in this practice is to align a slide's text with its images in a way that intuitively makes sense to the viewer.[148] Although image size will likely depend upon the type of slide being created, there are three major compositions that arise from following the rule of thirds: a full screen image, an almost-full screen image plus a caption, and a one-third-screen image (on the right, left, bottom, or top) with the rest of the slide dedicated to text and/or empty space.[149]

Third, it is important to use properly licensed images—after all, these are *legal* presentations. Thankfully there are a number of places on the Internet that allow presenters to find royalty-free images for use in any presentation (e.g., http://www.unsplash.com). It is also possible to find royalty-free images using an image search engine and limiting the search based on the appropriate license.

2.5. Step five: Slide design

At Step Five it is finally time to create individual slides using design software. For many lawyers this is the most intimidating step given that they did not become professional graphic designers (and usually for good reason). But remember at this point in the process the slide is already 80% complete: the presentation creator knows the purpose and audience for the slide, the content and goals for the slide as well as how it fits into the logical flow of the larger presentation, and the basic design elements to use by virtue of having a presentation brand.

The only task at this point is to "think visually"[150] and convey that content to the audience in a meaningful and visually accessible way using a series of digital objects: text, shapes, images, and other media. But that of course is like saying that the "only" task for a painter after generating an idea and compiling supplies is to make some brush strokes. Given that "[l]egal analysis can be conceptualized visually in any number of ways,"[151] this is still a challenge.

147 *See* Schwabish, *supra* note 59, at 124–25.

148 *See id.* at 123–24.

149 *See id.* at 118.

150 Ritter, *supra* note 5, at 145.

151 Johansen & Robbins, *supra* note 6, at 73.

But do not despair. For some slides, the process is straightforward. Documentary slides, for example, that simply display a map of a key location in a case, a quote from a key filing, or an eyewitness video of an alleged crime can be created in seconds. And for other slides, like guide slides and content slides, that do require more creativity, there are several tools and techniques that help the presentation creator transform an idea expressed in words into a slide that the audience is able to effectively consume. The three techniques this section will highlight are (1) including less on each slide, (2) using preattentive attributes, and (3) turning words into diagrams.

Less is more. The digital-presentation creator's most important asset is the audience's focus, and the easiest way to control or direct that focus is by including less on each slide. This technique is recommended universally by presentation design experts. Jonathan Schwabish talks about "the principle of focus," and says that by "put[ting] *less* on [their] slides—less text, less clutter—all with the goal of helping . . . [the presenter can guide the] audience's attention to what is actually important."[152] Steven Kosslyn refers to the same idea as the "principle of capacity limitations," reminding presenters that "[p]eople have a limited capacity to retain and to process information, and so will not understand a message if too much information must be retained or processed."[153] Garr Reynolds agrees that "most people have not been exposed to the idea of making a visual stronger by stripping it down to its essence."[154] And Nancy Duarte reaches the same conclusion, explaining that "[r]esearch shows that people learn more effectively from multimedia messages when they're stripped of extraneous words, graphics, animation, and sounds."[155] These "extras," she writes, "overtax the audience's cognitive resources."[156]

Of course, actually including less on each slide is easier said than done. One helpful technique for operationalizing this advice is to include no more than six objects—headers, bullet points, images, footers, etc.—per slide. The reason, as David J.P. Phillips, explains in his TEDx Talk "How to avoid death by PowerPoint" which has been viewed over 3 million times, is that a slide that contains any more than six images requires the audience to "count" those objects and review each one at a time whereas the typical audience member can "see" six objects of an image all at the same time without thinking about each one individually. [157] He reaches this

152 Schwabish, *supra* note 59, at 51.

153 Kosslyn, *supra* note 3, at 11.

154 Reynolds, *supra* note 60, at 125.

155 Duarte, *supra* note 37, at 113–14.

156 *Id.* at 114.

conclusion based on research that shows it takes the average person *500% less time* to count to six objects than it does to count to seven.[158] Of course, this does not mean that *every* slide must be fewer than seven objects (or that some slides with more than seven objects will still take the audience time to understand), but it is a helpful guide in exercising restraint.

But what if there is simply more that *needs* to go on a slide? Then a presenter has two options: (1) edit down or (2) spread across multiple slides. For some slides the first option is the best way to accomplish the goal. For example, assume that a title slide includes eight objects: the title of the presentation, an image, the presenter's name, their office phone number, their address, their fax number, their mailing address, and the presentation date. This slide can easily be edited down so that the audience can spend less time reading and more time listening (after all, what are the chances that the audience is going to write down the fax number and send a fax—and if they needed to what are the chances they could not find that information using a simple Google search). In other circumstances, the second option of spreading information across multiple slides is better. For example, if a lawyer needed to display an organizational chart with more than six individuals, it might be better to break that chart into pieces and cover one line of reports at a time to allow for fewer (and easier to see) names and images per slide. To quote Phillips, "[T]he amount of slides in your [presentation] has never been the problem. It is the amount of objects per slide which have been the problem."[159]

Preattentive attributes. Preattentive attributes are "visual properties that we notice without using conscious effort to do so."[160] In these visual properties we can see and find meaning without actively thinking. As a result, the use of preattentive attributes allow an image to be understood more quickly as a whole as opposed to merely representing the sum of its parts. For example, an effective presentation designer might use any number of the following to help convey information to the reader without requiring active thinking: contrast, position (showing hierarchy up to down and left to right), scale (bigger is more important), hierarchy (indentation demonstrates a sub-part to main heading), emphasis (an arrow or box means more important), and the use of negative space (less densely displayed information is more important).[161] In each case, these preat-

157 Phillips, *supra* note 137.

158 *Id.*

159 *Id.*

160 Meagan Longoria, *Design Concepts for Better Power BI Reports—Part 2: Preattentive Attributes*, Data Savvy (Nov. 30, 2017), https://datasavvy.me/2017/11/30/design-concepts-for-better-power-bi-reports-part-2-preattentive-attributes/; *see also* Schwabish, *supra* note 59, at 84–85.

161 *See* Schwabish, *supra* note 59, at 84–85.

tentive attributes allow the presentation creator to control the audience's attention by explicitly placing objects in an order that allows the audience to understand them implicitly. Using these attributes does not require a degree in graphic design. Instead, they just require the lawyer creating the slides to be intentional, not just about what they display but how they display it.

Turn words into diagrams. One of the best parts about presenting legal analysis in digital presentations is the ability to use diagrams instead of prose.[162] This is especially true when lawyers can use diagrams with which their audience is already familiar. These familiar diagrams create what Nancy Duarte calls a "visual taxonomy" or recognizable format that allows the audience to immediately understand subconsciously *how* information fits together.[163] Below are a number of examples of common slide types and familiar diagrams that a lawyer can use to share this information in a format that is easier to consume than bullet points.

Order of Events	Timeline
Steps or Process	Flowchart
Relative Percentages	Pie Chart
Changing Values over Time	Line Graph
Hierarchies of People	Organizational Chart
Hierarchies of Information	Pyramid
Comparison of Two Sets of Information	T Chart
Information that Shares Some But Not All Characteristics	Venn Diagram

Of course, this is not to imply that legal presentations should never use bullet points (they often should!) nor is it to argue that every time a lawyer conveys a particular type of information it must be conveyed using the associated visual diagram. But it is instead a reminder that lawyers *already know* how to display information and text visually. It is a matter of consciously and intentionally becoming a producer of information that taps into the visual heuristics rather than a mere consumer of those visual heuristics.

162 Rosman, *supra* note 5, at 71 ("Advances in computers make it relatively easy to integrate images with text, and there's every reason to think that courts (and other consumers of legal work) would welcome innovative displays of information.").

163 Duarte, *supra* note 37, at 143.

2.6. Step six: Purpose and audience audit (slide editing)

It is surprising that lawyers feel it is important to edit and rewrite briefs, memos, and even emails but too often do not give the same attention to editing digital presentations. This is a critical mistake. No deliverable is "file ready" after the first draft and every first draft can be strengthened by edits for content, organization, and substance. The same is true for digital presentations. In fact, it is probably even more true given the added complexity of editing both the presentation and the deliverable it accompanies.

The key takeaway here is that digital presentations require the same level of rewriting, editing, and polishing as any other legal document. And, in order to do so, it is helpful to conduct an "audience audit." An audience audit is a simple but structured process of review that reviews both individual slides and the presentation as a whole from the perspective of the audience for the presentation.

This audience audit proceeds in three steps. First, it starts with analyzing the content and conclusions of the digital presentations—the actual legal analysis. Is the analysis grounded in the correct law? Are the legally significant facts sufficiently accounted for? Second, the audit moves to a review of the design and organization. Do the slides display the content in an easy-to-digest visual format? Do they supplement as opposed to distract from the deliverable that accompanies the presentation, such as the oral presentation? Is the audience able to follow the organizational structure of the presentation? Do any slides need to be reorganized? Are any slides going to distract the audience from the presentation's focus? Third and finally, the audience audit requires a technical and technological edit. At this stage it is not only important to fix any technical errors (typos, imprecise phrases) but also images, transitions, animations, and failures to adhere to the presentation brand. If the presentation is delivered orally, it is extremely helpful to at least practice (if not script) the oral presentation and placement of slides in the presentation. If the presentation will only be shared visually, it is worth reading one last time out loud or in the format that it will be reviewed (on a screen or in print). By reviewing the presentation in this way, the presenter knows they are not losing an opportunity to convey ethos (authority) and, even more importantly, can be confident that the digital presentation is ready to accomplish its intended purpose for its intended audience.

3. What's next

This article seeks to jump-start a more robust conversation about legal presentations in the academy. It is part proof-of-concept that lawyers are increasingly asked to convey information using digital presentations and part instruction manual for lawyers (and future lawyers) to create better presentations in a more systematic and intentional way no matter the practice area or context. But this is just the beginning of that conversation. Future questions to ask about legal presentations are both qualitative and quantitative. For example, the legal community would benefit from a robust survey of the exact extent to which digital presentations are used by practicing lawyers, a more detailed discussion of what clients and particular industries have come to expect when it comes to digital presentations, and updated explorations of how adjudicators feel about the use of digital presentations that accompany oral advocacy.

Another important step in this conversation is to find ways to introduce the teaching of digital presentations more robustly into the law school curriculum.[164] To use Elizabeth Porter's words, the goal should be to "change through evolution, not revolution. . . . [I]t is possible—and worthwhile—to integrate visual learning and visual analysis into doctrinal, clinical, and writing courses without tossing your textbooks or reconceptualizing your pedagogical methods."[165]

In my own first-year legal writing course, I teach my students how to create digital presentations as part of a mock supervisor presentation after they draft their first predictive memo. Other legal practice/legal writing professors may already be including these skills in this or other ways. The benefits of integrating these exercises into the first-year curriculum are three-fold. First, they prepare law students for the tasks they are likely to encounter in their first internships and legal jobs. Second, they fit naturally into the typical legal writing curriculum and can add value without adding significant class time. And third, integrating presentations into classwork helps students refine their writing and research (and identify the holes in that writing and research) by being forced to present the same concepts in a different genre of communication. Legal presentations can also be easily introduced as part of clinical education (to the extent that they are not already introduced).

The final step is finding ways to better integrate presentation design into the toolbox of practicing lawyers. Despite the fact that presentation-

164 *See* Porter, *supra* note 120, at 9 ("[I]t's time, thoughtfully, to integrate visual literacy and visual advocacy throughout the law school curriculum.").

165 *Id.* at 10.

design software has been around for more than twenty-five years, many attorneys simply see presentation design as something that they are not prepared to do, not skilled enough to do, and not required to learn. A random smattering of one-time CLEs is not enough to solve this problem. It is important therefore that the profession continue to find and build concrete opportunities and tools to teach presentation design in more systematic ways to experienced attorneys and new attorneys alike. This article hopefully provides a start to that conversation.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ARTICLE

The Search for Clarity in an Attorney's Duty To Google

Michael Thomas Murphy*

Introduction

Attorneys have a professional duty to investigate relevant facts about the matters on which they work. There is no specific rule or statute requiring that an attorney perform an Internet search as part of this investigation. Yet attorneys have been found by judges to violate what commentators call a "Duty to Google"[1] by failing to discover relevant information about a matter, when that information was available through the investigative use of an Internet search.[2]

This Duty to Google contemplates that certain readily available information on the public Internet about a legal matter is so easily accessible that it *must* be discovered, collected, and examined by an attorney, or else that attorney is acting unethically, committing malpractice, or both. Discussion of an attorney's Duty to Google is filtering into court opinions, articles, and continuing legal education classes.[3]

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1 Megan Zavieh, *Lawyers' Duty to Google: Not Changing Anytime Soon*, Att'y at Work (July 7, 2020), https://www.attorneyatwork.com/lawyers-duty-to-google/.

2 To "Google" a subject for inquiry on the Internet is a ubiquitous term. *See* Jeffrey Bellin & Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 Nw. U. L. Rev. 1137, 1139 n.7 (2014) ("to use a search engine such as Google to find information, a website address, etc., on the internet") (quoting *Google*, Dictionary.com, http://dictionary.reference.com/browse/google?s=) (last visited Mar. 11, 2021). This article generally uses the term "to Google" to mean performing an Internet search using a search engine such as Google.

3 *See, e.g.*, *The Cybersleuth's Guide to Fast, Free, and Effective Investigative Internet Research*, King Cty. Bar Ass'n (No. 22, 2019), http://www.kcba.org/Portals/0/cle/pdf/!2019Cyber_Sleuths_Guide11222019.pdf. This CLE description stated,

It is a strange and wonderful time to be alive. Using the Internet to locate a fact is a commonplace activity for people with easy access to the Internet. But it is also a fast and inexpensive way for an attorney undertaking a factual inquiry to obtain an immense amount of information in a short time, and "[l]awyers, after all, are in the information business."[4] As Andrew Perlman concluded, "Simply put, lawyers cannot just stick their heads in the sand when it comes to Internet investigations."[5] Such an "ostrich-like" attorney would risk more than reputational embarrassment and client dissatisfaction, as courts have issued sanctions for an attorney who fails to Google pertinent information. Judges have reprimanded or sanctioned attorneys in cases in which the attorney failed to conduct an Internet search for relevant information about a matter, specifically about their own client,[6] a party,[7] witness,[8] or third party,[9] and that failure either caused harm or wasted the court's time.[10]

Even though the Internet has been around for several decades now, and even though courts have been imposing a Duty to Google for nearly that long, there has been no real attempt to bring coherence to this disjointed set of cases, and importantly, to define the breadth and depth of what the Duty to Google should be. Where does this Duty arise? How much electronic information must an attorney search to meet this Duty? How does an attorney know when a technology has become so ubiquitous

> In this fast-paced investigative research seminar, you will learn to create more effective Internet searches to locate information crucial to your matters, which you might otherwise miss.
> . . .
> Don't be left behind in exploiting this gold mine of information that will assist you in meeting your investigative research and due diligence obligations. And, in addition to meeting your ethical duty, be conversant with the benefits and risks of technology.

Id.

4 Jamie J. Baker, *Beyond the Information Age: The Duty of Technology Competence in the Algorithmic Society*, 69 S.C. L. Rev. 557, 570 (2018).

5 Andrew Perlman, *The Twenty-First Century Lawyer's Evolving Ethical Duty of Competence*, 22 Prof. Law. 24, 28 (2014).

6 *See, e.g.*, Cajamarca v. Regal Entm't Grp., No. 11 Civ. 2780, 2012 WL 3782437, at *2 (E.D.N.Y. Aug. 31, 2012) (explaining that in discovery, attorney did not search client's publicly available social media posts, which would have cast severe doubt on her employment discrimination claims); In re Axam, 778 S.E.2d 222, 222 (Ga. 2015) (holding that attorney should have verified transaction details before assisting in transaction).

7 Dubois v. Butler, 901 So. 2d 1029, 1031 (Fla. Dist. Ct. App. 2005) (denouncing as insufficient attorney's attempt to locate missing defendant by calling directory assistance); Munster v. Groce, 829 N.E.2d 52, 61 n.3 (Ind. Ct. App. 2005) (reasoning that failure to Google absent defendant made attempted service void); Weatherly v. Optimum Asset Mgmt., Inc., 928 So. 2d 118, 122–23 (La. Ct. App. 2005) (holding that tax sale notice was invalid where attorney failed to conduct an Internet search for the address of the current owner, who lived out of state).

8 Cannedy v. Adams, No. ED CV 08-1230-CJC(E), 2009 WL 3711958, at *30 (C.D. Cal. 2009) (concluding that attorney's failure to search for an Internet message containing a purported molestation victim's recantations was ineffective assistance of counsel).

9 Iowa Supreme Ct. Att'y Disciplinary Bd. v. Wright, 840 N.W.2d 295, 303 (Iowa 2013) (disciplining attorney for not discovering that a deal that a client was considering was an obvious scam).

10 Johnson v. McCullough, 306 S.W.3d 551, 598–99 (Mo. 2010) (en banc) (suggesting that an attorney could waive objection to a juror before trial if the attorney could have learned of the juror's bias with an Internet search).

that its use is compulsory to meet this Duty? This article explores these questions and proposes a solution.

Section 1 of this article includes a discussion of what obligations attorneys have under existing rules with respect to fact investigation and examines the sources of the historical duty of fact investigation.

Section 2 discusses the emergence of Internet research as a logical extension of an attorney's duty of fact investigation.[11] In doing so, it examines scenarios in legal practice where the Duty to Google has applied.

Section 3 examines the extent of the Duty to Google, in an attempt to find some guidance for attorneys to meet this emerging professional requirement. It suggests a codified Duty to Google as a specific addition to the rules of professional conduct with respect to attorney competency. It also explores how an emerging technology might become so ubiquitous that it becomes part of an attorney's investigation duty.

The article concludes with thoughts of the future, and how further advances in technology may shape this duty in the years to come.

1. An attorney's existing duty to investigate facts

The Duty to Google has its roots in an attorney's duty to investigate the facts surrounding their work. This duty to investigate is generally considered to be an outgrowth of a rule of attorney competence in the Model Rules of Professional Conduct (hereinafter Model Rules),[12] but can also be found to some extent in effective assistance of counsel standards, the Federal Rules of Civil Procedure, malpractice statutes, and general practice norms. This section discusses each of these sources in turn.

1.1. The Model Rules of Professional Conduct

There is no flat directive or specificity that attorneys must use a specific technology as part of their fact investigation. However, the cases discussed in this article seem to suggest that such a directive exists. To reach the conclusion that an attorney must use electronic search technology like Google to investigate certain facts, one must read together portions of the commentary language in Model Rule 1.1, dealing with

11 *See* Agnieszka McPeak, *Social Media Snooping and its Ethical Bounds*, 46 Ariz. St. L.J. 845, 862 (2014) (reviewing cases and concluding that "legal ethics rules impose a duty on lawyers to use reasonable efforts to investigate facts and to avoid frivolous claims, even with computer-aided legal and factual research").

12 Model R. Prof'l Conduct 1.1 cmt. 5 (Am. Bar. Ass'n 2020). Of course, the Model Rules do not in and of themselves have legal effect—states must adopt them, and often do, but not word-for-word. For a breakdown of the adoption of this change to the Model Rules, see John G. Browning, *The New Duty of Digital Competence: Being Ethical and Competent in the Age of Facebook and Twitter*, 44 U. Dayton L. Rev. 179, 180–84 (2019).

attorney competence.[13] This rule states, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[14]

Two comments in the rule work together to outline how a duty to investigate can be affected by technology. In comment 5, the rule explains that competent representation includes "inquiry into and analysis of the factual and legal elements of the problem and the use of methods and procedures meeting the standards of competent practitioners."[15] Lori Johnson notes, "Existing comments to Rule 1.1 indicate that competence is considered on a case-by-case basis, in a somewhat subjective manner. Specifically, comment 1 to Rule 1.1 indicates that competence is keyed to the 'nature of the matter' and 'the lawyer's training and experience in the field.'"[16] Comment 8 makes clear that this competency includes technological proficiency, not just rote use.[17] It clarifies Rule 1.1 to mean that a lawyer must stay abreast of "relevant technology."[18] As of this writing, thirty-eight states have adopted that rule in some way.[19] (Though as Mark Britton noted, this adoption is slow and incomplete.[20]) Florida and North Carolina now require attorneys to take yearly technology continuing legal education classes in the same way most states require yearly ethics or mental health CLE classes.[21]

13 *See, e.g.*, Perlman, *supra* note 5, at 24 ("Lawyers no longer need to rely exclusively on private investigators to uncover a wealth of factual information about a legal matter. Lawyers can learn a great deal from simple Internet searches. Lawyers ignore this competency at their peril.").

14 Model R. Prof'l Conduct 1.1.

15 *Id.* cmt. 5.

16 *See* Lori D. Johnson, *Navigating Technology Competence in Transactional Practice*, 65 Vill. L. Rev. 159, 165–66 (2020).

17 Browning, *supra* note 12, at 196–97 (discussing failures of attorneys to use technology and concluding that attorneys must be "knowledgeable of both the benefits and the risks of the technology that is out there, including the functionality of the technology they are actually using (or, in some cases, should be using)").

18 Model R. Prof'l Conduct 1.1 cmt. 8.

19 Johnson, *supra* note 16, at 166 (discussing comment 8). "As Rule 1.1 clearly focuses on the 'client' and 'representation,' guidance surrounding Comment 8 must do the same, and lawyers should be required to become and remain competent in any technology used by, or beneficial to, their clients." *Id.* at 163.

20 *See* Mark Britton, *Behind Stables and Saloons: The Legal Profession's Race to the Back of the Technological Pack*, Fla. B.J., Jan. 2016, at 34 (noting that the slow adoption is further evidence that "[l]awyers lag behind their clients (the general population) and even other professions in adopting new technology").

21 See Heidi Frostestad Kuehl, *Technologically Competent: Ethical Practice for 21st Century Lawyering*, 10 Case W. Res. J.L. Tech. & Internet 1, 26 n.177 (citing Bob Ambrogi, *North Carolina Becomes Second State to Mandate Technology Training for Lawyers*, LawSites (Dec. 5, 2018), https://www.lawsitesblog.com/2018/12/north-carolina-becomes-second-state-mandate-technology-training-lawyers.html#:~:text=North%20Carolina%20has%20become%20the,CLE%20devoted%20to%20technology%20training).

1.2. Effective assistance of counsel standards

An attorney's duty to investigate matters has evolved in an instructive way in the capital criminal defense context.[22] A long progression of cases exists interpreting whether an attorney's investigation in a capital case violates the American Bar Association's standards for ineffective assistance of counsel, a standard that has been adopted by many courts.[23] In a 1984 case, *Strickland v. Washington*, the Supreme Court cited the ABA standards and noted that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."[24] Subsequently, the issue of adequate investigation by defense counsel in capital cases has received attention in scholarship and by courts.[25] That attention expanded outside of capital cases and into other criminal cases. Today, the ABA standards with respect to criminal investigation include a specific description of a defense attorney's duty to investigate. ABA Standard 4-4.1 ("Duty to Investigate and Engage Investigators") provides that criminal defense attorneys have a duty to investigate the sufficiency of the factual basis for the criminal charges their clients face.[26] One court noted, "An attorney's performance is deficient when he or she fails to conduct any investigation into exculpatory evidence and has not provided any explanation for not doing so."[27]

In a later case, the Supreme Court interpreted the ABA standards and guidelines to include a reasonability requirement, stating, "The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'"[28] Notably, the ABA standards and guidelines became more specific over time and as courts interpreted them as a standard

22 *See* John H. Blume & Stacey D. Neumann, *It's Like Deja Vu All Over Again:* Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard *and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel*, 34 Am. J. Crim. L. 127, 132 (2007) (noting that the duty to investigate is "the most heavily scrutinized aspect of defense counsel's representation" in ineffective assistance of counsel cases).

23 *See* Robert R. Rigg, *The T-Rex Without Teeth: Evolving* Strickland v. Washington *and the Test for Ineffective Assistance of Counsel*, 35 Pepp. L. Rev. 77 (2007); *see also* Emily Olson-Gault, *Reclaiming* Van Hook*: Using the ABA's Guidelines and Resources to Establish Prevailing Professional Norms*, 46 Hofstra L. Rev. 1279, 1279 (2018) (noting that the guidelines "have been cited favorably by courts in more than 350 reported opinions, adopted in substantive part by at least ten capital jurisdictions").

24 Strickland v. Washington, 466 U.S. 668, 691 (1984).

25 *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835 (1994) (collecting cases showing widespread inadequate investigation by criminal defense counsel in capital cases); Rigg, *supra* note 23, at 88–93 (describing a series of cases in the early 2000s).

26 ABA, *Criminal Justice Standards for the Defense Function*, Am. Bar Ass'n Standard 4-4.1, https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/ (last visited May 12, 2021).

27 *See* Rigg, *supra* note 23, at 90 n.95 (quoting Stevens v. Del. Corr. Ctr., 152 F. Supp. 2d 561, 576–77 (D. Del. 2001)).

28 Wiggins v. Smith, 539 U.S. 510, 524 (2003); *see also* Rigg, *supra* note 23, at 91 n.105.

for the reasonableness of an investigation.[29] Courts then used the ABA's guidance to help determine and define the "'prevailing professional norms' in ineffective assistance cases."[30] Later cases have noted that courts must examine an investigation, in particular a decision not to investigate, for "reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."[31]

This language is certainly helpful for attorneys looking to better understand their factual investigation obligations, but it is of course limited to the specific context of criminal cases. It can be instructive in determining an overall Duty to Google, as explored in section 2.

1.3. The Federal Rules of Civil Procedure

The duty to investigate may be found in the Federal Rules of Civil Procedure, at Rule 11. Rule 11 requires that an attorney make a reasonable inquiry to determine that the arguments in a filed document are not frivolous.[32] Therefore, it seems that at least a cursory factual investigation such as an Internet search is required for an attorney to adequately make the good faith assertion that a filing is not being advanced for an improper purpose. Per the rule, the attorney must make a "reasonable inquiry" to build information and belief of proper purpose. This language and directive is helpful, but limited in context to litigation.

1.4. Malpractice or agency law

George Cohen notes that "other law may impose on lawyers a duty to investigate," citing malpractice law and agency law.[33] Cohen observes that these sources of a duty to investigate generally come from the Model Rules or Rule 11.[34] That is so because these sources arise as part of a negligence claim based on an attorney acting as a fiduciary to the client, which carries with it a duty of competent representation.[35] It is likely, then, that a charge of malpractice for the violation of the duty to investigate would be in addition to, not instead of, a violation of a rule of professional conduct or Rule 11.

29 *See* Rigg, *supra* note 23, at 93 ("Later, and current, ABA Guidelines relating to death penalty defense are even more explicit.").

30 *See id.* at 95 (citing Hamblin v. Mitchell, 354 F.3d 482, 486 (6th Cir. 2003)).

31 *See id.* at 96–97 (citing In re Lucas, 94 P.3d 477, 502 (Cal. 2004)).

32 Fed. R. Civ. P. 11.

33 *See* George M. Cohen, *The State of Lawyer Knowledge Under the Model Rules of Professional Conduct*, 3 Am. U. Bus. L. Rev. 115, 128 (2014) (citing Restatement (Third) of Law Governing Lawyers § 52 cmt. c (Am. Law Inst. 2000) and Restatement (Third) of Agency § 8.11(1) (Am. Law Inst. 2006)).

34 *See id.* at 129.

35 *See* Ellie Margolis, *Surfin' Safari—Why Competent Lawyers Should Research on the Web*, 10 Yale J.L. & Tech. 82, 103 (2008).

2. The curious appearance of the Duty to Google

Enter Google and other easily accessible means of obtaining information, which lower the cost of an attorney's investigation efforts to such a degree that their use is, to an extent, required. A series of unrelated cases has emerged over the last decade where courts have admonished or sanctioned an attorney for that attorney's failure to use electronic search technology as part of that attorney's duty to investigate a matter. These sanctions can be monetary, in the form of refunded client fees and other damages based on the error, or can take the form of prescribing attorney training or a certification that Internet research will be part of future conduct. The latter sanctions are a public reprimand, a "benchslap"[36] that creates bad press in an industry that relies on reputation.[37]

It is clear from the cases below that today's attorney has a duty to use technology—for the purposes of this article, "Googling" or another public Internet search—to investigate key aspects of a matter such as their client, adversary, facts, and even potential jurors. These cases show that a savvy attorney satisfying their Duty to Google should at least consider using the Internet to research social media evidence, the location of missing witnesses or parties, verifiable facts in dispute, and even the attorney's own client.

2.1. The Duty to Google missing witnesses and parties

One of the first and perhaps the most obvious instances in which the Duty to Google arises is one in which the attorney must locate a person, for service or other participation in a legal proceeding. For example, in *Munster v. Groce*,[38] the Court of Appeals of Indiana questioned the plaintiff's efforts to effectuate service on a missing individual defendant. The court found the plaintiff's efforts to be insufficient because the plaintiff's attorney did not run a skip trace, a public records search, or an Internet search.[39] Worse still, the court itself performed a search and found that it

36 This term is colloquial, and refers to an admonishment from the bench to a misbehaving counsel (or litigant). *See* Heidi K. Brown, *Converting Benchslaps to Backslaps: Instilling Professional Accountability in New Legal Writers by Teaching and Reinforcing Context*, 11 Legal Comm. & Rhetoric 109, 109 (2014); Dwight H. Sullivan & Eugene R. Fidell, *Winding (Back) the Crazy Clock: The Origins of a Benchslap*, 19 Green Bag 2d 397, 397 n.1 (2016) ("'Benchslap' made its Black's Law Dictionary debut in the 10th edition, defined as: 'A judge's sharp rebuke of counsel, a litigant, or perhaps another judge; esp., a scathing remark from a judge or magistrate to an attorney after an objection from opposing counsel has been sustained.'").

37 Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 Wash. & Lee L. Rev. 173, 176–83 (2008).

38 Munster v. Groce, 829 N.E.2d 52, 61 (Ind. Ct. App. 2005).

39 *Id.* at n.3.

would be easy for an attorney to find an address for the defendant, and the names of family members who may have known his whereabouts.[40]

In a similar case in Florida, *Dubois v. Butler*,[41] the plaintiff searching for a missing defendant checked directory assistance looking for an address to serve a defendant—and nothing more. The standard for whether such an effort is sufficient is, in the court's words, whether the plaintiff failed to follow an "obvious" lead or available resource.[42] The court found that an Internet search was an "obvious" avenue that the plaintiff ignored.[43] In taking issue with the plaintiff's sole call to directory assistance, the court cheekily stated that "advances in modern technology and the widespread use of the Internet have sent the investigative technique of a call to directory assistance the way of the horse and buggy and the eight track stereo."[44]

In *Weatherly v. Optimum Asset Management, Inc.*,[45] a Louisiana trial court considered whether a party was "reasonably identifiable" for the purposes of requiring actual service of a tax sale. The defendant argued that the plaintiff was not "reasonably identifiable" because the defendant did not have basic contact information for the plaintiff.[46] The trial court performed its own Internet search for plaintiff and, based on its results, found that the plaintiff was "reasonably identifiable."[47] The appeals court questioned the ability of the judge to take judicial notice of its own Internet search, but noted that plaintiff nevertheless did not perform a sufficient search.[48]

Relatedly, an attorney has a Duty to Google a client the attorney cannot locate. A New Jersey appeals court found that an attorney could not withdraw representation from an absent client where she did not make diligent efforts to locate the client, including an Internet search.[49] The Alaska Bar Association issued an ethics opinion stating that attorneys

40 *Id.* Specifically, the court wrote,

> We do note that there is no evidence in this case of a public records or internet search for Groce . . . . In fact, we discovered, upon entering "Joe Groce Indiana" into the Google search engine, an address for Groce that differed from either address used in this case, as well as an apparent obituary for Groce's mother that listed numerous surviving relatives who might have known his whereabouts.

Id.

41 Dubois v. Butler, 901 So. 2d 1029, 1031 (Fla. Dist. Ct. App. 2005).

42 *Id.* at 1030.

43 *Id.* at 1031.

44 *Id.*

45 Weatherly v. Optimum Asset Mgmt., Inc., 928 So. 2d 118, 121 23 (La. Ct. App. 2005).

46 *Id.*

47 *Id.*

48 *Id.* at 122–23.

49 Garrett v. Matisa, 927 A.2d 177, 182 (N.J. Super. Ct. Ch. Div. 2007).

representing a client in a criminal appeal, where the client cannot be contacted,[50] must make "reasonable efforts" to contact the client, which specifically include an Internet search.[51]

The Duty to Google should certainly exist where attorneys seek to show that they performed a diligent search for the location of witnesses or absent parties.[52] As a cautionary tale, Michael Whiteman notes that in one Pennsylvania case, a court found that a Google search *by itself* did not suffice as a reasonable search, when that Google search did not reveal the contact information for a missing party.[53] Therefore, a Google search would need to be performed in addition to, not instead of, searching for a party by conventional means (for example, in a phonebook).

It makes sense that an attorney would need to use any readily available technology when searching for a participant in a suit, particularly since this duty is so closely tied to the attorney's duty of candor to the tribunal. The extent of that search, of course, should be reasonable to the importance of the party or witness to the case, and the resources at hand.

2.2. The Duty to Google verifiable disputed facts in litigation

An attorney also has a Duty to Google facts in dispute in litigation. In *Cannedy v. Adams*,[54] a California court considered an ineffective assistance of counsel claim in a molestation case against a stepfather accused of molesting his stepdaughter.[55] The stepfather argued that, against his urging, his attorney failed to investigate a friend of the victim, who would have testified that she saw exculpating evidence (essentially, that the victim fabricated her allegations) on the victim's social media page, specifically an AOL Instant Messenger profile.[56] The court found the failure to follow up with this witness to be ineffective assistance of counsel.[57] In attempting to ascertain why the stepfather's attorney failed to contact this witness, the court surmised that the attorney may have lacked the technological knowledge and skill to appreciate the value of this information and to obtain it.[58] The court concluded that the attorney may have

50 Perhaps a somewhat common problem on the last frontier.

51 Alaska Bar Ass'n, Ethics Op. 2011-4, at 1 (2011).

52 *See supra* note 7 and accompanying text.

53 Michael Whiteman, *The Death of Twentieth-Century Authority*, 58 UCLA L. Rev. Discourse 27, 43 (2010) (citing Fernandez v. Tax Claim Bureau of Northampton Cty., 925 A.2d 207 (Pa. Commw. Ct. 2007)).

54 2009 WL 3711958 (C.D. Cal. Nov. 4, 2009).

55 *Id.* at *28.

56 *Id.* at *16.

57 *Id.* at *29.

58 *Id.* at *34 n.19.

"misunderstood the workings of AOL Instant Messenger in ways that caused him to depreciate the value of the information."[59] It is interesting to note here that the stepfather's attorney was held to the ineffective assistance of counsel standard—one in which the attorney's conduct falls "below an objective standard of reasonableness"[60]—not because the attorney did not use certain technology but because the attorney lacked the technical knowledge to use it proficiently. This case provides an example of the idea discussed in section 1 that technological *proficiency*, not just *use*, comprises the Duty to Google. So the Duty to Google really is one of technological competence, where an attorney must have both a breadth and a depth of knowledge of electronic information resources. An attorney must know *where* to look, locating relevant electronic information resources, but then also how to find relevant information from each resource. These resources change constantly with the winds and whims of usage. Today's Facebook may end up being tomorrow's MySpace.

On that note, the Duty to Google facts has extended into searching social media. As one commentator noted, "In light of the amount of time Americans spend online, and the ease with which users freely share information with others, it follows that lawyers should utilize social media to research and investigate cases on behalf of their clients."[61] In *Lorraine v. Markel American Insurance Co.*,[62] Judge Paul Grimm considered the admissibility of social media evidence, and in an oft-cited opinion noted, "[I]t is not surprising that many statements involving observations of events surrounding us, statements regarding how we feel, our plans and motives, and our feelings (emotional and physical) will be communicated in electronic medium." In other words, social media evidence can be among the most important evidence in a case, and is generally only available through an electronic search and often the use of the social media platform.[63] Discovering that evidence is thus a part of a lawyer's duty of competent representation.[64]

Using the Internet to investigate verifiable facts in dispute in litigation also seems commonsensical. It certainly should be required by attorneys at the beginning of a case as part of their ethical duty to verify the facts

59 *Id.*

60 Strickland v. Washington, 466 U.S. 668, 688 (1984).

61 Vanessa S. Browne-Barbour, *"Why Can't We Be 'Friends'?": Ethical Concerns in the Use of Social Media*, 57 S. Tex. L. Rev. 551, 552 (2016).

62 241 F.R.D. 534, 569 (D. Md. 2007).

63 McPeak, *supra* note 11, at 877.

64 *Id.* at 880 ("Although lawyers should, as a matter of professional competence, search social media in informal discovery, they must also be aware of the ethical limitations of doing so.").

asserted in legal pleadings. The extent of an attorney's duty to investigate the facts of a claim has been discussed by the ABA as depending on any number of factors:

> the complexity or nature of the claims or contentions to be investigated or developed, the time in which the investigation must be conducted, the resources available to the lawyer to conduct the investigation, the availability and cooperation of potential fact and expert witnesses, whether expert witnesses must be consulted, the availability of evidence that can be obtained without formal discovery, whether any investigation has been conducted prior to the lawyer undertaking the representation, the existence of parallel proceedings that complicate or expedite matters, and probably more.[65]

Internet searches fit into these factors in a number of ways. For one, a basic Internet search should be a resource available to almost every attorney, and should be able to be performed in little time. Therefore, the extent of the search rests on the nature and complexity of the claims. In a complex case with expert testimony and many "moving parts," it may be prudent for an attorney to use an investigator or research service to conduct an extremely comprehensive search.[66] These methods may be outside of an attorney's knowledge, but if the attorney's investigation warrants such methods, the attorney has a duty to contract with professionals who can capably perform the search.[67]

Also, the Duty to Google exists for both parties as part of their responsibility to cooperate in discovery, if only because parties are strongly encouraged to eliminate disputes over facts and stipulate to facts.[68] Using Internet technology to narrow the facts of a case by finding objective, verifiable information to which parties can stipulate will be a welcome development for courts and clients. It is said that parties should

65 Douglas R. Richmond, Brian Shannon Faughnan & Michael L. Matula, Professional Responsibility in Litigation 4 (2016).

66 A new profession has emerged of "digital private investigators," who specialize in using Internet searches and databases to collect information. *See, e.g.*, *Digital Private Investigators and Family Law*, Fournier Law Firm Blog (May 29, 2016), http://fournierlawoffice.com/blog/digital-private-investigators-and-family-law/.

67 This duty is explicit in an attorney's duty of technological competence. *See, e.g.*, Cal. Bar Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2015-193, at 3 (2015) (noting that to satisfy an attorney's duty of technological competence the attorney "must try to acquire sufficient learning or skill, or associate or consult with someone with the necessary expertise to assist").

68 *See generally* William Matthewman, *Towards a New Paradigm for E-Discovery in Civil Litigation: A Judicial Perspective*, 71 Fla. L. Rev. 1261 (2019) (discussing changes to the Federal Rules of Civil Procedure designed to increase cooperation among opposing parties in discovery).

ask judges to take judicial notice of facts more often.[69] The Duty to Google can be a key tool in that trend.[70]

2.3. The Duty to Google clients

An attorney has a Duty to Google their own client, particularly to verify the facts represented to the attorney by their client.[71] Joel Cohen investigated examples of this phenomenon:

> Must lawyers "Google" their (prospective) clients to learn "who" they're dealing with—meaning how reliable they're likely to be? Shouldn't lawyers research their clients' claims by not only looking at the information provided by the client, but by making sure it makes sense; that documents fit with the client's story and other information received? The rules seem to require it.[72]

The ABA noted that an attorney presenting false information to a tribunal runs afoul of Model Rule 3.3, "Candor Toward the Tribunal,"[73] and that "it is reasonable to note that pressure is mounting from the government to increase private lawyers' obligation of due diligence in representation of clients as to financial transactions."[74] This duty is maybe most obvious when an attorney is engaged in issuing an opinion, such as an opinion letter providing advice on a proposed merger or tax obligation.[75] George Cohen notes that "[l]egal duties of inquiry imposed are perhaps most developed for securities lawyers," particularly with respect to the issuance of materials to investors.[76] This duty would be tied very directly to the duty of competence—an attorney who provides an opinion letter based on unverified facts is gambling, at least.

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69 Judicial notice allows a court to accept a proposition without presented evidence of that proposition's veracity. *See* Fed. R. Evid. 201; Paul J. Kiernan, *Better Living Through Judicial Notice*, 36 Litig., Fall 2009, at 42–43, 45.

70 *See* Bellin & Ferguson, *supra* note 2, at 1137, 1141 n.18 (quoting Richard A. Posner, Reflections on Judging, 141–42 (2013) ("The Internet is not going away. The quality and quantity of online material that illuminates the issues in federal litigation will only grow. Judges must not ignore such a rich mine of information.")).

71 *See* Joel Cohen, *The Lawyer's Duty to Check Facts*, N.Y. L. J. (Feb. 9, 2015), https://www.stroock.com/uploads/newyorklawjournal.pdf.

72 *Id.* at *5. For example, George Cohen notes that the ABA issued an opinion on "Client Due Diligence, Money Laundering, and Terrorist Financing" in which it stated, "'It would be prudent for lawyers to undertake Client Due Diligence ("CDD") in appropriate circumstances to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity.'" Cohen, *supra* note 33, at 126 (quoting ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 13-463 (2013)). He explains further that lawyers must "determine a non-frivolous basis in fact and law for bringing or defending against a civil claim." *Id.* at 127.

73 Model R. Prof'l Conduct 3.3 (Am. Bar Ass'n 2020). Section 3.3(a)(3) states, "A lawyer shall not knowingly offer evidence that the lawyer knows to be false." *Id.*

74 Dennis A. Rendleman, *What to Do When Your Client Lies*, ABA Ethics in View (Sept. 2019), https://www.americanbar.org/news/abanews/publications/youraba/2019/september-2019/what-to-do-when-your-client-lies/.

75 *See* Cohen, *supra* note 33, at 129.

76 *Id.*

It is clear that attorneys should do something more than operate on faith that the client is telling the truth about who they say they are and what they are doing.[77] Vendors now market "people search" solutions to attorneys to accomplish this goal.[78]

One such case in which a "people search" would have been most useful is *Iowa Supreme Court Attorney Disciplinary Board v. Wright*.[79] There, an attorney learned from a client that the client stood to inherent a large sum of money from a long-lost relative in Nigeria, such sum to be released once the client paid an outstanding tax debt to the Nigerian government.[80] The attorney agreed to represent the client for a ten percent commission on the recovered funds.[81] The attorney then reached out to other clients and arranged for those clients to lend money so that the Nigerian tax debt could be paid.[82] The attorney then facilitated the repayment of the Nigerian tax debt.[83] Most readers of this article sadly shaking their heads reading this paragraph already know what the attorney in *Wright* did not; the "business deal" was actually a classic Internet scam referred to as the "Nigerian Prince" scam.[84] The client and attorney received no money, and the other clients who lent money were never repaid.[85] The attorney's license to practice law was suspended for a year.[86] In suspending it, the Iowa Supreme Court noted (somewhat charitably) that the "evidence in this case established that a cursory internet

77 *See* Richmond et al., *supra* note 65, at 4 ("[L]lawyers must conduct some type of preliminary investigation into clients' intended claims and contentions.").

78 Jeremy Byellin, *Investigate Your Potential Client? It's More Important Than You Think*, Thomson Reuters Practice of Law Blog (July 14, 2016), http://blog.legalsolutions.thomsonreuters.com/practice-of-law/investigate-your-own-client-its-more-important-than-you-may-think/ (describing the importance of an attorney conducting due diligence via Internet search on potential clients and marketing "PeopleMap").

79 Iowa Supreme Ct. Att'y Disciplinary Bd. v. Wright, 840 N.W.2d 295, 301–04 (Iowa 2013).

80 *Id.* at 297.

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.* at 301. The "Nigerian Prince" scam has been known since the 1990s and has made its way into popular culture on television shows such as "30 Rock" and "The Office." *See* Finn Brunton, *The Long, Weird History of the Nigerian E-mail Scam*, Bos. Globe (May 19, 2013), https://www.bostonglobe.com/ideas/2013/05/18/the-long-weird-history-nigerian-mail-scam/C8bIhwQSVoygYtrlxsJTlJ/story.html ("The deal is this: You make a small initial outlay (the advance fee), in exchange for an enormous return. But once you take the bait, things inevitably begin to go wrong. The customs staff changes, new bribes are needed, a key person in the transaction falls ill. Just a little more money, the writer promises, and you'll make it all back."). It is a version of the "advance fee" scam, which has its roots at least as far back as the "Spanish Prisoner" scams of the nineteenth century. *Id.* In that scam, a Spanish soldier concealed money while fighting in the Spanish-American war, only to be tragically and inconveniently imprisoned in Spain, needing an American to recover it. *Id.* This scam is still in use today. *See* Megan Leonhardt, *'Nigerian Prince' Email Scams Still Rake in Over $700,000 a Year—Here's How to Protect Yourself*, CNBC.com (Apr. 18, 2019), https://www.cnbc.com/2019/04/18/nigerian-prince-scams-still-rake-in-over-700000-dollars-a-year.html.

85 Iowa Supreme Ct. Att'y Disciplinary Bd. v. Wright, 840 N.W.2d 295, 299 (Iowa 2013).

86 *Id.* at 304.

search . . . would have revealed evidence that [the client's] dream of a Nigerian inheritance was probably based on a scam."[87] The court further observed that "'Wright appears to have honestly believed—and continues to believe—that one day a trunk full of . . . one hundred dollar bills is going to appear upon his office doorstep,'" and that other attorneys had fallen for the same ruse.[88]

The *Wright* case's Nigerian prince taught an attorney a lesson that all transactional attorneys should heed—the Duty to Google certainly extends into the transactional side of practice. A transactional attorney should, for example, Google all sides of a negotiation for a proposed transaction, especially if one or more of those sides is an unfamiliar entity. Indeed, the Duty to Google can and should extend to material representations made during negotiations, to the extent such representations are reasonably verifiable through an Internet search.

In another example, a high-profile attorney in Georgia, Tony Axam, voluntarily surrendered his license after an ethics investigation showed that he failed to take any steps to verify information about a transaction in a matter and thus facilitated illegal activity.[89]

The Duty to Google facts about one's client has extended to social media information, at least to the extent such information is available to the attorney.[90] For example, in *Cajamarca v. Regal Entertainment Group*, a sexual harassment case, readily available social media evidence revealed that the plaintiff, rather than being severely incapacitated as a result of the incidents of harassment, engaged in "an extraordinarily active travel and social life."[91] In sanctioning the plaintiff's attorney under Rule 11, relating to an attorney's duty to avoid frivolous filings, [92] the court stated

87 *Id.* at 301.

88 *Id.* at 300.

89 In re Axam, 778 S.E.2d 222, 222 (Ga. 2015). Specifically, Mr. Axam agreed to act as a "paymaster" for a client and distribute funds for the client, taking a commission as payment. *Id.* Mr. Axam received a wire transfer from an individual connected to his client and deposited that money into his firm operating account. *Id.* Axam admitted that he did not read the terms of the trading platform contract in connection with which he was serving as "paymaster," that he did not know the nature of the business dealings between his client and the other individual, and that he asked no questions about the transaction that he facilitated. *Id.*

90 *See* Peter Segrist, *How the Rise of Big Data and Predictive Analytics Are Changing the Attorney's Duty of Competence*, 16 N.C. J.L. & Tech. 527, 605 (2015) ("It has also been suggested that there is an affirmative obligation for attorneys to inquire into social networking information that may hold potential relevance in a given matter.").

91 Cajamarca v. Regal Entm't Grp., No. 11 Civ. 2780, 2012 WL 3782437, at *2 (E.D.N.Y. Aug. 31, 2012).

92 Fed. R. Civ. P. 11. Rule 11 provides in relevant part,

> By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> . . .
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

that "plaintiff's lawyer should be roundly embarrassed. At the very least, he did an extraordinarily poor job of client intake in not learning highly material information about his client."[93] Margaret DiBianca concluded, "Naysayers and late adopters alike may be equally surprised to learn that ignoring social media altogether may constitute a violation of their ethical obligations."[94]

2.4. The Duty to Google jurors

An attorney trying a case may have a Duty to Google jurors. This specific area of law is developed but still somewhat unsettled.[95] The genesis of this duty is in an attorney's ability to conduct due diligence on jurors "in order to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried."[96] The ease of Internet research, obviously, makes this due diligence common, if perhaps imprecise. "Googling" jurors is now common.[97] One article quotes a state judge in Florida as having an "unspoken expectation" that attorneys will research jurors before and during a case, because such research is part of an attorney's duty of competence.[98]

One case illustrates the complexity of this practice. In *Johnson v. McCullough*,[99] an attorney on appeal in a medical malpractice case argued that a juror in the trial court had lied during voir dire, when asked if he had ever been a party to a lawsuit.[100] The attorney discovered this falsehood by searching for the juror on Missouri's automated court record system,

For an excellent summary of Rule 11, see Julia K. Cowles, *Rule 11 of the Federal Rules of Civil Procedure and the Duty to Withdraw a Baseless Pleading*, 56 Fordham L. Rev. 697 (1988).

93 *Cajamarca*, 2012 WL 3782437, at *2; *see also* Donna Bader, *Have You Googled Your Clients Lately?*, An Appeal to Reason (Sept. 11, 2012), http://www.anappealtoreason.com/home/2012/9/11/have-you-googled-your-clients-lately.html. An additional complexity is that the user of a social media account controls the privacy settings, and the account may not be available to an attorney without the attorney "friending" the user, which may raise ethical concerns. *See* Pa. Bar Ass'n, Formal Op. 2014-300, at 7–8 (2014) (stating that attorneys may connect with clients and former clients, but not represented persons); *see also infra* notes 106–09 and accompanying text.

94 Margaret M. DiBianca, *Ethical Risks Arising from Lawyers' Use of (and Refusal to Use) Social Media*, 12 Del. L. Rev. 179, 182 (2011).

95 *See* J.C. Lundberg, *Googling Jurors to Conduct Voir Dire*, 8 Wash. J.L. Tech. & Arts 123 (2012). Lundberg notes, "The growing efficacy of the Internet as a tool for conducting jury research has far outpaced the development of guidelines for its use, leaving Internet-based jury research in an ambiguous position." *Id.* at 125.

96 *Id.* at 130 (quoting Mu'Min v. Virginia, 500 U.S. 415, 422 (1991)).

97 *See* John G. Browning, *Voir Dire Becomes Voir Google: Ethical Concerns of 21*st *Century Jury Selection,* The Brief (Apr. 25, 2019), https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2016_17/winter/voir_dire_becomes_voir_google_ethical_concerns_of_21st_century_jury_selection/.

98 Ben Hancock, *Should You 'Facebook' the Jury? Yes. No. Probably*, The Recorder (Apr. 26, 2017), http://www.therecorder.com/id=1202784626601/Should-You-Facebook-the-Jury-Yes-No-Probably.

99 306 S.W.3d 551, 598–99 (Mo. 2010) (en banc).

100 *Id.* at 554.

Case.net.[101] The Court bristled at the idea of attorneys searching for juror information after a case to undermine a verdict, and directed attorneys to affirmatively search for information about jurors on Case.net *before* trial. As one observer noted, attorneys "now have a free and potentially easy means to search a prospective juror's litigation experience."[102] Attorneys who fail to perform such a search risk waiving the ability to argue juror nondisclosure in voir dire on appeal.[103] That is to say that attorneys are not just *permitted* to Google jurors. They may be *required* to Google jurors to preserve a right on appeal.[104]

Johnson was not the only case in which a judge noted that an attorney's failure to discover juror bias during voir dire was the result of an insufficient investigation using electronic search technology.[105] The ABA's Standing Committee on Ethics and Professional Responsibility issued a formal opinion stating that it is acceptable for attorneys to research prospective jurors on the Internet and/or through social media, provided that the attorneys do not make any sort of "active" contact with the targets of their research, such as "friending" or "following" them (and as long as such research is not prohibited by law or court order).[106] There, the ABA noted in a footnote,

> While this Committee does not take a position on whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors that is relevant to the jury selection process, we are also mindful . . . that a lawyer "should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."[107]

The bar associations of New York, New Hampshire, and Pennsylvania have issued similar opinions, though these opinions do not so much establish a bright-line rule as they analogize jurors to opposing parties

101 *Id.* at 555.

102 John Constance, Note, *Attorney Duty to Search Case.net for Juror Nondisclosure: Missouri Supreme Court Rule 69.025*, 76 Mo. L. Rev. 493, 494 (2010).

103 *See Johnson,* 306 S.W.3d at 559.

104 Lundberg, *supra* note 95, at 132. Requiring attorneys to investigate jurors using electronic sources such as social media carries with it an additional responsibility. Attorneys must be aware of the ethical constraints of investigation and contact with unrepresented parties. These constraints, of course, are evolving. *See, e.g.*, Browning, *supra* note 97.

105 For example, in a personal injury case, attorneys for a defendant discovered after a trial that jurors had misrepresented prior involvement in litigation, and used that misrepresentation as a basis for appeal. Burden v. CSX Transp., Inc., No. 08–cv–04–DRH, 2011 WL 3793664, at *9 (S.D. Ill. Aug. 24, 2011). The court rejected this argument and stated that the attorney should have discovered that information during voir dire, and that such Internet searches constitute "reasonable diligence." *Id.*

106 ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466 (2014).

107 *Id.* at 2 n.3 (quoting Model R. Prof'l Conduct 1.1 cmt. 8).

with respect to the permissiveness of contact.[108] A district judge in the Eastern District of Texas has issued a standing order providing guidelines for the Internet research of jurors, prohibiting active communication such as "friending" but allowing for passive communication such as profile viewing, noting that in so doing, "The Court recognizes the duty imposed on diligent parties to secure as much useful information as possible about venire members."[109]

In the closest formal rule with respect to a Duty to Google to date, shortly after the *Johnson* decision, in 2010, the Missouri Supreme Court adopted Rule 69.025, which addresses juror nondisclosure.[110] It states in relevant part,

> (b) Reasonable Investigation. For purposes of this Rule 69.025, a "reasonable investigation" means review of Case.net before the jury is sworn.
>
> . . .
>
> (e) Waiver. A party waives the right to seek relief based on juror nondisclosure of information that would be readily apparent from a reasonable investigation unless the party does the following before the jury is sworn:
>
> (1) Conduct a reasonable investigation.

But this rule by no means settled the issue. In a later opinion in *King v. Sorensen*,[111] the Missouri Supreme Court stated, "While Rule 69.025(b) specifically requires Case.net searches of prospective jurors, it neither specifies the extent of an attorney's research obligation nor instructs how searches are to be conducted."[112] This was an issue in that particular case because an attorney's search for information about a juror was deemed by a lower court to be insufficient, but the court provided the attorney with the incorrect name of the juror. At issue was whether the attorney had a duty to search variants of the juror's name.[113] In concluding that the attorney's reliance on the court was reasonable, the Court in *King* observed, "No Missouri court has addressed the issue of what type of

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108 *See* N.H. Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05, at 2 (2012) (stating an attorney's "general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent"); N.Y. Cty. Lawyers Ass'n Comm. on Prof'l Ethics, Formal Op. 743 (2011); Pa. Bar Ass'n, Formal Op. 2014-300 (2014).

109 U.S. District Judge Rodney Gilstrap, *Standing Order Regarding Research as to Potential Jurors in All Cases Assigned to U.S. District Judge Rodney Gilstrap*, U.S. Dist. Ct. for the Eastern Dist. of Tex. 2 (Jan. 25, 2017), http://www.txed.uscourts.gov/sites/default/files/judgeFiles/Standing%20Order%20--%20Juror%20Research%20%28signed%29.pdf.

110 Mo. R. Civ. P. 69.025.

111 532 S.W.3d 209, 215 (Mo. Ct. App. 2017).

112 *Id.* at 215.

113 *Id.* at 212.

'review of Case.net' will be deemed 'reasonable investigation' with regard to Rule 69.025."[114]

Subsequently, Missouri appellate courts have noted that the standard for researching jurors on the Internet is not one of perfection and omniscience, stating that it cannot be the rule that "*any and all* research—Internet based or otherwise—into a juror's alleged material nondisclosure must be performed and brought to the attention of the trial court *before* the jury is empaneled or the complaining party waives the right to seek relief from the trial court."[115] Instead, Missouri courts seem in agreement with the rather nebulous rule

> that the day may come that technological advances may compel our Supreme Court to re-think the scope of required "reasonable investigation" into the background of jurors that may impact challenges to the veracity of responses given in voir dire before the jury is empanelled—[but] that day has not arrived as of yet.[116]

That conclusion does not inspire confidence in the current state of guidance with respect to a Duty to Google. While the ABA may not be imposing an affirmative obligation, the difficulties attorneys have faced in cases such as *Johnson* suggest that an attorney's obligation is more than a wise choice—it seems like a requirement.[117]

As noted above, there is a growing body of law with respect to the appropriateness of Googling jurors in voir dire.[118] Proponents of the practice argue that a juror's online presence is unable to misrepresent bias the way a juror can while under pressure of questioning in open court, while opponents of the practice note that it is tantamount to opening the voir dire process beyond questioning under oath and raises a host of reliability issues.[119] This is one of the few areas to date in which Rule 1.1 has

114 *Id.* at 215.

115 Khoury v. ConAgra Foods, Inc., 368 S.W.3d 189, 202 (Mo. Ct. App. 2012).

116 *Id.* at 203.

117 *See* Browning, *supra* note 97 ("Researching the social media activity of prospective jurors, and continuing to monitor social media activity during trial, can be vital to seating an honest, unbiased jury and to ensuring that any online misconduct is promptly brought to the court's attention.").

118 *See, e.g.*, Patrick Schweihs, Page Vault & Eric Pesale, *Common Ethical Issues to Consider When Researching Jurors and Witnesses on Social Media*, Above the Law (Mar. 14, 2017), http://abovethelaw.com/2017/03/common-ethical-issues-to-consider-when-researching-jurors-and-witnesses-on-social-media/citing.

119 *See* Zachary Mesenbourg, *Voir Dire in the #LOL Society: Jury Selection Needs Drastic Updates to Remain Relevant in the Digital Age*, 47 J. Marshall L. Rev. 459 (2013) (collecting sources and noting a tension in commentary). Mesenbourg cites one set of commentators for the premise that "lawyers cannot ignore the fact that social media affects every single stage of the litigation process, and urges litigators to expand juror research to social sites in order to get a full and real profile [of] potential jury members." *Id.* at 460 n.13 (citing Stephen P. Laitinen & Hilary J. Loynes, *Social Media: A New "Must Use" Tool in Litigation?*, For Def., Aug. 2010, at 16). He then contrasts that premise with another commentator who wrote that "lawyers['] use of social media research could have an adverse effect on jurors' perceptions of the legal process in general if

been explicitly interpreted to apply to factual investigations. As Lauren Kellerhouse noted in the context of searching jurors' social media profiles, " [A] lawyer who, following Rule 1.1, knows the risks and benefits associated with social media, can quickly come to the conclusion that not searching social media during *voir dire* may be grounds for a malpractice claim."[120] The prudent attorney should at least consider it in serious cases, especially high-stakes civil cases and criminal cases, to the extent that juror information is provided to attorneys by the court.[121] Kellerhouse continues,

> Therefore, as it now stands, [ABA Rule 1.1] Comment 8 does not impose an affirmative duty to search the social media accounts of potential jurors during *voir dire*. However, reasonable attorneys can recognize the profound benefits that a simple search can bring to the process and would be wise to start performing basic searches to meet their clients' expectations of using technology in their representation.[122]

2.5. And more to come

The Duty to Google is not limited to these scenarios—they instead represent a reflection of current caselaw, or more to the point, of the published cases to date in which a trier of fact and/or law determined that an attorney should have engaged in an Internet search. One can spend hours thinking of atypical scenarios in which a particular Internet search is required. Should an attorney probating a will Google death notices? Should an attorney handling an immigration case target a Google search of foreign news for information about her client? Should a labor and employment attorney research the social media profiles of an employee who threatens a suit? Unfortunately, absent clearer guidance, those searching for clarity in the Duty to Google may only obtain it by reading a "benchslap."

What these cases all have in common is that they extended an attorney's duty of fact collection, and in so doing, did not point to a specific rule, requirement, or even a guideline that Internet research was

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they feel as though their privacy is invaded—which could also hinder their willingness to be an impartial participant in the process." *Id.* (citing Duncan Stark, *Juror Investigation: Is In-Courtroom Internet Research Going Too Far?*, 7 Wash. J.L. Tech & Arts 93, 101 (2011)). Mesenbourg comes to the fair conclusion that like it or not, some amount of digital voir dire is becoming (or has become) the norm. *Id.* at 485–86.

120 Lauren Kellerhouse, *Comment 8 of Rule 1.1: The Implications of Technological Competence on Investigation, Discovery, and Client Security*, 40 J. Legal Prof. 291, 297 (2016).

121 *See* Lundberg, *supra* note 95, at 125 n.1 ("Multiple decisions have imposed some sort of obligation on attorneys to conduct Internet research on jurors or members of the venire in order to preserve a possible claim of juror misconduct or non-disclosure on appeal.").

122 Kellerhouse, *supra* note 120, at 298.

now warranted. What is concerning about all of them is that the attorneys involved violated a duty to their client that they *may not have known existed until after they violated it.*

It is clear from these cases that a technological revolution is changing the way attorneys must research their work. But is the Duty to Google just another example of how attorneys must become proficient in technology to meet their professional ethical obligations? What kind of professional duty is it? And when should it arise? These questions form the basis of the next section of this article.

3. Toward a codified Duty to Google

There is ample support for, at least, enhancing Model Rule 1.1 to more fully describe an attorney's responsibility to maintain technological proficiency, which could include guidance with respect to factual investigation of legal matters.[123] Commentators are already calling on the ABA to provide guidance of the contours and extent of an attorney's duty to use technology in practice.[124] Even then, it is clear, as Heidi Frostestad Kuehl noted, "[S]cholars and judges are still grappling with a functional definition for what would constitute competent representation within the era of this widely expanding digital age for attorneys."[125]

Attorneys worried that they are not researching enough (or at all) and taking on risk need some sort of relief. Reliance on judicial opinions is reactive, as described above. Knowledge of where a landmine sits is much more useful prior to stepping on it. Attorneys could consult their state bar for more focused guidance, but reliance on state bar ethical opinions is misplaced. Those opinions are difficult to find and vary from state to state.[126] Also, they can lack the dependability of a baseline rule from which deviation invites explanation,[127] if they are followed at all.[128]

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123 *See* Johnson, *supra* note 16, at 186 ("A better option for the ABA and state regulators might be to follow in the footsteps of states like Colorado, Indiana, and New York, and edit the technology competence Comment directly. Providing additional clarity regarding what the term 'relevant technology' encompasses may be seen by additional states as a method of providing clarity to lawyers seeking to fulfill their obligations.").

124 Katy Ho, *Defining the Contours of an Ethical Duty of Technological Competence*, 30 Geo. J. Legal Ethics 853 (2017).

125 Kuehl, *supra* note 21, at 4.

126 *See* Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?*, 30 Hofstra L. Rev. 731, 752 (2002) (noting variance in opinions); Lawrence K. Hellman, *When Ethics Rules Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions*, 10 Geo. J. Legal Ethics 317, 323–24 (1996).

127 *See, e.g.*, Lawrence K. Hellman, *A Better Way to Make State Legal Ethics Opinions*, 22 Okla. City U. L. Rev. 973 (1997) (discussing the problems with the current scheme of non-authoritative state ethics opinions and offering suggested reforms and value analysis of a controlling form of ethics opinions).

128 Green, *supra* note 126, at 742

What current guidance exists about the Duty to Google is in a comment to a Model Rule. As commentators have noted, states interpret comments to the Model Rules (and even the rules themselves) inconsistently and quite differently, making the boundaries of acceptable conduct even more murky.[129] As Peter A. Joy noted, "[E]ven jurisdictions with an identical ethical rule often interpret and apply the rule differently."[130] Multiple states have made changes to the rule, though none have specifically discussed an attorney's duty of investigation.[131] The current landscape is unclear, at best. Katy Ho put it bluntly: "Attorneys cannot fulfill their duty of competence if they do not know what it entails."[132]

Elevating the Duty to Google from a comment to a clearly described rule makes some sense. While its interpretation may still be murky, it is clear from the Duty to Google cases thus far that some, if not many, attorneys can use as much guidance as rulemakers can provide. Further, the exercise in drafting such a rule would invite and advance the development of the professional norm of a "reasonable investigation." Adopting such a rule would also hasten the creation or enhancement of a much-needed system of education and communication to the bar promoting technological proficiency.

Technology has changed factual investigation, much in the same way that it has changed essentially all of legal practice.[133] It is possible that the cases above reflect some resistance to that change.[134] In fact, legal practice seems even more resistant to adapt to technology than other industries.[135] Introducing a codified rule would help reduce that resistance, which would result in better, more affordable legal service to clients.[136] This section proposes a rule of professional conduct that is intended to be clear enough for lawyers to understand their ethical duties to investigate but broad enough to encompass emerging technologies. Its purpose is to provide a framework for an observer to appreciate the many different

129 *See* Johnson, *supra* note 16, at 173; Hellman, *supra* note 127, at 323–24, 975–76.

130 Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 Geo. J. Legal Ethics 313, 330 (2002).

131 Johnson, *supra* note 16, at 173.

132 Ho, *supra* note 124, at 870.

133 *See* Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-communication in the Twenty-First Century*, 12 Legal Comm. & Rhetoric 1, 2 (2015).

134 *Id.*

135 *See id.* at 2 n.12 (borrowing the observation that "many lawyers still practice law 'as if it were 1999'") (quoting Nicole Black, *Lawyers, Technology and a Light at the End of the Tunnel*, The Daily Record (Nov. 6, 2013),http://nylawblog.typepad.com/suigeneris/2013/11/lawyers-technology-and-a-light-at-the-end-of-the-tunnel-.html).

136 Ho, *supra* note 124, at 867 ("The ABA should take a disciplined approach to rule-making by explicitly identifying areas in which technology amplifies concerns . . . . As a normative matter, setting explicit rules will help manage expectations and provide a minimum standard for attorneys to meet.").

circumstances that may affect an attorney's investigation of a matter using electronic search technology, which can include the cost of the search, resources of the client, and availability of technology. It is also intended to be somewhat deferential to an attorney's judgment, to compensate for an *ex post* tendency to hold an attorney overly accountable for a mistake that seems more obvious looking backward from now.

3.1. Proposal for a codified Duty to Google

A codified Duty to Google—we could call it a "Duty of Technological Use in Investigations"—may best fit as language in a rule of professional conduct, likely Model Rule 1.1. An example of this language might read like the following:

> Competent handling of a particular matter includes a reasonable investigation of the factual circumstances surrounding that matter, including the competent use of common electronic search technology.

A comment to this language would provide more detail on two important factors: the breadth and the depth of an investigation. First, the comment would describe the breadth of an acceptable investigation:

> Factual circumstances surrounding a matter will differ in each matter, but may include facts stated in a legal filing; facts regarding a client, witness, or adverse or third party; facts conveyed to a lawyer from the lawyer's client; facts upon which a lawyer's legal opinion necessarily relies; or facts about a potential juror.

Next, the comment would describe the depth of an acceptable investigation:

> Circumstances surrounding a matter will also differ in each matter and may differ over time during a representation. In determining the scope of an investigation, a lawyer should take general standards of reasonableness and defensibility of decisionmaking into account. Factors used in determining the "reasonableness" of a fact investigation include: (a) the issues and/or amount at stake in the matter; (b) the resources available to the attorney, including where applicable, the resources of the client; (c) the availability of and cost to locate the overlooked information at the time of the search.[137] Reasonableness should also (d) account for

137 This standard may be similar to the reasonableness standard for a factual inquiry with respect to disclosures made in discovery. *See* Patrick Oot, Anne Kershaw & Herbert Roitblat, *Mandating Reasonableness in a Reasonable Inquiry*, 87 Denv. U. L. Rev. 533, 542 (2010) (quoting a judge's discovery ruling that when challenging a reasonable inquiry, counsel should consider "(1) the number and complexity of the issues; (2) the location, nature, number and availability of potentially relevant

> the availability, cost, and adoption of new search technologies.[138] Lastly, the reasonable standard should take into account the lawyer's professional judgment in evaluating the results of the lawyer's search, including evaluating the reliability of the sources of search results.

Certain specific phrases are discussed below.

3.1.1. "Competent handling of a particular matter includes"

This phrase intends to bring the new language in line with the existing framework of competent representation, as seen in Model Rule 1.1. This additional language should be considered a clarification of the parameters of the existing duty to investigate, and not a new duty. This additional language is more direct and provides more guidance than the current regime, which requires attorneys to take a general duty of competence and apply it to a duty to keep up with technology. It provides a framework for an attorney to use in creating a process for factual investigation, and a basis for defending the choices made as to the extent of that investigation.

3.1.2. "A reasonable investigation of the factual circumstances surrounding that matter"

"Reasonable" is the word doing the most work here. The duty to investigate has conceptual limits and should be proportional to a reasonable degree. An attorney must consider when searching for information about a matter ceases to be a benefit—at that point, the attorney should stop. In the capital case context, the Supreme Court has noted that attorneys need not "scour the globe on the off chance something will turn up" and that "reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste."[139] However, the lesson from the cases described in section 2 is that an attorney must make some sort of Internet search, and critically, the attorney must successfully locate important information.[140] There is an allure to simply relying on the comfortable language requiring an "inquiry into and analysis of the factual and legal elements of the problem and the use of methods and procedures meeting the standards of competent practitioners."[141] But this is an *ex post* requirement; to satisfy the duty the attorney must find the golden nugget of

witnesses or documents; (3) the extent of past working relationships between the attorney and the client, particularly in related or similar litigation; and (4) the time available to conduct an investigation").

138 Accordingly, lawyers would not be required to be "early adopters" of advanced search technology under most circumstances, but would be required to stay reasonably current with widely-adopted technology.

139 Rompilla v. Beard, 545 U.S. 374, 383 (2005).

140 *See* Anna Massoglia, *The Voodoo and How-To of Lawyers' Duty to Search the Internet*, Lawyerist.com (Aug. 8, 2016), https://lawyerist.com/104698/voodoo-howto-lawyers-duty-search-internet/.

141 Model R. Prof'l Conduct 1.1 cmt. 5.

information. To fail to find the nugget is to violate the duty.[142] If no nugget exists, no searching is required. *Strickland v. Washington* provides an example. There, the Court noted that "choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."[143]

This phenomenon has been examined in the legal research context. Ellie Margolis noted that when judges sanction attorneys for inadequate searches of legal authority, they do so mainly "based on the perception that the authority should have been known, or could have been easily found through basic research techniques known to all lawyers. Many courts judge the reasonableness of the research by the sufficiency of the argument, rather than looking at the research itself."[144]

George Cohen described the extent of the duty to investigate as wide, but not unlimited, and subject to reasonableness:

> It is true that any duty to investigate that the lawyer owes to the client under the Model Rules is not boundless. The duty to investigate is subject to a reasonableness requirement. Thus, a lawyer must calculate whether the likely value of the investigation exceeds the costs. The scope of the duty to investigate can also be limited by the nature and duration of the representation, as well as by specific agreements between the client and the lawyer concerning the scope of the representation or the type of advice sought.[145]

Also, Cohen has noted that statutes or guidelines requiring that an attorney have actual knowledge of a certain fact—for instance, whether their client has skipped bail—do not necessarily require an investigation, even if a reasonable attorney might suspect that fact to be true.[146] As Cohen put it, "Most duties to investigate . . . are created by substantive rules, not by the scienter standard."[147] Further, the *Strickland* Court allowed for instances in which an attorney may rely on a client's statements with respect to reasonably limiting an investigation, noting that "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."[148]

142 *See* Ho, *supra* note 124, at 868 ("What happens if an attorney mistakenly uses a new technology and gets sanctioned—what additional steps should she have taken to avoid a breach in her ethical duty of technological competence?").

143 Strickland v. Washington, 466 U.S. 668, 691 (1984).

144 Margolis, *supra* note 133, at 99.

145 Cohen, *supra* note 33, at 128.

146 *See id.* at 125–26.

147 *Id.* at 126.

148 466 U.S. at 691.

Evaluating that judgment will be fact-specific and should be viewed under a reasonableness standard.[149] Some parallels exist and perhaps some guidance can be found in courts' application of the standard for effectiveness of counsel as it relates to an attorney's duty to investigate facts in a criminal case, adopting the language from *Rompilla v. Beard* that "reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste."[150] For example, is a result on the second or third page of search engine results so obviously available that the failure to notice it is sanctionable?[151] This question is likely to be fact specific. It bears noting for any reasonableness determination that 95% of Google searchers never make it to the second page of results.[152]

Looking back from an *ex post* approach has its dangers. It is important that judges avoid the approach in which the *value* of the overlooked information affects the evaluation.[153] A judge should instead focus on the *cost* of locating that information. For example, if a free Google search would not have located the information that the attorney missed, but a professional search firm would have found that information, the cost of the search firm should be a factor in determining reasonableness.

In judging where a proper amount of Internet searching occurred, a ruling authority should be very careful to remember that timing is also an issue.[154] Internet searches are ephemeral—taking judicial notice of an Internet search that the judge makes during the case creates a temporal problem.[155] A reality of the Internet is that content comes and goes in a literal instant, and many links—perhaps even the ones in the footnotes

149 *See* Margolis, *supra* note 133, at 102 (examining the use of the Internet in determining the sufficiency of legal research and noting that "[s]ince the court measures reasonableness by considering what other attorneys in a similar position would do, it follows that the research techniques employed by the majority of lawyers are those that are standard in practice, and thus set the bar for reasonableness").

150 Rompilla v. Beard, 545 U.S. 374, 383 (2005).

151 *See* Jessica Lee, *No. 1 Position in Google Gets 33% of Search Traffic,* Search Engine Watch (June 20, 2013), https://searchenginewatch.com/sew/study/2276184/no-1-position-in-google-gets-33-of-search-traffic-study.

152 *Id.*

153 This may cause some tension to the extent that a judge views a Duty to Google sanction in the same vein as a discovery sanction. Discovery sanctions in particular can require a court to examine the importance of the information in question. *See, e.g.*, Fed. R. Civ. P. 37(e)(1) (requiring that a court considering discovery sanctions for spoliation of evidence weigh the "prejudice to another party" of the loss of evidence, which necessarily requires an examination of that evidence's importance to the party); Cunningham v. Hamilton Cty., 527 U.S. 198, 205 (1999) (stating that in discovery, "[a]n evaluation of the appropriateness of sanctions may require the reviewing court to inquire into the importance of the information sought or the adequacy or truthfulness of a response").

154 *See* Jill Lepore, *Can the Internet Be Archived?*, The New Yorker (Jan. 19, 2015), http://www.newyorker.com/magazine/2015/01/26/cobweb.

155 *Id.* (noting that "[t]he average life of a Web page is about a hundred days" and that "[t]he Web dwells in a never-ending present. It is—elementally—ethereal, ephemeral, unstable, and unreliable."). Link rot is a serious issue, especially for judicial opinions. One article notes that over a third of citations to the Internet in published appellate court opinions in Kentucky between June 2011 and July 2017 no longer worked. *See* Michael Whiteman & Jennifer Frazier, *Internet Citations in Appellate Court Opinions: Something's Still Rotting in the Commonwealth*, 82 Bench & B., July/Aug. 2018, at 20, 21.

of this article[156]—will disappear over time, a phenomenon known as "link rot."[157] Attorneys should be judged by the information available in such a search at the time they should have made it. A judge performing a proper search during the case is searching later—often much later—in time, and the judge's search results in the present will likely be different than the attorney's results in the past.

A different sort of availability issue exists with social media information. Most social media platforms have privacy settings that allow their users to control public access to any content that the users post.[158] Social media users can, usually, change those settings at any time. So information on, for example, a juror's bias that is seemingly available upon review today may not have been available at the time of voir dire. Practically, there is little way to determine the availability of such information in the past, without discovery into the history of the privacy settings of the juror's social media account.

"*A reasonable investigation of the factual circumstances surrounding that matter*" is also intended to account for the flexibility in "factual circumstances" specific to each matter, with the commentary fleshing out some examples. "Surrounding that matter" is also intended to be extremely broad.

3.1.3. "Including the competent use"

This language intentionally carries with it a professional responsibility for information literacy. It requires an attorney to evaluate sources in a more advanced way than a pre-Internet search comprising a check of a limited number of vetted information sources. Internet search engines tend to rank results by popularity, not veracity, and display unreliable information next to reliable information.[159] It is easy to confuse a misleading source with an "institutional depository of information."[160]

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156 As much as it pains the author of this article to note.

157 *See* Coleen M. Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. App. Prac. & Process 417, 438 (2002). Professor Barger points out the ironic observation of law librarian Mary Rumsey, author of a study about link rot, that "authors who cite Web sites instead of paper sources probably think they are making their sources more available to readers, rather than less." *Id*. (quoting Mary Rumsey, *Runaway Train: Problems of Permanence, Accessibility, and Stability in the Use of Web Sources in Law Review Citations*, 94 L. Lib. J. 27, 34 (2002)).

158 For example, on Facebook, a user can choose an "audience" for each piece of account information or content—and can choose between making that content essentially unpublished, only available to the user's Facebook "friends," or available to the general public. *See Basic Privacy Settings & Tools*, Facebook, https://www.facebook.com/help/325807937506242 (last visited Feb. 20, 2021).

159 Baker, *supra* note 4, at 570 (observing that "information retrieval is generally now reliant upon algorithms to provide 'relevant' results. The list of relevant results provided with relative ease is an absolute benefit of using algorithms in law. It allows for great efficiency, which equates to greater access to justice. However, the problem is how competent it all looks, enticing lawyers to blindly rely on the results.").

160 Barger, *supra* note 157, at 422.

As Michael Whiteman has noted, "The ease of using Google can lull an attorney into a false sense of security, but attorneys should be cautious because 'search engine returns are incomplete for research purposes.'"[161]

It should also be clear that the *attorney's judgment* is subject to the duty, and not the search algorithm's effectiveness.[162] This relationship between attorney and algorithm has been aptly described as the attorney acting as an "information fiduciary."[163] Jamie J. Baker, who first adapted the term to attorneys, concludes that "competent lawyers must understand the information they rely on and provide advice to a client that is the result of the lawyer's independent, educated judgment."[164] In this way the attorney's duty to interpret search results does not differ much from the attorney's interpretation of, for example, due diligence research or a form contract.

It is possible to fashion criteria for evaluating an Internet source, of course. Collen Barger has suggested that a critical Internet researcher should examine "a site's completeness, along with its author and publisher, source of data, language, accuracy, currency, coverage, archiving, workability, stability, user interactivity, cost, and licensing."[165] Technological proficiency is, once again, essential to the reasonableness of the attorney's judgment in interpreting search results. Lauren Kellerhouse notes that attorneys perform a similar task in interpreting search results in predictive coding searches in discovery, where attorneys must understand the technology to make sure it has worked correctly.[166] Kellerhouse notes that this technical proficiency is in harmony with comment 8's charge that the attorney should "keep abreast of changes in the law and its practice, including the *benefits and risks* associated with relevant technology."[167] Attorneys must then understand search technology enough to critically evaluate its results.

3.1.4. "Of common electronic search technology"

This specific language is intentionally broad. Jamie Baker notes that the Model Rules with respect to technological competence are drafted as

161 Whiteman, *supra* note 53, at 46.

162 Baker, *supra* note 4, at 574 (noting that "a lawyer, at a minimum, must be aware of the issues surrounding the use of algorithms and use reasonable care").

163 *Id.*

164 *Id.*

165 Barger, *supra* note 157, at 426 n.24 (citing Mirela Roznovschi, *Evaluating Foreign and International Legal Databases on the Internet*, LLRX (Feb. 1, 1999), https://www.llrx.com/1999/02/features-evaluating-foreign-and-international-legal-databases-on-the-internet/).

166 Kellerhouse, *supra* note 120, at 298–300. Predictive coding is a method of machine-aided document review by which a computer algorithm and "machine learning" assist a reviewer in locating relevant information in a set of electronically stored information. *Id*. at 298.

167 *Id.* at 299 (quoting Model R. of Prof'l Conduct 1.1 cmt. 8).

"purposefully broad," such that they can address "technologies that have not yet been conceived."[168] However, the guidance thus far published about these rules has been extremely narrow, focusing mainly on data security.[169] So while these rules *can* adjust to new technologies with respect to Internet searching, absent specificity in the rules, attorneys are on their own to extrapolate the rules to new technologies.[170] Indeed, there is some support for intentional flexibility in the rules and guidelines with respect to technological competence *because* technological innovation will invariably move faster than those rules and guidelines.[171]

Most of this article assumes that Google is the first, best, and last piece of technology to provide for an increased ability to conduct factual investigation into a legal matter. That is, of course, shortsighted. Somewhere in the world an entrepreneur is developing a piece of technology that will become as widely used as Google, and will affect many aspects of life, including factual investigations. At what point does that technology become the next "Google," in other words, "common" technology, and thus part of the "Duty to Google"?

Some parallels can again be found in the development of electronic legal research. In one of the first, but still very relevant, discussions of how access to the Internet changed legal research, Michael Whiteman discussed the question about what standard an attorney should follow in conducting legal research.[172] To do so, Whiteman cited a standard from a California Supreme Court case, *Smith v. Lewis*,[173] where the Court wrote,

> As the jury was correctly instructed, an attorney does not ordinarily guarantee the soundness of his opinions and, accordingly, is not liable for every mistake he may make in his practice. He is expected, however, to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques.[174]

Whiteman concludes, "Unless it can be shown that the use of electronic sources in legal research has become a standard technique, then

168 Johnson, *supra* note 16, at 170 (quoting Baker, *supra* note 4, at 557).

169 *See id.*

170 *See id.* (noting that "state regulators enacting and enforcing the Comment, as well as scholars who have discussed it, have instead provided narrow, prescriptive guidance and enforcement").

171 *See id.* at 189.

172 Michael Whiteman, *The Impact of the Internet and Other Electronic Sources on an Attorney's Duty of Competence Under the Rules of Professional Conduct*, 11 Alb. L.J. Sci. & Tech. 89, 91 (2000).

173 530 P.2d 589 (Cal. 1975).

174 Whiteman, *supra* note 172, at 91 (quoting Smith v. Lewis, 530 P.2d 589, 595 (Cal. 1975)).

lawyers who fail to use electronic sources will not be deemed unethical or negligent in his or her failure to use such tools."[175] He points to the following factors to determine whether the use of an electronic source is a "standard technique": the level of adoption and whether attorneys charge for its use.[176]

Ellie Margolis chronicled the evolution of electronic legal research technology, noting where a tool made the key jump from "luxury" to "necessity."[177] Specifically, Margolis pointed to Shepardizing as an example of a technology that is so ubiquitous in legal practice as to be required for an attorney's legal research work to be competent.[178] She notes that certain factors contributed to the "expectation" that a technology would be used for competent legal research: (a) its widespread use among attorneys in legal representation, (b) its inclusion as a billed service passed on by attorneys to clients, (c) its adoption as part of a practical curriculum in law schools, and (d) its essentialness in accessing certain sources of information.[179]

3.2. Application of the Duty to Google

Following a Duty to Google may compel attorneys to handle the intake and management of matters a little differently. As a matter of best practices, absent an explicit rule, attorneys should carefully document their Internet searches and results. They should consider drafting a memo to file describing their interpretation of the results, along with any potential follow-up research or tasks. Importantly, attorneys should recognize at the time that the memorialization of this process cuts into the very time- and money-saving benefits of the electronic search, and document their decision to discontinue a line of investigation.

To that end, an attorney has to build this additional fact investigation into the cost of representation. After all, attorneys often bill by the hour and while Internet searches take milliseconds, scrolling through search results, reading, digesting, and following up on those results can take some time. Is an attorney's investigation now more expensive, because more information is available, even though relevant information is much easier to locate?[180]

175 *Id.*

176 *See id.* at 91–102.

177 Margolis, *supra* note 35, at 119.

178 *Id.* at 92. Indeed, it is notable that "Shepardizing," like "Googling," is a proper noun that has become ubiquitous.

179 *See generally id.* at 107–10.

180 That technology would reduce time to perform a task but nevertheless increase cost in litigation has for years been the reality in litigation discovery. *See generally* Rebecca Simmons, Monica Lerma & Steve S. McNew, *Discovery in 2016: New Rules, Cases and Technology*, 74 Advoc. (Tex.) 61 (2016).

Given these cost considerations, it may be appropriate for an attorney in many instances to delegate the required investigation duty to a paralegal or support staff. But in which instances? The line is certainly not clear; however it is common and ethically proper for attorneys to delegate their professional responsibilities, under supervision.[181] That being said, the higher the stakes and the more potentially important the information, the more the attorney will want to be involved in the Internet search and analysis.

The existence of the attorney's rationale for interpreting search results will provide a factfinder with the ability to evaluate the attorney's judgment at the time, rather than in a backwards-looking manner. In the capital case context, the Supreme Court in *Wiggins v. Smith*[182] made a telling distinction in finding an inadequate investigation by concluding, "The record of the actual sentencing proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment."[183] Attorneys should be ready to evidence their judgment in setting the scope of an investigation, including their use (or lack of use) of available search technology.

Should an attorney Google each and every client, every matter? It is hard to say. There do not appear to be any recent cases holding that even though the attorney didn't perform an Internet search, the attorney's investigation was nonetheless sufficient. An attorney handling a routine matter for a longstanding client may not need to Google the matter, for example.

It seems likely that in most matters of any size, some measure of Googling is required. Even a cursory Google search seems prudent in almost every circumstance. Think about that for a moment. In a little more than a generation, an attorney's duty to investigate has grown to the point where, at the absolute minimum, the attorney needs Internet access and the ability to make a reasonably skilled Internet search.[184]

The reasonableness of frequency and intensity of searches should depend on the issues and resources available. Attorneys would be well advised to set up automatic "alerts" for certain keywords involving important clients or matters, so that they are automatically notified of potentially important new Internet content.[185]

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181 *See* R. Thomas Howell Jr. & Eric G. Orlinsky, *What Paralegals Can Do: And the List Goes on*, 16 Bus. L. Today 17 (2007).

182 539 U.S. 510 (2003).

183 *Id.* at 526.

184 *See* Margolis, *supra* note 35, at 110 (referencing the "Google Generation" of young attorneys who grew up using the world wide web constantly to learn about the world).

185 For example, Google offers free Google Alerts, in which a user can have a daily, weekly or monthly email sent to them collecting new articles that meet user-defined keywords. *See, e.g.*, *Google Alerts*, Google, https://www.google.com/alerts (last visited May 12, 2021).

Conclusion: Looking ahead

The bar and legal academia should incorporate Internet fact-finding into basic legal training and continuing legal education.[186] Several CLEs exist to teach attorneys how to conduct effective Internet searches,[187] but they tend to focus on building on a core competency that each attorney possesses. It is likely that many attorneys can benefit from fine-tuning their search skills, but it may be more impactful for more CLEs to focus on basic electronic search skills. Attorney technological competency is famously poor, despite such competency being an ethical requirement.[188] There are anecdotal and empirical examples of skilled attorneys who lack technological competency.[189] It may take an outreach program to educate the bar to bring its overall competency up to the appropriate level—if that level is discernible. This outreach program would incorporate basic skills for attorneys who need them but would feature recent technology, helping attorneys "keep up with the times." Further, as Ellie Margolis pointed out, advances in technology *raise* standards for competency, meaning that the expectations judges and clients have for attorney fact investigation are now higher (and will increase).[190]

In the future, it is not difficult to see more state bar associations requiring technology CLE credit in the same specialized way that they require ethics CLE credit, and even to see law schools offer technological competency courses.[191] While practicing attorneys reading this paragraph may have audibly groaned at *yet another* licensure requirement, closing the "technology gap" is a worthwhile enterprise. Attorneys who lack basic skills and resist innovation would be at least exposed to the technology

186 *See* Browning, *supra* note 12, at 196 ("But as a practical matter, how do we go about achieving the goal of technological competence? The key is education.").

187 *See, e.g.*, *CLE Webinar Covers Ethics of Social Media Research*, Internet for Lawyers (June 2020), https://www.netforlawyers.com/content/social-media-research-ethics-mcle-0227; *Google-Based Legal Research for Lawyers (On Demand)*, LawPracticeCLE (Nov. 4, 2020), https://lawpracticecle.com/courses/google-based-legal-research-for-lawyers-on-demand/.

188 Britton, *supra* note 20, at 34 ("Even back in the 19th century, lawyers were failing to adopt the newest technology—the telephone. In 1891, 7,000 businesses in the New York/New Jersey area had telephones. Among those, there were 937 doctors, 363 saloons, 315 stables, and last were 146 lawyers. Lawyers' biggest technological challenge, then, has nothing to do with a specific technology; the hesitation and reticence with which they adopt *any* technology is the primary obstacle they must overcome.").

189 Michael E. McCabe Jr., *What They Didn't Teach in Law School: The Ethical Duty of "Technical Competence,"* McCabe IP Ethics Law Blog (Aug. 17, 2015), https://www.ipethicslaw.com/what-they-didnt-teach-in-law-school-the-ethical-duty-of-technical-competence/ (describing a colleague, a talented patent lawyer who never used a computer, and urging attorneys to take CLEs to become technologically competent).

190 Margolis, *supra* note 35, at 111.

191 *See* Browning, *supra* note 12, at 196. Indeed, as Browning notes, Suffolk University Law School offers a six-course Legal Innovations and Technology Certificate designed for practicing attorneys. *Id.*

they should be using, and more technologically savvy attorneys would have a good reason to stay current.

It is clear that attorneys have a requirement to perform an Internet search about prospective (and current) clients, witnesses, potential matters, and in certain cases, potential jurors. It is less clear where that requirement extends to other areas of legal representation and troubling that those areas may only be discovered after an attorney faces sanctions. Reliance on ethical opinions from state bar journals to avoid these sanctions is not enough. For guidance's sake, it makes sense to codify this requirement as part of the rules governing an attorney's professional responsibility. Drafters of such a rule face a real challenge of scope and depth as they search for the right balance between expectation and fairness. Greater detail with respect to an attorney's technological competence will help the bar stop searching for answers about its Duty to Google.

BOOK REVIEW

Wake Up Everybody

Caste: The Origins of Our Discontents
Isabel Wilkerson (Random House 2020), 476 pages

Aysha S. Ames, rev'r*

> Race, in the United States, is the visible agent of the unseen force of caste. Caste is the bones, race the skin. Race is what we can see, the physical traits that have been given arbitrary meaning and become shorthand for who a person is. Caste is the powerful infrastructure that holds each group in its place.[1]

In 2020, the murders of Ahmaud Aubrey, George Floyd, and Breonna Taylor and the COVID-19 pandemic's disproportionate health, financial, and emotional impact on Black, Indigenous, and People of Color brought a new racial, social, political, and economic consciousness for many Americans. In seven powerful parts, Pulitzer Prize-winning author of *The Warmth of Other Suns*, historian, reporter, and sociologist Isabel Wilkerson explores the rigidity of our nation's racial, social, political, and economic constructs in *Caste: The Origins of Our Discontents*.[2] Throughout the work, Wilkerson, using the power of storytelling, from sacred texts to ancient mythology to anecdotes about people we know such as Martin Luther King, Jr., Henry Louis Gates, Jr., and even herself, shifts the narrative from race to caste—the concept that there is a system of dividing society into fixed and hereditary classes.[3] Using deliberate language such as "dominant caste," "upper caste," "favored caste," "subordinate caste," and "lower caste," she pushes the conversation beyond "black," "white," "race," and "racism" to further her central thesis that mere

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1 Isabel Wilkerson, Caste: The Origins of Our Discontents 19 (2020).

2 *Id.*; Isabel Wilkerson, The Warmth of Other Suns (2010).

3 Wilkerson, *supra* note 1, at 319.

race is not comprehensive enough to portray what has happened and what is currently happening in American society.[4] She explains that "[l]ooking at caste is like holding the country's X-ray up to the light."[5] If you don't hold the X-ray up to the light, you cannot know the full story.

This book resonates because all lawyers tell stories. It is especially important that the stories we tell are accurate and complete. Equally important is how we tell those stories.[6] As law students, professors, lawyers, and judges, we cannot begin to fully tell clients' stories if we do not understand the social context of the American story. In her exploration of the United States' "four-hundred-year-old social order," Wilkerson provides that context.[7]

I. Caste in America

To depict the intricacy of caste systems, Wilkerson describes the eight pillars of caste that are the foundations of caste systems throughout modern civilization—including in India and in Nazi Germany.[8] Beginning with "Divine Will and the Laws of Nature" and concluding with "Inherent Superiority versus Inherent Inferiority," Wilkerson presents the reader with a logical and progressive narrative of the tenets of caste.[9] She proffers that caste systems endure when the dominant caste declares that it is a higher power's will that groups are classified differently based on fixed, heritable characteristics, such as race.[10] This declaration, accompanied by the caution that any alterations to the classification system would lead to the suspected degradation of the "dominant caste," effectively perpetuates and maintains the system. She further explains that caste is propagated by restricting which occupations members of certain castes can occupy, and ways in which the caste systems are structured to dehumanize, stigmatize, and terrorize the subordinate caste to maintain the inherent superiority of the dominant caste.[11]

4 *Id.* at 18 ("Race does the heavy lifting for a caste system that demands a means of human division.").

5 *Id.* at 17.

6 *See* Elizabeth Berenguer, Lucy Jewel & Teri A. McMurtry-Chubb, *Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power*, 23 Harv. Latinx L. Rev. 205, 220 (2020) (explaining that even innovative legal storytelling "is situated relationally to the classic rhetoric traditions" and reinforces harmful paradigms by only telling one side of the story).

7 Wilkerson, *supra* note 1, at 17.

8 *See* James Q. Whitman, Hitler's American Model: The United States and the Making of Nazi Race Law (2017) (highlighting the impact in Nazi Germany of the U.S. model of codified racism and explaining how the Nazis researched American legal codes based on white supremacy to strategically design their plan to exile Jewish people).

9 Wilkerson, *supra* note 1, at 101–64.

10 *Id.* at 131–64.

11 *Id.*

To illustrate the permanence of caste in America, Wilkerson provides powerful illustrations throughout our history, but perhaps the most striking is her recollection of a flight in which she, an African-American, a lower caste woman, was assaulted by a white upper caste man, and fellow passengers and the flight attendant, who was also lower caste, did not intervene.[12] Her retelling is striking in not only how vivid and violating the experience was, but also in its ordinariness. It was a simple reminder that caste dominates even what should be the most seemingly mundane interactions. Caste determines who feels empowered to speak up and who does not; caste can also determine who pays attention to certain interactions and who does not. In essence, "[c]aste, like grammar, becomes an invisible guide not only to how we speak, but to how we process information, the automatic calculations that figure into a sentence without our having to think about it."[13]

Understanding that this "invisible guide" governs the interactions we have with our students, our colleagues, and our clients could prompt us to reevaluate the dynamics of many of our professional relationships—how students interact with each other; how professors interact with students; how attorneys interact with clients and other attorneys; and how judges interact with attorneys and the parties in their courtrooms. All of these interactions are governed by this "invisible guide," and this "invisible guide" shapes the story.

II. Wake up everybody![14]

The final part of Wilkerson's book is entitled, "Awakening."[15] Even though she spends the better part of 300 pages illustrating that caste is enduring, rigid, and inflexible, she is still hopeful that the caste in American society does not have to be a permanent fixture and strongly advocates for "radical empathy," which means

> putting in the work to educate oneself and to listen with a humble heart to understand another's experience from their perspective, not as we imagine we would feel. Radical empathy is not about you and what you think you would do in a situation you have never been in and perhaps never will. It is the kindred connection from a place of deep knowing that opens your spirit to the pain of another as they perceive it.[16]

12 *Id.* at 297–300.

13 *Id.* at 18.

14 Harold Melvin & The Blue Notes, Wake Up Everybody (Phila. Int'l 1975).

15 Wilkerson, *supra* note 1, at 359–75.

16 *Id.* at 386.

Radical empathy is important for law students, law professors, lawyers, and judges. Radical empathy is especially important for law professors, as we are uniquely primed to foster environments which allow all students to tell their stories by the curriculum we plan, the books we assign, and the classroom environment we cultivate. These meaningful and intentional acts help to ensure that stories that are told are not just the stories from the dominant caste.[17] And these actions not only will shape the students we teach, but will extend beyond our classroom when our students take what they've learned into the legal profession. When students approach their fellow classmates and future clients and colleagues with radical empathy, they will hold space for people to tell their own stories, which will build stronger relationships, and the stronger the relationships they build, the better advocates and storytellers we all become. Reader, perhaps one of your first, of many, acts of radical empathy can begin by reading this book.

17 One of the major components of critical race theory is "counter storytelling," which highlights the experiences, narratives, and stories of those outside the dominant caste. Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction 48 (2011).

BOOK REVIEW

A Grammar of Legal Thought

How to Do Things with Legal Doctrine
Pierre Schlag & Amy J. Griffin (U. Chicago Press), 207 pages

Derek H. Kiernan-Johnson, rev'r*

"Just how does one do doctrine?"[1] The authors of *How to Do Things with Legal Doctrine*, a collaboration of two law professors, one who specializes in constitutional law, and one who specializes in legal writing,[2] aim to answer that question. Those who work with the law know "doctrine" as a "rule, principle, theory or tenet of the law."[3] The book is a taut, comprehensive guide for how to, well, do things with doctrine. More precisely, it's a guide for how to *continue* to do things with doctrine—just more consciously and systematically. For the problem, the authors argue, isn't that lawyers, judges, and law professors aren't already doing things with doctrine (quite the opposite) but that we aren't aware that this is even a choice. We skip past the step of conceiving of law *as doctrine*, to jump right into analyzing or arguing about the (doctrinal) substance of a particular matter.

The authors don't argue (at least here) for a primary conception of law other than as doctrine. Their task is descriptive: to catalogue all the "recurrent structures and moves across the corpus of the law" so that they "can be taught and learned."[4] The book is thus, to this reviewer, akin to a linguistic "reference grammar."[5]

* Legal Writing Professor, University of Colorado Law School.

1 Pierre Schlag & Amy J. Griffin, How to Do Things with Legal Doctrine 3 (2020).

2 The authors, both on the Colorado Law faculty, are Pierre Schlag, University Distinguished Professor and Byron R. White Professor of Law, and Amy J. Griffin, Professor of Legal Writing and Associate Dean for Instructional Development.

3 Schlag & Griffin, *supra* note 1, at 10 (citing *Doctrine*, Black's Law Dictionary (6th ed. 1990)).

4 *Id.* at 6, 180.

5 *See, e.g.*, Irina Nikolavea, *Reference Grammars*, in Handbooks of Linguistics and Communication Science, vol. 4 ch. 59 (Jeroen Darquennes & Patience Epps eds., 2015); SIL, *Reference Grammar*, *in* Glossary of Linguistic Terms (2003), https://glossary.sil.org/term/reference-grammar.

This grammar's proposed taxonomy is extensive. The first chapter, for example, divides doctrine into four main components: artifacts, sources of law, functions, and elements. The first component, artifacts, is itself divided into seven parts: concepts, directives, principles, policies, values, considerations, and interests. This articulation continues through to the end, where a two-page table sets out nineteen "structural distinction clusters," each cluster of which, as the name implies, involves a handful of different distinctions.[6] Whew!

The authors admit that calling such a book "dense" is "an understatement."[7] They therefore structure it so that, while it could be read from start to finish (perhaps one chapter, or part of a chapter, at a sitting), it can also, like a grammar, serve as a teaching tool or reference text. Chapters stand alone and the Table of Contents is extensive.

One way to use the book, the authors hope, is as an "argument resource," a "prompt," or "checklist of possibilities and limitations."[8] Used this way, a brief writer struggling to craft a Question Presented might scan the table of contents and jump to Chapter 2, "Frames and Framing," in particular Part I, "Entry-Framing." A judge striving to distinguish a precedent on their way to articulate a holding might instead turn to Chapter 4, "The Legal Distinction," and in that chapter focus especially on the three criteria for sound distinctions, trade-offs among these criteria, and how to craft a sound distinction in writing.

Law professors will also find the book useful, either as the textbook for a class on legal doctrine or as a resource for an existing doctrinal or writing course. Academic-support professionals might also find the book helpful. Both readers may wish to peruse the book's 112-page supplement of exercises, which is available as a free PDF online.[9] These exercises vary, intentionally, from focused prompts meant to spark class discussions, to longer hypotheticals for use as multi-week writing assignments. The authors have also written a "teacher's manual of sorts" to pair with the exercises, which is available to educators (but not students) upon request.[10]

In sum, *How to do Things with Doctrine* is the reference grammar we didn't know we needed. All of us who learned the language of the law through immersion could benefit from a deeper, more systematic under-

6 Schlag & Griffin, *supra* note 1, at 160–61.

7 *Id.* at 7.

8 *Id.*

9 Pierre Schlag & Amy J. Griffin, How to How to Do Things with Legal Doctrine: Exercises (2020), https://press.uchicago.edu/sites/legal_doctrine/legal_doctrine_exercises.pdf.

10 *Id.* at 1.

standing of how that language is put together. While it isn't a breezy read (nor is it meant to be), this important book will reward the patient, attentive reader.

LC&R
JALWD

BOOK REVIEW

Some Pitfalls of Empathic Lawyering

Against Empathy: The Case for Rational Compassion
Paul Bloom (Ecco 2016), 304 pages

Ezra Ross, rev'r*

Attorney: What's the next thing that happened after the conversation with your manager on Monday?
Client: Well, I was supposed to go to work on Tuesday.
Attorney: Did you go to work on Tuesday?
Client: No, I didn't.
Attorney: Why not?
Client: I had to attend my mother's funeral.
Attorney: Ok, what happened next?

Good lawyering requires empathy. When someone tells you they lost their mother, you don't say, "What happened next?" You say, "I'm very sorry to hear about your loss." You do this not as a matter of interviewing technique. You do it because you feel your client's pain.

According to the seminal text *Essential Lawyering Skills*,[1] "Empathy is invaluable in interviewing, counseling, and negotiating." Experiencing "what it's like to be in [the client's] shoes" helps lawyers connect to clients and can empower clients to "feel stronger and more capable." When lawyers and clients can't connect face-to-face, as they often can't during the COVID pandemic,[2] empathizing with client suffering becomes even more critical to the attorney-client relationship.[3]

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1 Stefan H. Krieger & Richard K. Neumann Jr., Essential Lawyering Skills 51 (4th ed. 2011).

2 Am. Bar Ass'n, *How to Navigate Working from Home During the Time of COVID*, YourABA, (May 2020), https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-may-2020/working-from-home-during-covid/ ("For lawyers, that shift has included the loss of face-to-face meetings with clients . . . .").

3 Some commentators have argued that emotional skills, such as empathetic interaction, could grow in importance in future job markets because they may prove difficult to replace with artificial intelligence. Kai-Fu Lee, *Ten Jobs That Are Safe in*

All this seems uncontroversial. Good lawyering requires empathy. The only question is how to help lawyers empathize more.

Yale psychologist Paul Bloom, however, would disagree. The title of Bloom's book, *Against Empathy: The Case for Rational Compassion*,[4] suggests provocative clickbait more than thoughtful analysis. But he, in fact, levels three serious challenges to the view that empathy helps people help others.

First, empathy can stoke bias because people often identify with the feelings of those most like them. Bloom illustrates the point by juxtaposing the flood of American news coverage of Natalee Holloway, an American student who went missing on vacation, with the minimal airtime devoted to the genocide in Darfur at the same time. This mismatch, according to Bloom, "doesn't reflect an assessment of the extent of suffering, of [the] global importance, or of the extent to which it's possible for us to help. Rather, it reflects our natural biases . . . [favoring] those who look like us and come from our community."[5]

Second, empathy can exacerbate the identifiable victim problem. The "spotlight" of empathy shines on individuals whose feelings one can vicariously experience. By contrast, empathy tends not to focus people on helping large, unindividuated groups. Bloom highlights studies showing people donate more money to help feed one named child than to help feed eight times as many anonymous ones.[6]

Third, empathy can overwhelm the empathizer, defeating the person's ability to help those in need. For example, directly experiencing a patient's fear and pain might disable, rather than promote, a doctor's ability to effectively provide treatment. As Bloom suggests, the patient might much prefer the doctor's unemotional deployment of technical expertise to the sharing of feelings.[7]

Bloom's broadside appears to apply forcefully to the legal context.[8] Lawyers choosing to represent only those clients with whom they

an AI World, Medium (Oct. 1, 2018), https://kaifulee.medium.com/10-jobs-that-are-safe-in-an-ai-world-ec4c45523f4f ("AI cannot, unlike humans, feel or interact with empathy and compassion; therefore, it is unlikely that humans would opt for interacting with an apathetic robot for traditional communication services.").

4 Paul Bloom, Against Empathy: The Case for Rational Compassion (2016).

5 *Id.* at 90.

6 *Id.* at 88.

7 *See id.* at 142–45.

8 Although beyond the scope of this essay, law teaching, as well as law practice, could fall within the ambit of Bloom's attack on empathy. For example, Bloom contends that parental empathy could contribute to overparenting. Uncontrolled empathy for students might similarly spur teachers to try to insulate students from uncomfortable, but ultimately valuable, educational experiences. It might also contribute to burnout in legal writing communities. Toni M. Fine, *Legal Writers Writing: Scholarship and the Demarginalization of Legal Writing Instructors*, 5 Legal Writing 225, 228 (1999) (describing experience of "exhaustion from the enormous workload and intensive, nearly continuous, student contact").

empathize could put lawyers' personal biases in the driver's seat. Empathy could inadvertently contribute to clients looking even more like their lawyers. Such a funneling of legal services not into communities that need them, but into communities that mirror the demographics of lawyers themselves, would frustrate the cause of equal access to justice.[9] Likewise, empathy could pose problematic conflicts. For example, empathy could heighten a class action lawyer's preference for the interest of a named plaintiff—at the expense of a putative class's interests.[10] Finally, lawyers have attested that emotional identification with clients can lead to exhaustion and burnout.[11] These emotional impacts could exacerbate the high level of mental health challenges lawyers already face in their work.

On the other hand, wholesale condemnation of empathy in lawyering runs severe risks. Rather than contributing to exhaustion, empathy might energize some lawyers to keep fighting. Cause lawyers, for example, who cannot empathize with their clients might lack the emotional fuel to endure professional setbacks and disappointments.[12] And instead of promoting bias, empathic client selection might open the door to legal services for clients typically excluded by lack of social or economic power. Moreover, recall the lawyer whose response to his client's mother's death was "what happened next." The pure technician, experiencing no empathy, might lack the ability to provide even a baseline of helpful, humane service.[13]

This apparent deadlock over empathy, however, might rest on an ambiguity. Bloom distinguishes compassion from empathy. Bloom largely approves of compassion, which he defines as caring for the well-being of others, but without experiencing the feelings of others, as a moral guide. And compassionate lawyering—caring for your clients but without

9 The concern about empathy's impact on access to justice echoes problems raised by screening clients on the basis of each individual lawyer's subjective moral views. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 Am. B. Found. Res. J. 613, 617 (1986) ("[F]or the lawyer to have a moral obligation to refuse to facilitate that which the lawyer believes to be immoral, is to substitute lawyers' beliefs for individual autonomy and diversity.").

10 Further, commentators have examined the "dominance of client interests in the practical activities of lawyers" and its negative impacts on independent professional judgment. Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 Stan. L. Rev. 503, 505 (1985). If a lawyer truly feels a client's pain, this might increase existing pressures to accomplish client goals, even morally dubious ones.

11 *See* Marina Zaloznaya & Laura Beth Nielsen, *Mechanisms and Consequences of Professional Marginality: The Case of Poverty Lawyers Revisited*, 36 Law & Soc. Inquiry 919, 931 (2011) ("[O]ur interviewees agreed that too much empathy can also be debilitating for lawyers. Several shared stories about their colleagues who got so caught up in caring for their clients that they could no longer do their best as attorneys.").

12 *Id.* at 937 (observing that legal aid attorneys "held onto the idea of making a positive difference in the world riddled with inequalities. [They frame] the importance of legal aid in terms of helping specific individuals rather than bring about abstract socio-economic justice.").

13 Judith L. Maute, *Balanced Lives in a Stressful Profession: An Impossible Dream?*, 21 Cap. U. L. Rev. 797, 798–99 (1992) ("Many lawyers today function like machines. They hear a problem and immediately begin identifying an appropriate course of action. They frequently insulate themselves from emotional matters with clients, associates, and family. Safely sheltered in their legal cocoons, they have little comprehension of their client's ultimate concerns with the legal problem at hand.").

feeling their feelings—might thread the needle of energetic representation without moral myopia. Indeed, when commentators lionize empathy, they may really mean what Bloom denominates compassion, i.e., caring without vicarious feeling. In other words, Bloom's challenge may amount to heckling a strawman.

But such a view, I think, would discount Bloom's perspective too much. *Against Empathy* raises important challenges to empathy as an absolute good, in legal practice or otherwise. Identifying strongly with a client's feelings, in some circumstances, can counterbalance the heartless, robotic lawyering represented by the lawyer-client exchange at the outset of this essay. But, at other times, the "spotlight" of empathy might serve neither lawyer nor client—where, for example, a lawyer has duties to unidentified class members or shoulders a backlog of emotional exhaustion. Ultimately, a balanced view might acknowledge empathy as a valid emotional response, but one warranting neither blind maximization, nor unqualified criticism.

BOOK REVIEW

Back to Basics

Restoring Humanity to (Legal) Writing and Storytelling

Pity the Reader: On Writing with Style
Kurt Vonnegut & Suzanne McConnell (Seven Stories Press 2020), 432 pages

Gabrielle Marks Stafford, rev'r*

What could a book by and about Kurt Vonnegut, most known for his dark, sardonic humor, possibly have to say to students and teachers of legal communication and rhetoric? As it turns out, Vonnegut captures, in his idiosyncratic and magical way, just about everything that we hold dear. The book reminds those of us who have plied our trade of teaching legal writing for years of what we're really up to. But the book appeals not only to teachers or aspiring teachers of legal writing. It offers solace, empathy, and inspiration to all writers, including all students of legal communication—which should, at the very least, include all lawyers.

Why does this book by Vonnegut (and his medium, Suzanne McConnell) deserve this grandiose billing, you may ask? Put simply, the book's "gleaming trinkets of truth"[1] about the craft and teaching of writing, along with its substantial doses of encouragement, validation, and generosity towards all writers, and human beings, for that matter, entertain, enrich, and hearten all of us.

First, a word about the book's format. Published in its soft-cover edition in 2020, it is a posthumous collection of writing advice co-authored by one of Vonnegut's former students, Suzanne McConnell, who was one of his pupils at the Iowa Writer's Workshop in the 1960s. Vonnegut and McConnell became friends and remained so until

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1 Niklas, *Review: Suzanne McConnell and Kurt Vonnegut—"Pity the Reader"* (July 17, 2019), https://niklasblog.com/?p=23391.

Vonnegut's death in 2007. Acting as Vonnegut's medium is no easy task, and McConnell's efforts yield mixed results. The brilliance of the book lies in Vonnegut's unique voice that shines through in every word he writes or utters (excerpts of his speeches are included, too). However, the Vonnegut Trust, which commissioned McConnell to write the book, allotted forty percent to her words and sixty percent to his.[2] This arrangement makes for a necessarily fragmented approach, which some critics have found distracting.[3] McConnell is left with the dilemma between exercising her own voice or trying to mimic his style. She chooses both approaches at different points in the book. Sometimes, she renders her own advice or discusses events from Vonnegut's life, which is sometimes a distraction and sometimes verges on cheerleading, or worse, worship of Vonnegut as a kind of cult hero. At other times, her "intrusions" are welcome insights into events in Vonnegut's life (like his witnessing of the bombing of Dresden, which figures prominently in his writing and world view).[4] In contrast, when McConnell chooses to mimic Vonnegut's style, the reader is sometimes confused whether the words are hers or his.

Ultimately, the book's unevenness can be forgiven because it serves as a single repository, however fragmented, of Vonnegut's most sage advice to writers that he imparted over the course of over sixty-five years in his novels, short stories, letters, essays, speeches, lectures, and even his assignments to students at the Writer's Workshop. McConnell deserves enormous credit in bringing to us this enormous haul of wisdom, and in organizing it around coherent themes. She also includes at the end of the book oodles of exercises, which she calls "practices," which are derived directly from the advice offered in each chapter. I've starred twenty-one of them that seem useful in my legal writing classroom.

So, what is the sage wisdom of which I speak, and what are the themes around which the book is organized? Well, the book's thirty-seven chapters are roughly organized around the following topics: concrete advice about the craft of writing and "style"; the emotional, spiritual experience of writing; writers as teachers (what Vonnegut called "the noblest profession");[5] the art of storytelling (mostly as it relates to fiction, but with applications to legal storytelling); and the rewards and pitfalls of choosing writing as a career (both spiritually and monetarily). Of course, each of these areas has spawned its own area of study and a cottage industry of

2 Kurt Vonnegut & Suzanne McConnell, Pity the Reader: On Writing with Style 3 (2020).

3 *Pity the Reader: On Writing with Style*, 87 Kirkus Reviews, no. 2, Oct. 15, 2019, at 71, https://www.kirkusreviews.com/book-reviews/kurt-vonnegut/pity-the-reader.

4 Vonnegut & McConnell, *supra* note 2, at 65–71.

5 *Id.* at 128.

articles in learned journals, such as this one. It is a testament to Vonnegut's brilliance that he manages to capture their essence so precisely, succinctly, and, along the way, so humorously. This is why reading his words is more inspiring, I would venture, than reading most manuals on style and grammar, fiction writing, or the like (with some notable exceptions). Here are some examples:

Writing and Style. Vonnegut is known, above all, for his minimalist, sardonic writing style. His voice is unmistakable. It speaks volumes about Vonnegut's writing style that the publisher Sam Lawrence was so enamored with Vonnegut's review of the unabridged edition of the Random House Dictionary of the English Language (yes, a review of a *dictionary*), that it swayed Lawrence to pursue a three-book contract with Vonnegut.[6] That contract resulted in Lawrence's publishing *Slaughterhouse Five*, Vonnegut's most famous novel.

So, it's unsurprising that on the subject of style, his wisdom is conveyed with flair and freshness. The book draws heavily from Vonnegut's essay, "How to Write with Style," published in 1980 as an advertisement for the International Paper Company, of all patrons. In the first paragraph of the two-page essay, Vonnegut defines "style" as "revelations [that] tell us as readers what sort of person it is with whom we are spending time."[7] Vonnegut goes on to offer seven numbered "rules," each with its own title of six or fewer words. His first, and most important, rule is "find a subject you care about."[8] Under this title, he remarks:

> It is this genuine caring, and not your games with language, which will be the most compelling and seductive element in your style. I am not urging you to write a novel, by the way . . . . A petition to the mayor about a pothole in front of your house or a love letter to the girl next door will do.[9]

It seems to me that here Vonnegut strikes at the heart of what makes some legal writing dull and lifeless, but it is rarely addressed as a "writing" problem. Of course, as legal writers, sometimes we don't have the luxury to care deeply about what we're writing, which opens a critique of the legal profession that is well outside the scope of this review. But, it seems that

6 Kurt Vonnegut & Suzanne McConnell, *Kurt Vonnegut on Making a Living as a Writer*, The Nation, Nov. 11, 2019, https://www.thenation.com/article/archive/vonnegut-writing-iowa-workshop.

7 The essay is reproduced in full on the inside of the front cover of *Pity the Reader*.

8 Vonnegut & McConnell, *supra* note 2, at 12. On a related note, he questions, "Did you ever admire an empty-headed writer for his or her mastery of the language? No." Therefore, "winning style must begin with the ideas in your head." *Id.* at inside front cover.

9 *Id.* at 12.

what we call "professionalism" is made better by Vonnegut's demand—that even the most ordinary letter or email "demands the generosity of your time, effort and thought."[10]

Another maxim, "keep it simple," is as old as the hills, but here's what Vonnegut has to say about that subject:

> As for your use of language: Remember that two great masters of language, William Shakespeare and James Joyce, wrote sentences which were almost childlike when their subjects were most profound. "To be or not to be?" asks Shakespeare's Hamlet. The longest word is three letters long. Joyce, when he was frisky, could put together a sentence as intricate and as glittering as a necklace for Cleopatra, but my favorite sentence in his short story "Eveline" is this one: "She was tired." . . . Simplicity of language is not only reputable, but perhaps sacred. The Bible opens with a sentence well within the writing skills of a lively fourteen-year-old: "In the beginning God created the heaven and the earth."[11]

The rest of Vonnegut's advice features similarly well-trodden territory with a similar wit and verve—because he cares about good writing.

The emotional and spiritual experience of writing. Vonnegut saw writing as a spiritual exercise: he says, "The primary benefit of practicing any art, whether well or badly, is that it enables one's soul to grow."[12] Once again, one can question how much this applies to the kinds of writing that legal writers do. However, given that legal writers are storytellers, often about matters that are critically important to themselves and their clients, I think it does very much. Once again, Vonnegut reinforces this point as only he can: "You should write for the same reasons you should take dancing lessons. For the same reason you should learn what fork to use at a fancy dinner. . . . It's about grace."[13]

This section of the book tracks Vonnegut's musings on mindfulness and self-care in writings that came decades before these topics' current popularity in the legal academy and our society generally. He writes of writing as a source of solace and refuge: "The artist says, 'I can do very little about the chaos around me, but at least I can reduce to perfect order this square of canvas, this piece of paper, this chunk of stone.'"[14] One could say the same of the brief writer, or the contract drafter, for that matter.

10 *Id.* at 18.

11 *Id.* at inside front cover.

12 *Id.* at 91.

13 *Id.* at 92.

14 *Id.* at 108.

Writers as teachers. Vonnegut says that all writers are, first and foremost, teachers.[15] But, in terms of classroom teaching, Vonnegut, who spent many years teaching creative writing, had much to say about what it means to be a good teacher. He held good teachers in high regard, quipping "everything I believe I was taught in junior civics during the Great Depression."[16] In a letter to one of his former students, Vonnegut had this to say about his approach to holding private conferences:

> All I did . . . was to say *Trust me*. What I'm going to do now is open your mouth, very gently, with these two fingers, and then I'm going to reach in—being very careful not to bruise your epiglottis—and catch hold of this little tape inside you and slowly, very carefully and gently, pull it out of you. It's your tape, and it's the only tape like that in the world.[17]

Again and again, his former student and "co-author" Suzanne McConnell offers up examples of Vonnegut's teaching as less about methodology and more about generosity of spirit. She says, "All he did in those classes and conferences was to trust us. He trusted that we were working out our tapes at our own pace in our own ways. And what would come, would come. Or it wouldn't."[18] Once again, Vonnegut puts his finger on what makes teachers great—that they empathize with and trust in their students. This is so whether one teaches creative writing, legal writing, golf, or knitting. It is true that teaching requires knowledge and a sure hand, and teaching methodologies surely come in handy, but at bottom, Vonnegut brings us back to what really matters.

The art of storytelling. It comes as no surprise to the readers of this journal that narrative shapes all that we humans feel and do. That is why Vonnegut devoted his life to storytelling. This section of the book devotes several chapters to matters of character and plot. But it also addresses matters, both mundane and profound, that legal writers can take to heart: the importance of paragraph breaks, that "writing takes a kind of demented patience,"[19] and the destructiveness of self-doubt, which Vonnegut calls the "third-player."[20] On the point of our sometimes harsh and demoralizing inner "judge," he says that in writing, as in the other arts, "since the game goes well only when played by two, the [writer] and the

15 *Id.* at 127.

16 *Id.* at 128.

17 *Id.* at 141.

18 *Id.* at 145.

19 *Id.* at 163.

20 *Id.* at 168.

Great Big Everything, *three's a crowd*."[21] These observations are helpful and comforting to any writer, especially beginning legal writers who are trying to find their way. One of the best chapters, entitled "Much Better Stories: Re-Vision and Revision," is replete with examples of Vonnegut's conviction that "smart, effective writing results from the sweat equity of revision."[22] In his usual, humble style, he observes, "This is what I find most encouraging about the writing trades. They allow mediocre people who are patient and industrious to revise their stupidity, to edit themselves into intelligence."[23]

So, in the end, this book not only reinforces and distills traditional ideas about what makes good writing, but it helps all of us to put the fun and humanity back into writing. For me, and for most of us, it is refreshing to go back to the simple truths that lie at the foundation of our trade. In this volume, legal writers and teachers of legal writing can, along with the broader writing community, savor Vonnegut's knack for laying bare the truths about what it means to be and write like a human being.

21 *Id.*

22 *Id.* at 280.

23 *Id.*

BOOK REVIEW

Breadth before Depth

Range: Why Generalists Triumph in a Specialized World
David Epstein (Riverhead Books 2019), 339 pages

Jessica Lynn Wherry, rev'r*

Range opens with the familiar (to me) story of Tiger Woods and the less familiar (to me) story of Roger Federer.[1] The book highlights two different stories about highly successful professional sports figures. Tiger's interest in golf began before age one and he specialized by age three. Roger specialized as a teenager after participating in various sports other than tennis during a "sampling period."[2]

Books about sports are not my typical read and I wondered whether to keep reading. But then the author, David Epstein, mentions working with military veterans—in particular, Pat Tillman Scholars. As a veteran myself, I was intrigued by Epstein's experience with these veterans who were embarking on a career change, leaving the military behind, and transitioning into a new field via college or graduate school. Epstein explains that many in this audience were "late specializers or career changers," and that they expressed concern over their circuitous paths.[3]

In preparing for these talks with veterans, Epstein learned that the early versus late specialization has applicability beyond sports. He offered the veterans some comfort by explaining that avoiding early specialization through their military service was actually a positive and by reframing their non-linear paths as "a unique advantage"[4] built on "inimitable life and leadership experiences."[5] Though the stories about sports sensations

* Professor of Law, Legal Practice, Georgetown Law. Thank you to Rick Schurr for the tip that led me to read *Range*, and to Nantiya Ruan and Kent Streseman for their help during the editing process.

1 David Epstein, Range: Why Generalists Triumph in a Specialized World 1 (2019). The very first line: "Let's start with a couple of stories from the world of sports." *Id.*

2 *Id.* at 7.

3 *Id.* at 10.

4 *Id.*

5 *Id.*

Tiger and Roger were interesting, the discussion about the Pat Tillman Scholars hooked me. Not only were these examples not about sports, but I have had the pleasure of teaching Pat Tillman Scholar Ashley Nicolas at Georgetown Law. With this connection, I was interested to read more.[6]

As lawyers, judges, legal scholars, and other legal communication audiences, you will likely find something of interest that is relevant to your own work as writers and communicators, even if your interests don't include sports and veterans. The book, as you might expect, includes a broad range of examples involving music, science, education, and technology. You'll recognize many of the examples and broaden your understanding through new stories or greater context for the stories you thought you knew.

Epstein's thesis is that specializing too soon has opportunity costs and there is value in intentional breadth and diverse experience. Specialization should only come after diverse experience, and with specialization, there is room for range to make the specialization even more valuable. The thesis applies to sports, but only as a starting point. There is a broader relevance to this world "that increasingly incentivizes, even demands, hyperspecialization."[7] We need conceptual understanding that can be applied to new areas rather than overreliance on narrow procedures. Acknowledging that sometimes the Tiger model is the right or best model does not undermine the value of the Roger model—"people who start broad and embrace diverse experiences and perspectives while they progress. People with range."[8]

The book proceeds in twelve chapters, the first two setting up how we became convinced of the need to specialize and defining the kind (predictable and fairly simple) and wicked (unpredictable and more complex) worlds. In a "kind world," specialization works because there are patterns. Once familiar with the patterns, decisionmaking is governed by the boundaries. For example, in golf, chess, and firefighting, "a learner improves simply by engaging in the activity and trying to do better."[9] Specialization is a strength in kind environments because of the patterns. A "wicked" environment, on the other hand, may be boundless. "[T]he rules of the game are often unclear or incomplete, there may or may not be repetitive patterns and they may not be obvious, and feedback is often delayed, inaccurate, or both."[10] In these wicked environments, siloed

6 On a personal note, I was also interested because I am a veteran and have found myself explaining my circuitous path toward my career in law teaching and scholarship. Thanks to Epstein, I now understand that I've tried to justify or explain away things that are actually unique strengths! *Id.*

7 *Id.* at 13.

8 *Id.* at 14.

9 *Id.* at 21.

10 *Id.*

experience fails by focusing on procedures and patterns when conceptual application is needed. Success in the wicked world requires "conceptual reasoning skills that can connect new ideas and work across contexts."[11]

Chapters 3 through 10 develop the parameters of the kind and wicked worlds and offer examples that support range over specialization. For example, Chapter 6, "The Trouble with Too Much Grit," explores how committing to something despite not enjoying it or being bad at it gets in the way of learning and growth. Grit makes people want to stick it out; never quit. But Epstein explains that quitting can be good.[12] As one example in Chapter 6, Epstein discusses the many failures of Vincent Van Gogh—he failed as a "student, an art dealer, a teacher, a bookseller, a prospective pastor, and an itinerant catechist."[13] He dabbled in drawing and painting. All of his experience—and failures—added up to the moment he discovered he loved painting and started experimenting with new techniques. Had he committed to any one of the previous vocations out of a pure no-quit attitude, he would not have had the opportunity to discover his own style of painting.

Chapter 6 also uses the Army as an example to demonstrate the flawed model of persistence at all costs.[14] Epstein describes Angela Duckworth's study intended "to predict which incoming freshmen would drop out of the U.S. Military Academy's basic-training-cum-orientation, traditionally known as 'Beast Barracks.'"[15] Duckworth's study determined that the "the Whole Candidate Score—an agglomeration of standardized test scores, high school rank, physical fitness tests, and demonstrated leadership" used for admission decisions was "useless in predicting" who would quit.[16] The likelihood of quitting was instead associated with grit, measured as "work ethic and resilience" and "knowing exactly what one wants."[17] In discussing the results, Epstein asks "whether dropping out might actually be a good decision."[18] Relying on input from Beast alums, Epstein suggests that for some of the cadets who dropped out during Beast, they were not failures. Instead, these dropouts realized they were not a good fit for the Army; they determined that their abilities or

11 *Id.* at 53.

12 *Id.* at 132.

13 *Id.* at 124.

14 In this example, I experienced a first: one of my former Georgetown Law students, Pat Tillman Scholar Ashley Nicolas, was quoted in the book! *Id.* at 134, 139.

15 *Id.* at 132.

16 *Id.* at 133.

17 *Id.*

18 *Id.* at 135.

interests were not a match, and so they left. Even though quitting Beast suggested less grittiness in Duckworth's study, Epstein's point is that the decision to quit was a success, reflecting persistence in finding a better fit.

In the final chapters of the book, Epstein offers some approaches to building range over specialization. In Chapter 11, Epstein discusses the *Challenger* disaster. Many readers likely have an indelible memory of watching the Challenger explode while sitting in a classroom, making the discussion here particularly compelling and painful. Through the lens of how specialization can be limiting—and deadly—Epstein explains how NASA's overreliance on quantitative analysis led to the decision to go forward with the launch. There was other information available "that could have helped NASA avert disaster."[19] That information "was not quantitative" and therefore ignored.[20] Shedding light on how specialization can result in disaster is a tangible example of what Epstein suggests we do: drop, reimagine, or repurpose familiar tools so as to competently "navigate an unfamiliar challenge."[21]

So, why should lawyers, judges, legal scholars, and other legal communication audiences read *Range*? For affirmation, inspiration, or disruption—or, if you're lucky, all three.

If you have a circuitous path behind you or are in the midst of one, you can feel confident that those varied experiences are adding up to unique strengths. Instead of trying to justify why you did something that seems inconsistent with your current career or scholarship, think about how that experience adds to your perspective. You can also affirm your decision to quit something that was not a good fit and subsequently changing jobs or employers to find a better fit.[22] This perspective could also be helpful to law students stressing about committing to and following a particular career path while still a law student when the reality is there are many paths to success and many ways to define success.

Range can also serve to inspire you to broaden your experience or get better at something by trying other things. Read articles that are outside of your interest area.[23] Doing so creates opportunities to see broader themes or apply by analogy one area to another. Seek some experience in an area of law that is new to you, perhaps through pro bono work.

19 *Id.* at 243.

20 *Id.*

21 *Id.* at 250.

22 *Id.* at 131.

23 *Id.* at 282 (quoting MD-PhD Arturo Casadevall: "'I always advise my people to read outside your field, everyday something. And most people say, "Well, I don't have time to read outside my field." I say, "No, you do have time, it's far more important." Your world becomes a bigger world, and maybe there's a moment in which you make connections.'").

Take up a hobby. For many people, the circumstances surrounding the pandemic created an opportunity—if forced—to try new things. Those new things may add up to improvements in other areas, as suggested by the data connecting scientific brilliance and broad interests in creative areas outside science.[24]

There's also an engaging sense of disruption in reading *Range*, realizing that what you thought you knew or understood about something is incomplete or even wrong. One of the most disrupting parts of the book for me was reading about analogical thinking and realizing I have been doing it, thinking about it, and teaching it in a too circumscribed manner. Analogical thinking is more than comparing precedent to new facts to justify a conclusion. It "takes the new and makes it familiar, or takes the familiar and puts it in a new light, and allows humans to reason through problems they have never seen in unfamiliar contexts. It allows us to understand that which we cannot *see* at all."[25]

In line with Epstein's example-filled book, take my experience as an example—I read *Range*, a book outside my scholarly area (and even outside my interest as a voracious reader of fiction and nonfiction), and it's had a significant impact on how I am thinking about reading, writing, lawyering, law teaching, and advising students on careers. I'm thinking that I can read more broadly as I continue to develop my scholarship. I can find concepts in other areas of law and even other subject areas and use those to engage more deeply with my own writing. I can look outside the group of scholars who write in "my area," and try to write outside my area as a way to encourage broader thinking. This book review, in fact, is an example of me expanding my range!

Lawyers should consider switching jobs, trying new practice areas, or just trying new techniques, to expand their understanding of effective concepts of law practice. Advocates might want to consider incorporating some of the concepts demonstrated in Amanda Gorman's inauguration poem[26] by using rhythm, pacing, and cadence to better tell their clients' stories.[27] There is value in taking a "meandering path,"[28] and we should encourage that for the overall strengthening of the legal profession.

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24 *Id.* at 32–33 ("Scientists and members of the general public are about equally likely to have artistic hobbies, but scientists inducted into the highest national academies are much more likely to have avocations outside of their vocation.").

25 *Id.* at 103.

26 Amanda Gorman, The Hill We Climb: An Inaugural Poem for the Country (2021).

27 See, even this list of things we might do demonstrates how *Range* has broadened my thinking. I've been a lawyer for sixteen years and a law professor for fifteen years. It has never occurred to me to look to poetry for ideas about how to strengthen advocacy. Acutely aware of the limits of specialization as I was midway through *Range* on Inauguration Day, I was struck by how many concepts exist around us just waiting to be applied in a new context.

28 Epstein, *supra* note 1, at 153.

In advising students about career paths, I now want to talk to them about the possible myths of "demonstrating an interest" to be able to get a job. For years, I've heard and repeated the advice that goes something like this, "If you want a public interest job, you've got to demonstrate your commitment to public interest on your resume." In other words, before you get your first public interest law job, you need to have had one already. But, based on my reading of *Range*, I think I want to encourage students to use their "non-demonstrative" resume to their advantage, by identifying their diversity of experience as a value-add rather than a dealbreaker. And employers may want to similarly reassess their views on hiring students who may have specialized too early by intentionally seeking candidates with diverse experiences, even when there may be an apparent conflict between a former career and the prospective position.

I encourage you, even if you decide not to read this book, to do something outside your norm and expand your range. Epstein recently expanded his range of experience by taking over the former "How To! With Charles Duhigg" podcast. In announcing this new project, Epstein describes it as "a generative experiment," that can teach him "more about [his] own strengths, weaknesses, and interests."[29] It's just the kind of experiment *Range* suggests we all try.

29 David Epstein, *Some Personal News: I'm a Podcast Host!*, The Range Report, Jan. 26, 2021, https://davidepstein.com/some-personal-news-im-a-podcast-host-2/.

BOOK REVIEW

Understanding Misogyny

Down Girl: The Logic of Misogyny
Kate Manne (Oxford Univ. Press 2018), 362 pages

Pamela A. Wilkins, rev'r*

Down Girl[1] opens with strangulation and closes with the 2016 presidential election. Nestled between these unsettling bookends is a bracing philosophical exploration of misogyny: what it is and isn't, its social functions, its relationship to sexism, and its relationship to dehumanization. The book even explores some of misogyny's specific manifestations in our culture.

If only this book had existed when I began teaching legal writing.

The phenomenon of gendered second-class status is all too familiar to teachers of legal writing both past and present. Most of us entered the legal academy from the world of practice, where we enjoyed status, respect, a presumption of competence. We knew the skills we would be teaching are as—or more—important to our students' professional lives (not to mention to their clients' interests) as anything else they learn in law school. Some of us had even earned PhDs in related fields—rhetoric, writing, etc. And all of us were smart, competent, curious, and eager to contribute to the intellectual culture of our institutions and the legal academy.

And then we learned our (gendered, all too gendered) place.

Former federal prosecutor, Georgetown Law professor, and public intellectual Paul Butler has said that he became a Black man by virtue of his arrest and prosecution for a crime he didn't commit.[2] Wrongful arrest and prosecution is several orders of magnitude worse than being a second-class citizen at a workplace of highly educated, highly privileged

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1 Kate Manne, Down Girl: The Logic of Misogyny (2018).

2 Oliver Laughland, *Q & A with Paul Butler*, The Guardian, Aug. 11, 2017, https://www.theguardian.com/us-news/2017/aug/11/chokehold-book-paul-butler-us-police-african-americans.

professionals. The experiences aren't in the same league. That said, a strained analogy still holds: at least as regards the workplace, all too many of us became women by virtue of teaching legal writing at American law schools.

Down Girl: The Logic of Misogyny gives us tools to name and understand not only our experiences in the legal academy but also experiences similar at their core but far more pernicious in their impact. Its author, Kate Manne, is a philosophy professor at Cornell University whose research focuses on moral, feminist, and social philosophy,[3] and *Down Girl* is the first book-length analytical feminist treatment of misogyny.[4] Although the book isn't a quick and easy read—don't take it to the beach—its careful, systematic argument rewards patient readers. The bottom line: *Down Girl* is a tour de force.

The book is both deeply ambitious and expressly cabined. Manne provides a *general* account of the logic of misogyny, meaning one that applies across cultures and social groups—an ambitious effort, to say the least. She knows such generalization is a fraught topic, given (among other things) the history of white women's feminism,[5] and she also acknowledges that a "limiting factor for [her] authority is [her] own (highly privileged) social position and the associated epistemic standpoint or vantage point."[6] Nonetheless, she undertakes to provide a "conceptual skeleton" that can be filled in by those "with the relevant epistemic and moral authority to do so, should they so choose."[7] Differently put, her theory "explicitly builds in space"[8] for intersectional insights and provides room "for detailed, substantive accounts of misogyny as they affect particular groups of girls and women."[9]

Manne expressly limits her argument in several ways,[10] but, for the sake of this review, one limitation is key: she "concentrate[s] largely on moral *diagnosis*, or getting clear on the *nature* of misogyny."[11] She's not interested in making "characterological judgments, and effectively putting people on trial,"[12] in part because she views "an obsessive focus with

3 *Kate A. Manne*, Cornell Univ., https://philosophy.cornell.edu/kate--manne (last visited Feb. 13, 2021).

4 Manne, *supra* note 1, at xiv.

5 As Manne points out, "Middle-class white women (in particular) have rightly been criticized for doing feminism in ways that illicitly over-generalize, even universalize, on the basis of our own experiences." *Id.* at 14.

6 *Id.* at 12.

7 *Id.* at 13.

8 *Id.*

9 *Id.* at 12.

10 Manne expressly omits any discussion of transmisogyny, not because she considers the issue unimportant, but because she lacks "the requisite authority to do so." *Id.* at 24.

11 *Id.* at 28.

12 *Id.*

individual guilt and innocence" as a counterproductive form of moral narcissism.[13] She also eschews any discussion of solutions to misogyny, noting that "combating misogyny is likely to be a messy, retail business that permits few wholesale answers."[14]

So what is Manne's argument? A full explanation is beyond the scope of this review, but her core arguments focus on the following points.

Rejection of misogyny as a psychological construct. First, she rejects what she calls the "naïve conception" of misogyny.[15] The naïve conception—the likely dictionary definition[16]—posits that misogyny is the hatred of women *qua* women, and that a misogynist's attitudes "are held to be caused or triggered merely by his representing people as women . . . , and on no further basis specific to his targets."[17] Under this view, the misogynist's attitudes toward women will "trigger his hostility in most, if not all, cases."[18]

But Manne argues the naïve conception falls woefully short. Among other things, "what lies behind an individual agent's attitudes, as a matter of deep or ultimate psychological explanation, is frequently inscrutable,"[19] which "threaten[s] to make misogyny epistemically inaccessible,"[20] and, therefore, conceptually irrelevant. Moreover, Manne argues that misogyny under the naïve conception would be rare rather than common in a highly patriarchal society, when one would expect patriarchy to be fertile ground for misogyny. Why would that be? As Manne explains,

> [T]o see why misogyny would be rare within a patriarchal setting if the naïve conception of misogyny and misogynists is accepted, consider: Why would any given man in a typical patriarchal setting have a problem with women universally, or even very generally, regardless of their relations? On the contrary, we would expect even the least enlightened man to be well-pleased with some women, that is, those who amicably serve his interests. It is not just that being hostile toward these women would be doubly problematic, in being both interpersonally churlish and morally objectionable. It is that it would be highly *peculiar*, as a matter

13 *Id.*

14 *Id.* at 29.

15 *See id.* ch. 1.

16 Manne's analysis rests on "three different approaches [within social philosophy] to 'what is x?'-style questions": (1) conceptual projects that examine our ordinary idea of *x*; (2) descriptive projects that investigate the extension of a term; and (3) ameliorative projects that try "to formulate a concept that best suits the *point* of having such a term." *Id.* at 41–42. A detailed discussion of these approaches is beyond the scope of this review.

17 *Id.* at 32.

18 *Id.*

19 *Id.* at 43.

20 *Id.* at 43–44.

> of basic moral psychology. *To put the problem bluntly: when it comes to the women who are not only dutifully but lovingly catering to his desires, what's to hate, exactly?*[21]

For these and other reasons, Manne dismisses the naïve conception of misogyny.

Misogyny as a mechanism for "policing" compliance with patriarchal norms. Second, after dismissing the naïve conception, Manne posits a different conception. Under Manne's ameliorative proposal,[22] misogyny "should be understood as the 'law enforcement' branch of a patriarchal order, which has the overall function of *policing* and *enforcing* its governing ideology."[23] It is "whatever hostile force field forms part of the backdrop to her actions, in ways that differentiate her from a male counterpart (with all else being held equal)."[24] The specific norms of any particular patriarchal order may vary: patriarchal norms in, say, Iceland may differ from those in Afghanistan, just as those in a philosophy department may differ from those in an economics department. Similarly, the policing or enforcement mechanisms—"down girl" moves that keep someone in her place[25]—may vary widely:

> [M]isogynist hostility can be anything that is suitable to serve a punitive, deterrent, or warning function, which . . . may be anything aversive to human beings in general, or the women being targeted in particular. . . . As well as infantilizing and belittling, there's ridiculing, humiliating, mocking, slurring, vilifying, demonizing, as well as sexualizing or, alternatively, *desexualizing*, silencing, shunning, shaming, blaming, patronizing, condescending, and other forms of treatment that are dismissive and disparaging in specific social contexts. Then there is violence and threatening behavior . . . .[26]

Under this view, the practice of acid attacks against women in Bangladesh, commonly motivated by a woman's rejection of a relationship with a man, is misogynistic;[27] so too were Rush Limbaugh's radio riffs about Georgetown Law student Sandra Fluke.[28]

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21 *Id.* at 47 (final emphasis added).

22 *See supra* note 16.

23 Manne, *supra* note 1, at 63.

24 *Id.* at 19.

25 *See id.* at 68.

26 *Id.* at 67–68.

27 *See id.* at 72–73 (describing the rationale and social function of acid attacks in Bangladesh).

28 *See id.* at 55–57 (describing the rationale and social function of Limbaugh's statements referring to Sandra Fluke as a "slut" by reason of her advocacy for required coverage of birth control in health insurance policies).

Relationship of misogyny to sexism. Manne's third major argument focuses on the distinction between misogyny and sexism. Both form part of a patriarchal order, but their functions differ. If misogyny serves to police and enforce compliance with patriarchal norms, sexism justifies these norms: "[S]exism should be understood primarily as the 'justificatory' branch of a patriarchal order, which consists in ideology that has the overall function of rationalizing and justifying patriarchal social relations."[29]

It often seeks to accomplish such justification by alleging or naturalizing sex differences "beyond what is known or could be known, and sometimes counter to our best current scientific evidence."[30]

Relationship of misogyny to dehumanization. Manne's fourth major argument surprised me. Most of us have heard the old saying that "feminism is the radical notion that women are people,"[31] and that misogyny stems from a (sometimes mild, sometimes extreme) form of dehumanization. Manne disagrees. Her argument on this issue is involved, but she posits that much misogyny presupposes the humanity of its target. In fact, a target may be singled out for misogynistic punishment for withholding uniquely human goods. If she is regarded as "*owing* her human capacities [service labor, love, loyalty, etc.] to particular people,"[32] her failure to provide these supposed entitlements may trigger misogynistic reactions. But her humanity is never in doubt.

Manne further observes that recognizing someone's humanity *may* lead to empathy, but it may also lead to hostility. "[O]nly another human being can sensibly *be* conceived as an enemy, a rival, a usurper, an insubordinate, [or] a traitor,"[33] and given that, "[m]any of the nastiest things that people do to each other seem to proceed in full view of . . . shared or common humanity."[34]

Down Girl's satisfactions extend well beyond a careful, thought-provoking (and to me compelling) argument. My summary of her conclusions cannot do justice to Manne's careful, methodical articulation of her argument. The book is replete with examples, with full discussions of counterarguments and competing positions, with qualifications of her own position. Even those who disagree with Manne's conclusions must wrestle with her weighty arguments.

29 *Id.* at 79.

30 *Id.*

31 This statement is attributed to Marie Shear. *See Marie Shear*, Wikipedia, https://en.wikipedia.org/wiki/Marie_Shear (last edited Dec. 12, 2020, 11:00 PM).

32 Manne, *supra* note 1, at 173–74.

33 *Id.* at 152.

34 *Id.* at 148–49.

Another pleasure of the book lies in its metaphors and word play. I read *Down Girl* on a Kindle and found myself highlighting materials constantly. My two personal favorites: (a) the term *himpathy* (coined by Manne's husband), referring to the "excessive sympathy sometimes shown toward male perpetrators of sexual violence"[35] or other wrongdoing; and (b) in describing the difference between sexism and misogyny, "[s]exism wears a lab coat; misogyny goes on witch hunts."[36]

Down Girl has begun to make its way into legal scholarship but merits far more engagement within the legal academy. Two potential points of engagement stand out. First, as noted above, for those of us in (historically) pink ghettos within the legal academy, *Down Girl* gives us a new language and lens for understanding our experiences, which (at least in my experience) reduces the likelihood we will internalize any sense of second-class status. Second, in her argument, Manne outlines a series of "down girl" moves, meaning moves designed to keep people in their place. For those interested in rhetoric, metaphor, and storytelling, an analysis of "down girl" moves in judicial opinions and briefs—in subjects ranging from family law to employment discrimination to equal protection—would allow scholars and practitioners to rethink the assumptions that undergird many of our doctrines. But these two points of engagement represent only a beginning. For any scholar interested in issues of gender, reading *Down Girl* will generate new insights, new questions, and new frames for understanding familiar problems. Highly recommended.

35 *Id.* at 197.

36 *Id.* at 80.

Visual Legal Writing

A Bibliography

Ellie Margolis*

I. Introduction

As those who teach legal writing know, there is more to writing than words on a page, spelling, grammar, and syntax. (And, as someone once asked me, it is not about penmanship). As scholars in the field of legal writing, we have explored different types of legal documents,[1] and studied the art (and science) of persuasion,[2] storytelling and narrative theory,[3] and rhetoric theory.[4] While there has always been a visual component to legal writing, the digital revolution opened wider possibilities, and scholars turned their eye toward exploration of visual aspects of legal writing.

For most of the twentieth century, the visual aspect of legal writing was fairly static. Produced largely on typewriters, lawyer-written documents were linear and text based, with little variation in appearance. While lawyers gave an occasional nod towards graphic representation by including charts or diagrams, for the most part legal documents contained only words. Constraints imposed by the limits of technology precluded incorporating visual elements on a widespread basis. Toward the end of the twentieth century, as personal and office computers became more available, and word-processing programs became more sophisticated,

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1 Carrie W. Teitcher, *Legal Writing Beyond Memos and Briefs: An Annotated Bibliography*, 5 J. ALWD 133 (2008).

2 Kathryn Stanchi, *Persuasion: An Annotated Bibliography*, 6 J. ALWD 75 (2009).

3 J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 Legal Comm & Rhetoric 247 (2015).

4 Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 J. ALWD 129 (2006).

lawyers started paying more attention to the appearance of document design—fonts and the like—and the number of visual elements in legal writing began to increase.

As we have moved further into the twenty-first century, communication has become increasingly visual, using memes, emojis, video, and other visual forms to share thoughts, ideas, and feelings. While lawyers haven't embraced images to such a degree in legal writing, it is increasingly common to see lawyers incorporate visual elements into the documents they create. Many academics have turned their eye toward understanding more about how visual elements affect written communication and assessing when it is effective.

This bibliography attempts to capture the growing body of scholarship related to visual aspects of legal writing. As a relatively new area of study, the number of books and articles is smaller than other more well-developed topics of legal writing scholarship, yet enough has been written about this subject to warrant collection and consideration. I was able to identify 68 works, included here, and there are undoubtedly some that I missed. My goal is that this bibliography will serve as a valuable resource for scholars delving into the subject for the first time, as well as practicing lawyers looking for guidance on different aspects of including visual elements into their own legal writing. And I particularly hope the bibliography will be of use to those scholars looking to develop their own new and exciting work on the exploration of visual legal writing.

II. The bibliography

Scholarship on visual aspects of legal writing is still developing, so I have erred on the side of inclusion in selecting works to include in this bibliography. Because the use of visual elements in legal writing is a relatively new concept, many works, both long and short, address the "how to" of incorporating visual elements into writing. Others focus more on "why" incorporating visual elements is a good (or bad) idea. Some scholars have taken on the difficult work of theorizing visuals and the role they play in communication. I cast a wide research net to gain a wholistic sense of the issues lawyers and scholars have tackled in their exploration of visual aspects of legal writing.

Nonetheless, there are limits on what I have included here. While the use of visual images in legal documents is relatively recent, the use of visual evidence in the courtroom has been around for centuries.[5]

5 Lucille A. Jewel, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 S. Cal. Interdisc. L.J. 237, 240–41 (2010).

Numerous articles address the use of visual images in trial advocacy. While some of those may touch on issues relevant to the use of visuals in writing, this bibliography focuses on works that address written communication and theoretical works relevant to that topic. In keeping with the mission of *Legal Communication & Rhetoric*, I have similarly omitted articles discussing the role of images in understanding substantive law and those that focus on visual images as a tool for pedagogy.

In choosing what to include and exclude, I have inevitably made errors in judgment, and it is possible that despite extensive research, I have omitted works that should have been included, and for that I take full responsibility.

The bibliography is organized into broad categories. It is impossible to draw clear lines with many of these pieces, and many of the books and articles could likely fit into more than one category. I tried to group works with broad strokes, rather than having a large number of precise categories with only one or two articles in each. The categories are based either on the type of visual mode involved (typography, image), practice area (appellate, transactional), or theoretical use of images. In the big picture, I hope the bibliography shows which areas are more fully explored and which still have much room for more development.

A. Document design and typography

Since documents are the coin of the realm, both in law practice and legal academia, it is no surprise that scholars have turned an eye towards understanding the visual aspects of the written word. The experience of the reader is a paramount consideration for legal writers, and as the profession transitions from paper to electronic files, numerous issues arise relating to how visual aspects of the document affect that experience. A significant number of articles and books address this topic, ranging from articles exploring the brain science behind readability to concrete identification of best practices regarding typography and navigation of electronic documents. Some of these works touch on the broader topic of Legal Design, a growing field in its own right, and I have included them here when they touch on issues relevant to document design in legal writing.

Articles

Mary Beth Beazley, *Hiding in Plain Sight: "Conspicuous Type" Standards in Mandated Communication Statutes*, 40 J. Legis. 1, 31–35 (2014).

Gerlinde Berger-Walliser, Thomas D. Barton & Helena Haapio, *From Visualization to Legal Design: A Collaborative and Creative Process*, 54 Am. Bus. L.J. 347 (2017).

Maria Perez Crist, *The E-Brief: Legal Writing for an Online World*, 33 N.M. L. Rev. 49 (2003).

Bryan A. Garner, *Pay Attention to the Aesthetics of Your Pages*, 89 Mich. B.J., Mar. 2010, at 42.

R. Lainie Wilson Harris, *Ready or Not Here We E-Come: Remaining Persuasive Amidst the Shift towards Electronic Filing*, 12 Legal Comm. & Rhetoric 83 (2015).

Peter M. Mansfield, *Citational Footnotes: Should Garner Win the Battle Against the In-Line Tradition?*, 19 Appalachian J.L. 163 (2019–2020).

Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, 12 Legal Comm. & Rhetoric 1 (2015).

Ruth Anne Robbins, *Conserving the Canvas: Reducing the Environmental Footprint of Legal Briefs by Re-imagining Court Rules and Document Design Strategies*, 7 J. ALWD 193 (2010).

Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. ALWD 108 (2004).

Mark Sableman, *Typographic Legibility: Delivering Your Message Effectively*, 17 Scribes J. Legal Writing 9 (2017).

Books

Matthew Butterick, Typography for Lawyers (2d ed. 2015).

Elizabeth Fajans, Mary R. Falk & Helene S. Shapo, Writing for Law Practice: Advanced Legal Writing (3d ed. 2015).

Bryan A. Garner, Legal Writing in Plain English (2d ed. 2013).

Bryan A. Garner, The Redbook: A Manual on Legal Style (4th ed. 2018).

Joyce J. George, Judicial Opinion Writing Handbook (5th ed. 2007).

Mark P. Painter, The Legal Writer (3d ed. 2005).

Wayne Schiess, Preparing Legal Documents Nonlawyers Can Read and Understand (2008).

B. Images

Writing does not get more visual than when it includes actual images. Images are a powerful tool to convey meaning, especially in our

increasingly visual society. While the inclusion of images in traditional legal writing has been slow compared to the proliferation of images in other written media, lawyers have increasingly adopted the practice. The use of images in legal writing has invited scholarly attention to the rhetorical role of images in legal communication, as well as the complex ethical issues involved.

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

Michael D. Murray, *The Ethics of Visual Legal Rhetoric*, 13 Legal Comm. & Rhetoric 107 (2016).

Michael D. Murray, *Mise en Scène and the Decisive Moment of Visual Legal Rhetoric*, 68 U. Kan. L. Rev. 241 (2019).

Michael D. Murray, *The Sharpest Tool in the Toolbox: Visual Legal Rhetoric*, 68 J. Legal Educ. 64 (2018).

Elizabeth G. Porter, *Taking Images Seriously*, 114 Colum. L. Rev. 1687 (2014).

Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 Harv. L. Rev. 683 (2012).

C. Legal analysis

Communicating legal analysis is at the heart of legal writing. Whether the goal of a piece of writing is to convince a judge or advise a client, it must clearly set out the analysis in a way the reader can understand and follow. Because law has traditionally been text-based, so too has legal analysis. Yet the visual aspect of writing has always played a role, and in our increasingly visual and digital world, that is more the case than ever. This group of articles focuses on the way that the use of visual techniques ranging from sentence diagramming to flow charts affect the substance and communication of legal analysis.

Kristen K. Davis, "*The Reports of My Death Are Greatly Exaggerated": Reading and Writing Objective Legal Memoranda in a Mobile Computing Age*, 92 Or. L. Rev. 471 (2013).

Rossana Ducato, Editorial, *De Iurisprudentia Picturata: Brief Notes on Law and Visualization*, 7 J. Open Access L. 1 (2019).

James Durling, Comment, *Diagramming Interpretation*, 35 Yale J. Reg. 325 (2018).

Lisa Eichhorn, *Old Habits: Sister Bernadette and the Potential Revival of Sentence Diagramming in Written Legal Advocacy*, 13 Legal Comm. & Rhetoric 79 (2016).

Derek H. Kiernan-Johnson, *Telling Through Type: Typography and Narrative in Legal Briefs*, 7 J. ALWD 87 (2010).

Michael D. Murray, *Leaping Language and Cultural Barriers with Visual Legal Rhetoric*, 49 U.S.F. L. Rev. 61 (2014).

Michael D. Murray, *Visual Rhetoric: Topics of Invention and Arrangement and Tropes of Style*, 21 Legal Writing 185 (2016).

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

D. Rhetoric and persuasion

Several scholars have done the important theoretical work of considering how visual rhetoric affects thinking, exploring concepts such as visual literacy and the ways that both images and document design affect legal analysis. These works go to the heart of understanding visual communication. While these works are an excellent beginning, this is an area rich for further scholarly exploration.

Articles

Lucille A. Jewel, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 S. Cal. Interdisc. L.J. 237 (2010).

Ticien Marie Sassoubre, *Visual Persuasion for Lawyers*, 68 J. Legal Educ. 82 (2018).

Richard K. Sherwin, Neal Feigenson & Christina Speisel, *Law in the Digital Age: How Visual Communication Technologies Are Transforming the Practice, Theory, and Teaching of Law*, 12 B.U. J. Sci. & Tech. L. 227 (2006).

Books

Neal Feigenson & Christina Spiesel, Law on Display: The Digital Transformation of Legal Persuasion and Judgment (2009).

Karen Petroski, Visual Legal Commentary, in Anne Wagner & Richard K. Sherwin, Law, Culture and Visual Studies 671 (2014).

Michael R. Smith, Advanced Legal Writing: Theories and Strategies in Persuasive Writing 30 (3d ed. 2012).

E. Appellate practice

The appellate brief is likely what most lawyers and law students think of when asked to picture legal writing. Appellate court decisions are the focus of legal education, and appellate lawyers are often considered among the elite of legal practitioners. Thus, although the use of visuals occurs in all types of legal writing, many scholars have explored their use in the appellate context. These articles span considerations of typography, rhetoric, and ethics.

Articles

Mary Beth Beazley, *Writing (and Reading) Appellate Briefs in the Digital Age*, J. App. Prac. & Process 47 (2014).

Mary Beth Beazley, *Writing for a Mind at Work: Appellate Advocacy and the Science of Digital Reading*, 54 Duq. L. Rev. 415 (2016).

Hampton Dellinger, *Words Are Enough: the Troublesome Use of Photographs, Maps, and Other Images in Supreme Court Opinions*, 110 Harv. L. Rev. 1704 (1997).

Arno H. Denecke, James H. Clarke & Philip A. Levin, *Notes on Appellate Brief Writing*, 51 Or. L. Rev. 351 (1972).

Nancy S. Marder, *The Court and the Visual: Images and Artifacts in U.S. Supreme Court Opinions*, 88 Chi-Kent L. Rev. 331 (2013).

Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts—One Judge's View*, 51 Duq. L. Rev. 3, 12–13 (2013).

Leah A. Walker, *Will Video Kill the Trial Courts' Star? How "Hot" Records Will Change the Appellate Process*, 19 Alb. L.J. Sci. & Tech. 449 (2009).

Michael Whiteman, *Appellate Court Briefs on the Web: Electronic Dynamos or Legal Quagmire?*, 97 Law Libr. J. 467 (2005).

Books

Bryan A. Garner, The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts 403–55 (3d ed. 2014).

Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges 136 (2008).

F. Transactional and other non-litigation writing

The term "legal writing" usually calls to mind the memos and briefs that most law school writing courses focus on, and that lawyers write in the process of representing clients in litigation. Yet there is a whole world of writing outside of this context—contracts, compliance documents, estate planning documents, and beyond. Lawyers drafting these types of documents frequently use visual elements. A number of excellent articles and books address issues of visual communication in this category of writing.

Articles

Thomas D. Barton, Gerlinde Berger-Walliser & Helena Haapio, *Visualization: Seeing Contracts for What They Are, and What They Could Become*, 19 J.L. Bus. & Ethics 47 (2013).

Mary Beth Beazley, *Ballot Design as a Fail-Safe: An Ounce of Rotation Is Worth a Pound of Litigation*, 12 Election L. J. 18 (2013).

Collette R. Brunschwig, *Contract Comics and the Visualization, Audio-Visualization, and Multisensorization of Law*, 46 U.W. Austl. L. Rev. 191 (2019).

Margaret Hagan, *User-Centered Privacy Communication Design*, Proceedings of the Symposium on Usable Privacy and Security (SOUPS) 2016, June 22, 2016, https://law.stanford.edu/publications/user-centered-privacy-communication-design/.

Stephen R. Miller, *The Visual and the Law of Cities*, 33 Pace L. Rev. 183 (2013).

Jay A. Mitchell, *Putting Some Product into Work-Product: Corporate Lawyers Learning from Designers*, 12 Berkeley Bus. L.J. 1 (2015).

Jay A. Mitchell, *Whiteboard and Black-Letter: Visual Communication in Commercial Contracts*, 20 U. Pa. J. Bus. L. 815 (2018).

Stefania Passera, *Flowcharts, Swimlanes, and Timelines: Alternatives to Prose in Communicating Legal-Bureaucratic Instructions to Civil Servants*, 32 J. Bus. & Tech. Comm. 229 (2018).

Sefania Passera, Anne Kankaanranta & Leena Louhiala-Salminen, *Diagrams in Contracts: Fostering Understanding in Global-Business Communication*, 60 IEEE Transactions on Prof. Comm. 118 (2017).

Genevieve B. Tung & Ruth Anne Robbins, *Beyond #thenew10—The Case for a Citizens Currency Advisory Committee*, 69 Rutgers U. L. Rev. 195 (2016).

Books

George W. Kuney & Donna C. Looper, Legal Drafting in a Nutshell (4th ed. 2016).

Richard K. Neumann & J. Lyn Entrikin, Legal Drafting by Design: A Unified Approach (2018).

G. Short works

While the focus of this bibliography is scholarly works, the use of visuals in legal writing is highly relevant to practicing attorneys, so I have included shorter works aimed at that audience. There are more entries in bar journals and other publications aimed at the practicing bar than I could possibly include, so I have chosen to highlight those pieces that are particularly useful and/or are written by known scholars in the legal writing field.

Linda Berger, *Document Design for Lawyers: The End of the Typewriter Era*, 16 Ga. Bar J., Feb. 2011, at 62.

Susan Hanley Duncan, *Best Dressed Briefs—Why Appearance Matters*, Bench & Bar, Jan. 2011, at 56.

Daniel B. Evans, *You Are What You Print*, from Counselor's Comp. & Mgt. Rep., *reprinted in* 20 Law Prac. Mgt., July–Aug. 1994, at 58.

Suzanne Suarez Hurley, *Advancing the Legal Profession with Typography*, 86 Fla. Bar J., Nov. 2012, at 53.

Emily Hamm Huseth & Michael F. Rafferty, *A Picture Can Save A Thousand Words*, 61 For Defense, Feb. 2019, at 22.

Gerald Lebovits, *E-Filing: Mastering the Tech-Rhetoric*, 83 N.Y. St. Bar Ass'n J., May 2011, at 64.

Philip N. Meyer, *Picture This*, 102 A.B.A. J., Feb. 2016, at 27.

Michael D. Murray, *Getting Visual*, 82 Bench & Bar, Nov./Dec. 2018, at 24.

Ellie Neiberger, *Judge-Friendly Briefs in the Electronic Age*, 89 Fla. Bar J., Feb. 2015, at 46.

Brian C. Potts, *40 Writing Hacks for Appellate Attorneys*, 19 Scribes J. Legal Writing 49 (2020).

Marcello Rodriguez, *Researching the Use of Emojis in the Legal Profession*, Slaw, Oct. 15, 2020, https://perma.cc/FH7S-8PBH.

Adam L. Rosman, *Happy Warriors Against Herein: Ten Rules for Creating Better Legal Documents*, 17 Scribes J. Legal Writing 47 (2016–17).

Persuasion

An Updated Bibliography

Kristen E. Murray*

1. Introduction

It has been more than ten years since this journal first published Kathy Stanchi's *Persuasion: An Annotated Bibliography*.[1] Persuasion, of course, remains "at the heart of the lawyer's craft."[2] However, persuasion scholarship has expanded and evolved a great deal since the original bibliography. Scholars have built upon foundational works and found new pathways for scholarly research, and the ranks of scholars—including legal writing scholars—writing in the field has grown significantly. Thus, it seemed like the right time for an update.

The methodology for updating this bibliography seemed obvious from the start. This bibliography should be read as a descendant of the original. No item from the first bibliography is repeated here. This update looks at how, of late, scholars have built upon the foundations established in the original bibliography and found new, smaller, broader, and/or different pockets of inquiry and discovery. If the first bibliography was focused on "greatest hits,"[3] then this bibliography should be read as a list of "current events."

These "current events" capture several threads in the field of the study of persuasion. First, certain areas of persuasion research that were nascent at the time of the original bibliography, such as Applied Legal Story-

* Professor of Law, Temple University, Beasley School of Law. Thanks to Jonathan Fedors, Jamie Klein, and Michelle Tabach for their research assistance. Sha-Shana Crichton and Brian Larson provided valuable insights and additions to the bibliography, as did the author of the original bibliography, Kathy Stanchi.

1 Kathryn Stanchi, *Persuasion: An Annotated Bibliography*, 6 J. ALWD 75 (2009).

2 *Id.* at 75.

3 *Id.* at 76.

telling, are now robust, thriving areas of study—some even with their own bibliographies.[4] Second, the community of legal writing scholars has established firmer footing with respect to places to share their work.[5] More of us are writing, and more are writing about persuasion. (This is particularly evident in certain categories, such as the section on contemporary rhetoric and argumentation theory, *infra* at section C.) In this decade we have also seen the growth of community support and events such as reading groups, workshops, and symposia. Finally, persuasion scholars have pursued new areas of inquiry that we might not have even contemplated ten years ago.

Thus this collection of works explores the same fundamental question as the original—*why* and *how* do we persuade?—but presents different answers, answers that build upon and complement the entries in the original bibliography.

2. The bibliography

This bibliography shares the same mission as the original, and "focuses on books and articles that tell us something about how to persuade in legal writing."[6] It is faithful to the eleven categories[7] of the original bibliography but also adds a new category: persuasion in transactional legal writing. Within categories, I sometimes collapsed subcategories, and sometimes created them. Like its predecessor, this bibliography does not presume to be comprehensive. Somewhere, I had to stop. One day, I hope, a subsequent update will pick up where I left off.

Not surprisingly, later works by several authors from the original bibliography are featured here. Where there have been pockets of scholarship resulting from specific events, I have tried to note them.

Generally speaking, the bibliography proceeds in the same order as the original did, with my new category appended as section L. After that, my organization diverges from the original, which organized each category from narrow to broad; I have simply listed the articles in each category

4 *See generally* Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ALWD 63 (2010); Philip N. Meyer, Storytelling for Lawyers (2014); Ruth Anne Robbins, Steve Johansen & Ken Chestek, Your Client's Story: Persuasive Legal Writing (2d ed. 2019).

5 Linda L. Berger, Linda H. Edwards & Terrill Pollman, *The Past, Presence, and Future of Legal Writing Scholarship: Rhetoric, Voice, and Community*, 16 Legal Writing 521, 537 (2010).

6 Stanchi, *supra* note 1, at 75.

7 They are: use of narrative theory, use of classical rhetoric, use of contemporary rhetoric and argumentation theory, use of visual and graphic arts to enhance persuasive writing, use of social science in persuasive writing, using authority to persuade, the structure of legal arguments and the use of framing techniques, the importance of emotion to persuasive legal writing, ethical considerations in persuasion, what judges think, and oral argument. *See* Stanchi, *supra* note 1.

alphabetically, by author. As in the original, the 125 works I included are exclusively placed in one category based on their dominant theme, even though several might have been placed in other categories as well.

A. Use of narrative theory

Over the last decade, scholarship on the role of narrative in legal persuasion has largely been a product of or in conversation with the Applied Legal Storytelling (AppLS) movement, which is the subject of its own bibliography in this volume.[8] The AppLS bibliography catalogues the genre in all its forms. Here, I have focused on the use of narrative as a persuasive tool.

The origin of the AppLS movement dates to a July 2007 conference in London, *Once Upon a Time: Developing the Skills of Storytelling in Law*,[9] which occurred shortly before the creation of the original bibliography. AppLS has since held biennial conferences that have been co-hosted by the Legal Writing Institute and, since 2011, the Clinical Legal Education Association. Presentations from the conferences have been adapted for publication and grouped in issues of *Legal Writing: Journal of the Legal Writing Institute*, *The Law Teacher: The International Journal of Legal Education*, *The Clinical Law Review*, and this journal.[10]

The movement's roots are in law and literature scholarship published between the 1970s and early 2000s.[11] Today, AppLS scholars who focus on persuasion do so on one of two topics: the persuasiveness of storytelling in the context of legal advocacy and the effectiveness of storytelling in the context of legal pedagogy.[12]

Thus, unlike the original persuasion bibliography, this section is divided into two parts: practice and pedagogy. In the case of works about skills instruction in advocacy and clinical coursework, these two areas overlap (but appear under pedagogy in the bibliography below).

This section includes follow-up works from some of the authors whose work was included in the original volume along with exciting new scholarship, some of which is award-winning.[13]

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8 J. Christopher Rideout, *Applied Legal Storytelling: An UIpdated Bibliography*, 18 Legal Comm. & Rhetoric 221 (2021). That bibliography, unlike this one, does recreate the entries from the first bibliography.

9 *See* Ruth Anne Robbins, *An Introduction to this Volume and to Applied Legal Storytelling*, 14 Legal Writing 1 (2008); J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 Legal Comm. & Rhetoric 247 (2015).

10 S*ee, e.g.*, 7 J. ALWD (2010); 9 Legal Comm. & Rhetoric (2012); 14 Legal Writing (2008).

11 Robbins, *supra* note 9, at 6–10; Rideout, *supra* note 8, at 249.

12 Robbins, *supra* note 9, at 5.

13 Anne Ralph, *Narrative-Erasing Procedure*, 18 Nev. L.J. 573 (2018) (receiving the Penny Pether Award for Law and Language Scholarship); Helena Whalen-Bridge, *Negative Narrative: Reconsidering Client Portrayals*, 16 Legal Comm. & Rhetoric 151 (2019) (receiving the Teresa Godwin Phelps Award for Scholarship in Legal Communication).

Part I. Narrative in persuasive legal advocacy

Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. Cal. Interdisc. L. J. 259 (2009).

Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 Washburn L.J. 275 (2011).

Linda H. Edwards, *Hearing Voices: Non-Party Stories in Abortion and Gay Rights Advocacy*, 2015 Mich. St. L. Rev. 1327 (2015).

Linda H. Edwards, *Speaking of Stories and Law*, 13 Legal Comm. & Rhetoric 157 (2016).

Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 Geo. L.J. 281 (2013).

Lucille A. Jewel, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 S. Cal. Interdisc. L.J. 237 (2010).

Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 Geo. Immigr. L.J. 207 (2012).

Philip N. Meyer, Storytelling for Lawyers (2014).

Anne E. Ralph, *Not the Same Old Story: Using Narrative Theory to Understand and Overcome the Plausibility Pleading Standard*, 26 Yale J.L. & Human. 1 (2014).

Anne E. Ralph, *Narrative-Erasing Procedure*, 18 Nev. L.J. 573 (2018).

Ruth Anne Robbins, Steve Johansen & Ken Chestek, Your Client's Story: Persuasive Legal Writing (2d ed. 2019).

Jennifer Sheppard, *Once Upon a Time, Happily Ever After, and in a Galaxy Far, Far, Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 Willamette L. Rev. 255 (2009).

Michael R. Smith, Advanced Legal Writing: Theories and Strategies in Persuasive Writing (3rd ed. 2013).

Nicole Smith Futrell, *Vulnerable, Not Voiceless: Outsider Narrative in Advocacy Against Discriminatory Policing*, 93 N.C. L. Rev. 1597 (2015).

Helena Whalen-Bridge, *Negative Narrative: Reconsidering Client Portrayals*, 16 Legal Comm. & Rhetoric 151 (2019).

Part II. Narrative in effective legal pedagogy

Mary Ann Becker, *What Is Your Favorite Book?: Using Narrative to Teach Theme Development in Persuasive Writing*, 46 Gonz. L. Rev. 575 (2010–11).

Sha-Shana Crichton, *What Happens when the Media Gets Ahead of your Client's Story? An Attorney's Duty to use Conscious Word Choice*, 47 S.U. L. Rev. 155 (2019).

Sha-Shana Crichton, *Using Fiction to Teach Word Choice and To Teach How to Write an Effective Fact Statement*, *in* Teaching Law and Popular Culture (Christine Corcos ed. 2019).

Carolyn Grose, *Storytelling Across the Curriculum: From Margin to Center, from Clinic to the Classroom*, 7 J. ALWD 37 (2010).

Teri A. McMurtry-Chubb, *The Practical Implications of Unexamined Assumptions: Disrupting Flawed Legal Arguments to Advance the Cause of Justice*, 58 Washburn L.J. 531 (2019).

Laurie Shanks, *Whose Story Is It, Anyway?—Guiding Students to Client-Centered Interviewing Through Storytelling*, 14 Clinical L. Rev. 509 (2008).

Jo A. Tyler & Faith Mullen, *Telling Tales in School: Storytelling for Self-Reflection and Pedagogical Improvement in Clinical Legal Education*, 18 Clinical L. Rev. 283 (2011).

B. Use of classical rhetoric

Here, I have diverged from the structure of the original bibliography, which divided this section into three parts (general classical rhetoric, metaphor and stylistic devices, and foundational works). These pieces are united in their pursuit of questions about why and how we use classical rhetoric to persuade, but vary by the contexts they consider, including historical topics such as advocacy and evidence and modern topics regarding digital commentary and curricular reform. Several of the works are from a symposium in the spring 2020 issue of the Nevada Law Journal, *Classical Rhetoric as a Lens for Contemporary Legal Praxis*.[14]

Elizabeth Berenguer, Lucy Jewel & Teri A. McMurtry-Chubb, *Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power*, 23 Harv. Latinx L. Rev. 205 (2020).

Linda L. Berger, *Studying and Teaching "Law as Rhetoric": A Place to Stand*, 16 Legal Writing 3 (2010).

14 *Symposium: Classical Rhetoric as a Lens for Contemporary Legal Praxis*, 20 Nev. L.J. 845 (2020).

Linda L. Berger, *Creating Kairos at the Supreme Court:* Shelby County, Citizens United, Hobby Lobby*, and the Judicial Construction of Right Moments*, 16 J. App. Prac. & Process 147 (2015).

Linda L. Berger & Kathryn M. Stanchi, *Gender Justice: The Role of Stories and Images*, *in* Narrative and Metaphor in the Law (Michael Hanne & Robert Weisberg eds., 2018).

Kirsten A. Dauphinais, *Quintilian's Curriculum*, 20 Nev. L.J. 917 (2020).

Kirsten K. Davis, *[Classical] Lawyers as [Digital] Public Speakers: Classical Rhetoric and Lawyer Digital Public Commentary*, 20 Nev. L.J. 1137 (2020).

Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 Colum. L. Rev. 1389 (2013).

Francis J. Mootz III, Kirsten K. Davis, Brian N. Larson & Kristen K. Tiscione, Classical Rhetoric and Contemporary Law: A Critical Reader (forthcoming 2022).

Daphne O'Regan, *Eying the Body: The Impact of Classical Rules for Demeanor Credibility, Bias, and the Need to Blind Legal Decision Makers*, 37 Pace L. Rev. 379 (2017).

J. Christopher Rideout, *Penumbral Thinking Revisited: Metaphor in Legal Argumentation*, 7 J. ALWD 155 (2010).

J. Christopher Rideout, *Ethos, Character, and Discoursal Self in Persuasive Legal Writing*, 21 Legal Writing 19 (2016).

Kristen Konrad Tiscione, Rhetoric for Legal Writers: The Theory and Practice of Analysis and Persuasion (2009).

Kristen K. Tiscione, *How the Disappearance of Classical Rhetoric and the Decision to Teach Law as a "Science" Severed Theory from Practice in Legal Education*, 51 Wake Forest L. Rev. 385 (2016).

Melissa H. Weresh, *Ethos at the Intersection: Classical Insights for Contemporary Application*, 20 Nev. L.J. 877 (2020).

C. Use of contemporary rhetoric and argumentation theory

This category has seen a fair amount of growth since the original bibliography, which styled it as an "emerging discipline." Themes addressed in these newer works include contemporary understandings and applications of rhetorical concepts, rhetoric and identity, other humanistic approaches to law and rhetoric, and recent argumentation theory.

Several of the works are part of a series established at the University of Alabama Press in 2015: *Rhetoric, Law, and the Humanities*.[15] Also

represented here are a number of works previously featured in 2015's Law and Rhetoric Bibliography[16] and works generated from participants in the West Coast Rhetoric Workshop.

Linda L. Berger, *Metaphor and Analogy: The Sun and Moon of Legal Persuasion*, 22 J. L. & Pol'y 147 (2013).

Handbook of Legal Reasoning and Argumentation (Giorgio Bongiovanni, Gerald Posterna, Antonio Rotolo, Giovanni Sartor, Chiara Valentini & Douglas Walson eds., 2018).

Martin Camper & Zach Fechter, *Enthymematic Free Space: The Efficacy of Anti-stop-and-frisk Arguments in the Face of Racial Prejudice*, 55 Argumentation & Advocacy 259 (2019).

Katie L. Gibson, Ruth Bader Ginsburg's Legacy of Dissent: Feminist Rhetoric and the Law (2018).

Mark A. Hannah & Susie Salmon, *Against the Grain: The Secret Role of Dissents in Integrating Rhetoric Across the Curriculum*, 20 Nev. L.J. 935 (2020).

Presumptions and Burdens of Proof: An Anthology of Argumentation and the Law (Hans V. Hansen, Fred J. Kauffeld, James B. Freeman, & Lilian Bermejo-Luque eds., 2019).

Brian N. Larson, *Law's Enterprise: Argumentation Schemes & Legal Analogy*, 87 U. Cin. L. Rev. 663 (2019).

Teri A. McMurtry-Chubb, *Writing at the Master's Table: Reflections on Theft, Criminality, and Otherness in the Legal Writing Profession*, 2 Drexel L. Rev. 41 (2009).

Teri A. McMurtry-Chubb, *Still Writing at the Master's Table: Decolonizing Rhetoric in Legal Writing for a "Woke" Legal Academy*, 21 Scholar 255 (2019).

Susan E. Provenzano & Brian N. Larson, *Civil Procedure as a Critical Discussion*, 20 Nev. L.J. 967 (2020).

Melissa H. Weresh, *Wait, What? Harnessing the Power of Distraction or Redirection in Persuasion*, 15 Legal Comm. & Rhetoric 81 (2018).

15 The current catalog of series titles is available at the University of Alabama Press website. *Rhetoric, Law, and the Humanities*, Univ. Alabama Press, http://www.uapress.ua.edu/Catalog/ProductSearch.aspx?ExtendedSearch=false&SearchOnLoad=true&rhl=Rhetoric%2c+Law%2c+and+the+Humanities&sj=1446&rhdcid=1446 (last visited Jan. 6, 2020).

16 Kirsten K. Davis, Julie A. Oseid & Kristen Konrad Tiscione, *Law and Rhetoric Bibliography: Selected Readings and Resources* (Stetson University College of Law Legal Studies Research Paper Series, Research Paper No. 2015-4, 2004), https://ssrn.com/abstract=2555707.

D. Use of visual and graphic arts to enhance persuasive writing

Given the pace of growth of technology and media, it is not surprising that this category has expanded since the original bibliography in 2009. This area of study has blossomed so much that the category is now worthy of its own comprehensive bibliography.[17] Key scholarly contributions catalogued here relate to the law of evidence: the competence, ethics, and rhetoric involved in using visual evidence in the context of advocacy and, as in other categories, how to teach law students about these topics. Other threads represented in this category are the impact on advocacy of developments in evidentiary and courtroom technology, the value of visual representations of legal reasoning, and the graphic design of legal writing documents.

Veronica Blas Dahir, *Digital Visual Evidence*, *in* The Future of Evidence: How Science & Technology Will Change the Practice of Law (Carol Henderson & Jules Epstein eds., 2011).

Neal Feigenson & Christina Spiesel, Law on Display: The Digital Transformation of Legal Persuasion and Judgment (2009).

Steve Johansen & Ruth Anne Robbins, *Art-iculating the Analysis: Systematizing the Decision to Use Visuals as Legal Reasoning*, 20 Legal Writing 57 (2015).

Ellie Margolis, *Is the Medium the Message?: Unleashing the Power of E-Communication in the Twenty-First Century,* 12 Legal Comm. & Rhetoric 1 (2015).

Gregory J. Morse, *Techno-jury: Techniques in Verbal and Visual Persuasion*, 54 N.Y. L. Sch. L. Rev. 241 (2009–2010).

Michael D. Murray, *The Sharpest Tool in the Toolbox: Visual Legal Rhetoric*, 68 J. Legal Educ. 64 (2018).

Michael D. Murray, *Mise en Scène and the Decisive Moment of Visual Legal Rhetoric*, 68 U. Kan. L. Rev. 241 (2019).

Anshul Vikram Pandey, Anjali Manivannan, Oded Nov, Margaret Satterthwaite & Enrico Bertini, *The Persuasive Power of Data Visualization*, 20 IEEE Transactions on Visualization & Comput. Graphics 2211 (2014).

Elizabeth G. Porter, *Taking Images Seriously*, 114 Colum. L. Rev. 1687 (2014).

17 Ellie Margolis, *Visual Legal Writing: A Bibliography*, 18 Legal Comm. & Rhetoric 195 (2021).

Elizabeth G. Porter, *Imagining Law: Visual Thinking Across the Law School Curriculum*, 68 J. Legal Educ. 8 (2018).

Ticien Marie Sassoubre, *Visual Persuasion for Lawyers*, 68 J. Legal Educ. 82 (2018).

E. Use of social science in persuasive writing

This, too, was styled as a "burgeoning area in persuasive legal advocacy" in the original bibliography. Today, this category features the maturation/fuller development of interdisciplinary work represented in the original bibliography and new works that demonstrate the increasingly specialized application of that work to different facets of persuasive advocacy.

A number of the contributions listed here were generated at one of three symposia that have taken place since the last bibliography was published. Brooklyn Law School held a symposium in 2013, called *The Impact of Cognitive Bias on Persuasion and Writing Strategies*, resulting in an issue of the Journal of Law and Policy.[18] In 2014, the UNLV Boyd School of Law held a conference on Psychology and Lawyering.[19] Finally, in 2015, Wyoming Law held its conference on the Psychology of Persuasion.[20]

Linda L. Berger & Kathryn M. Stanchi, Legal Persuasion: A Rhetorical Approach to the *Science* (2017).

Kenneth D. Chestek, *Of Reptiles and Velcro: The Brain's Negativity Bias and Persuasion*, 15 Nev. L.J. 605 (2015).

Lucille A. Jewel, *Old-School Rhetoric and New-School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 Legal Comm. & Rhetoric 39 (2016).

Jennifer K. Robbennolt & Jean R. Sternlight, Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation, and Decision Making (2012).

Michael R. Smith, *The Sociological and Cognitive Dimensions of Policy-Based Persuasion*, 22 J. L. & Pol'y 35 (2013).

Carrie Sperling, *Priming Legal Negotiations Through Written Demands*, 60 Cath. U. L. Rev. 107 (2010).

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18 Symposium, *The Impact of Cognitive Bias on Persuasion and Writing Strategies*, 22 J. L. & Pol'y 1 (2013). Michael R. Smith's work from the symposium appears in this category as well, below.

19 *See* Jean R. Sternlight, *Psychology and Lawyering: Coalescing the Field*, 15 Nev. L.J. 431 (2015) (introducing the written version of the conference held at the UNLV Boyd School of Law, Las Vegas, Nevada in Feb. 2014). Kenneth D. Chestek's work from the symposium appears in this category below; Larry Cunningham's article from the symposium appears in the Oral Argument section.

20 Kenneth D. Chestek, *Introduction to Psychology of Persuasion Symposium*, 16 Wyo. L. Rev. 281 (2016).

Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 Or. L. Rev. 305 (2010).

F. Using authority to persuade

Current developments in this category fit neatly into one of three categories: scholarship on the nature of legal authority (especially comparisons between settled authority and other forms, including persuasive authorities), scholarship on the use of nonlegal material in advocacy and judicial reasoning, and scholarship on the use of Internet material as authority.

Alexa Z. Chew, *Citation Literacy*, 70 Ark. L. Rev. 869 (2018).

Linda H. Edwards, *Telling Stories in the Supreme Court: Voices Briefs and the Role of Democracy in Constitutional Deliberation*, 29 Yale J.L. & Feminism 29 (2017).

Amy J. Griffin, *Dethroning the Hierarchy of Authority*, 97 Or. L. Rev. 51 (2018).

Sherri Lee Keene, *Stories That Swim Upstream: Uncovering the Influence of Stereotypes and Stock Stories in Fourth Amendment Reasonable Suspicion Analysis*, 76 Md. L. Rev. 747 (2017).

David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 Wm. & Mary L. Rev. 2021 (2013).

Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 Va. L. Rev. 1255 (2012).

Brian N. Larson, *Precedent as Rational Persuasion*, 25 Legal Writing 135 (2021).

Ellie Margolis, *Authority Without Borders: The World Wide Web and the Delegalization of Law*, 41 Seton Hall L. Rev. 909 (2011).

Lee F. Peoples, *The Citation of Blogs in Judicial Opinions*, 13 Tul. J. Tech. & Intell. Prop. 39 (2010).

G. The structure of legal arguments and the use of framing techniques

These works also fall roughly into one of three sub-categories: continuations of the work of Critical Legal Studies and Legal Semiotics scholars on argumentation and framing, arguments for the value of varied conceptions of framing for better understanding and development of particular areas of substantive law, and the value of legal framing in

social movements. (Some foundational works in the second category were published pre-2009 and for the sake of consistency I have not included them here, but rather focused on more modern iterations of the concept.) The third sub-category is an area of recent growth.

Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 Const. Comment. 145 (2018).

William W. Bratton, *Framing a Purpose for Corporate Law*, 39 J. Corp. L. 713 (2014).

Leslie Culver, *(Un)Wicked Analytical Frameworks and the Cry for Identity*, 21 Nev. L.J. 655 (2021).

Martha F. Davis, *Law, Issue Frames and Social Movements: Three Case Studies*, 14 U. Pa. J.L. & Soc. Change 363 (2011).

Justin Desautels-Stein, The Jurisprudence of Style: A Structuralist History of American Pragmatism and Liberal Legal Thought (2018).

Marie-Amélie George, *Framing Trans Rights*, 114 Nw. U. L. Rev. 555 (2019).

Gwendolyn Leachman, *Legal Framing*, 61 Stud. L. Pol. & Soc'y 25 (2013).

Michael Paris, Framing Equal Opportunity: Law and the Politics of School Finance Reform (2010).

Jaya Ramji-Nogales, *Symposium on Framing Global Migration*: *Moving Beyond the Refugee Law Paradigm*, 111 AJIL Unbound 8 (2017).

H. Emotion in legal persuasion

Here, scholars have continued their work on the critical role that emotion plays in persuasion. The newer contributions build on the works in the original bibliography; another area of inquiry involves the invocation of emotion in lawyering and law school pedagogy. Of note generally is the Wake Forest Law Review's 2019 Symposium on "Cognitive Emotion and the Law."[21]

Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 Minn. L. Rev. 1997 (2010).

Susan A. Bandes & Jeremy A Blumenthal, *Emotion and the Law*, 8 Ann. Rev. L. & Soc. Sci. 161 (2012).

21 Symposium, *Cognitive Emotion and the Law*, 54 Wake Forest L. Rev. 909 (2019).

Steven I. Friedland, *Fire and Ice: Reframing Emotion and Cognition in the Law*, 54 Wake Forest L. Rev. 1001 (2019).

Law, Reason, and Emotion (M.N.S. Sellers ed., 2017).

Julia J.A. Shaw, Law and the Passions: Why Emotion Matters for Justice (2019).

Kristen Konrad Tiscione, *Feelthinking Like a Lawyer: The Role of Emotion in Legal Reasoning and Decision-Making*, 54 Wake Forest L. Rev. 1159 (2019).

I. Ethical considerations in persuasion

Entrants in this category continue the work of considering the boundaries of persuasion and where they might run up against ethical rules. Also represented here is work considering philosophical legal ethics as well as some ethical implications invoked by the AppLS movement.

Geoffrey C. Hazard, Jr. & Dana A. Remus, *Advocacy Revalued*, 159 U. Pa. L. Rev. 751 (2011).

Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ALWD 63 (2010).

Lori D. Johnson & Melissa Love Koenig, *Walk the Line: Aristotle and the Ethics of Narrative*, 20 Nev. L.J. 1037 (2020).

Michael D. Murray, *The Ethics of Visual Legal Rhetoric*, 13 Legal Comm. & Rhetoric 107 (2016).

Laura A. Webb, *Speaking the Truth: Supporting Authentic Advocacy with Professional Identity Formation*, 20 Nev. L.J. 1079 (2020).

W. Bradley Wendel, *Whose Truth? Objective and Subjective Perspectives on Truthfulness in Advocacy*, 28 Yale J.L. & Human. 105 (2016).

Helena Whalen-Bridge, *The Lost Narrative: The Connection Between Legal Narrative and Legal Ethics*, 7 J. ALWD 229 (2010).

Helena Whalen-Bridge, *Persuasive Legal Narrative: Articulating Ethical Standards*, 21 Legal Ethics 136 (2018).

J. What judges think

As in the first bibliography, works here fall into two subcategories. First are lessons learned from judges—directly or through surveys—regarding advocacy techniques. Second are works consisting of scholarly analysis of judicial opinions that purport to explain some aspect(s) of "judicial thinking" in a way that is useful for advocates. This is also an area where empirical work on the study of persuasion is prominent.

Ted Becker, *What We Still Don't Know about What Persuades Judges—And Some Ways We Might Find Out*, 22 Legal Writing 41 (2018).

Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ALWD 1 (2010).

Lee Epstein, William M. Landes & Richard A. Posner, The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice (2013).

Sean Flammer, *Persuading Judges: An Empirical Analysis of Writing Style, Persuasion, and the Use of Plain English*, 16 Legal Writing 183 (2010).

The Psychology of Judicial Decision Making (David Klein & Gregory Mitchell eds., 2010).

Lance N. Long & William F. Christensen, *When Justices (Subconsciously) Attack: The Theory of Argumentative Threat and the Supreme Court*, 91 Or. L. Rev. 933 (2013).

James A. Macleod, *Reporting Certainty*, 2019 BYU L. Rev. 473 (2019).

Anne E. Mullins, *Subtly Selling the System: Where Psychological Influence Tactics Lurk in Judicial Writing*, 48 U. Rich. L. Rev. 1111 (2014).

Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts—One Judge's Views*, 51 Duq. L. Rev. 3 (2013).

Richard A. Posner, Reflections on Judging 236–86 (2013).

Holger Spamann & Lars Klöhn, *Justice Is Less Blind, and Less Legalistic, than We Thought: Evidence from an Experiment with Real Judges*, 45 J. Legal Stud. 255 (2016).

Elizabeth Thornburg, *(Un)Conscious Judging*, 76 Wash. & Lee L. Rev. 1567 (2019).

Amy Vorenberg & Margaret Sova McCabe, *Practice Writing: Responding to the Needs of the Bench and Bar in First-Year Writing Programs*, 2 Phoenix L. Rev. 1 (2009).

K. Oral argument

Pedagogically speaking, oral argument remains an important corollary to persuasive writing and is often the culminating experience

22 Stanchi, *supra* note 1, at 86.

23 Mary Beth Beazley, A Practical Guide To Appellate Advocacy ch. 13 (5th ed. 2018).

24 Linda H. Edwards, Legal Writing and Analysis ch. 21 (5th ed. 2019).

25 David C. Frederick, The Art Of Oral Advocacy (3d ed. 2019).

of the persuasive writing course. The first persuasion bibliography introduced a "smattering of the leading voices on the topic."[22] These leading voices continue to explore the topic, with several new editions of works that appeared in the original bibliography. These include updates from scholars Mary Beth Beazley,[23] Linda Edwards,[24] David Frederick,[25] and Richard Neumann,[26] and updates to the late Judge Ruggero Aldisert's classic book *Winning on Appeal*.[27]

The perception of practical oral argument has perhaps changed since the original iteration of the bibliography. For example, a new thread of scholarship discusses the belief that oral argument is of decreasing importance to case outcomes. Also of note are explorations of how some recent social science research might be incorporated into how we prepare for, execute, and perceive oral arguments.

Rachel Clark Hughey, *Effective Appellate Advocacy Before the Federal Circuit: A Former Law Clerk's Perspective*, 11 J. App. Prac. & Process 401 (2010).

David R. Cleveland & Steven Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 J. App. Prac. & Process 119 (2012).

Larry Cunningham, *Using Principles from Cognitive Behavioral Therapy to Reduce Nervousness in Oral Argument or Moot Court*, 15 Nev. L.J. 586 (2015).

J. Marshall L. Davidson, III, *Oral Argument: Transformation, Troubles, and Trends*, 5 Belmont L. Rev. 203 (2018).

Michael J. Higdon, *Oral Advocacy and Vocal Fry: The Unseemly, Sexist Side of Nonverbal Persuasion*, 13 Legal Comm. & Rhetoric 209 (2016).

James C. Martin & Susan M. Freeman, *Wither Oral Argument? The American Academy of Appellate Lawyers Says Let's Resurrect It!*, 19 J. App. Prac. & Process 89 (2018).

Jay Tidmarsh, *The Future of Oral Argument*, 48 Loy. U. Chi. L.J. 475 (2016).

Michael Vitiello, *Teaching Oral Advocacy: Creating More Opportunities for an Essential Skill*, 45 Seton Hall L. Rev. 1031 (2015).

26 Richard K. Neumann Jr., Ellie Margolis & Kathryn M. Stanchi, Legal Writing and Legal Reasoning ch. 33 (8th ed. 2017).

27 Tessa L. Dysart, Hon. Leslie H. Southwick & Hon. Ruggero J. Aldisert, Winning on Appeal: Better Briefs and Oral Argument ch. 16 (3d ed. 2017).

L. Persuasion in transactional documents

Finally, we reach the newest category in the bibliography: a new line of scholarship in persuasion that involves the role of persuasion in the process and products of transactional lawyering. This is an exciting development, as persuasion and advocacy are too often reflexively associated only with the litigation context. Some of these works might have been included in the narrative category that opened this bibliography, but it felt appropriate to give space to this new addition, currently occupied exclusively by legal writing scholars, which I hope will continue to flourish.

Susan M. Chesler & Karen J. Sneddon, *Once Upon a Transaction: Narrative Techniques and Drafting*, 68 Okla. L. Rev. 263 (2016).

Susan M. Chesler & Karen J. Sneddon, *Tales from a Form Book: Stock Stories and Transactional Documents*, 78 Mont. L. Rev. 237 (2017).

Deborah S. Gordon, *Mor[t]ality and Identity: Wills, Narratives, and Cherished Possessions*, 28 Yale J.L. & Human. 265 (2016).

Lori D. Johnson, *Say the Magic Word: A Rhetorical Analysis of Contract Drafting Choices*, 65 Syracuse L. Rev. 451 (2015).

Lori D. Johnson, *Redefining Roles and Duties of the Transactional Lawyer: A Narrative Approach*, 91 St. John's L. Rev. 845 (2017).

Karen J. Sneddon, *The Will as Personal Narrative*, 20 Elder L.J. 355 (2013).

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Applied Legal Storytelling

An Updated Bibliography

J. Christopher Rideout*

Introduction

This article contains a bibliography, updated to 2020, on the movement commonly known as Applied Legal Storytelling (also referred to as "AppLS").[1] The movement is largely, although not wholly, identified with a series of academic conferences,[2] and its starting date is difficult to pinpoint precisely. Some might say it began with the striking of a large wooden staff on a stone floor.

On the evening of July 20, 2007, a group of legal academics assembled in the historic Old Hall at Lincoln's Inn, in the center of London, for a glass of wine and a formal dinner. They had come from the U.S., the U.K., and a handful of other countries to attend a conference on Applied Legal Storytelling at the City Law School, not far away at Gray's Inn. The evening marked the culmination of the conference,[3] and everyone in the

* Professor of Lawyering Skills, Seattle University School of Law. The author thanks those who helped him with this bibliography, originally including Ruth Anne Robbins, Steve Johansen, Ken Chestek, Sue Provenzano, and Erika Rackley. They generously shared their own bibliographic work or cheerfully responded to his pestering emails. He also thanks the many people who corresponded with him about the project during both the summer of 2014 and the summer of 2020, almost always with a pleasant note, and most of whom who are represented in this bibliography

1 The original bibliography was published in this journal in 2015. *See* J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 Legal Comm. & Rhetoric 247 (2015). The original bibliography was assembled in 2014. This updated bibliography is current as of Spring 2021. For more on the Applied Legal Storytelling movement, see Ruth Anne Robbins, *An Introduction to Applied Legal Storytelling and to This Symposium*, 14 Legal Writing 3 (2008).

2 The first conference was held from July 18–20, 2007, at the City Law School, City University, in London, United Kingdom. The conferences have since been held biennially: at Lewis and Clark School of Law in Portland, Oregon, in 2009; Denver University in 2011; and City University again in London in 2013. The fifth biennial conference was held at Seattle University in July 2015. All of the conferences have been co-sponsored by the Legal Writing Institute and the Clinical Legal Education Association.

3 The organizers of this originating conference were Robert McPeake, Erika Rackley, Ruth Anne Robbins, Steve Johansen, and Brian Foley.

room was somewhat spellbound. The conference had sparked an ongoing and lively conversation about the uses of storytelling in the law, and the ancient, timbered ceiling and the historical portraits on the stone walls added to what seemed the import of the moment. Ideas were flowing and the room had a buzz, to such an extent that the steward of the Old Hall had to strike his staff on the floor to get the attention of the group. One member[4] then read out loud from the opening to Charles Dickens's *Bleak House*,[5] fittingly set in that very hall, and the group sat down to dinner and more conversation. Talk arose of publishing some of the conference presentations as law review articles. Applied Legal Storytelling as a visible movement was underway.

I. Applied legal storytelling

Those interested in Applied Legal Storytelling examine the use of stories—and of storytelling or narrative elements—in law practice, in law school pedagogy, and within the law generally. Not surprisingly, they often teach either in legal writing programs or in law school clinics.

In the introduction to a symposium that followed the 2007 conference mentioned above, Ruth Anne Robbins wrestles with the definition of Applied Legal Storytelling.[6] She ties it to the practical aspects of lawyering—"storytelling is the backbone of the all-important theory of the case, which is the essence of all good lawyering"[7]—and suggests that Applied Legal Storytelling also promotes the incorporation of storytelling into the pedagogy of lawyering skills.[8] Brian Foley, another organizer of the 2007 conference, underscores the notion that the movement is applied and that storytelling has fundamental uses in the practice of law.[9]

But Robbins and Foley both acknowledge other efforts to understand the role of narrative and storytelling in the law and in legal discourse. Robbins, in particular, notes that the Applied Legal Storytelling movement shares common ground with the Law and Literature movement, even as she senses that the two also differ in some ways.[10] Both movements share

4 Erika Rackley, Professor of Law, Durham Law School, Durham University, Durham, England.

5 Charles Dickens, Bleak House (Oxford 1998) (1853).

6 Robbins, *supra* note 1, at 13–14.

7 *Id.* at 3.

8 *Id.* at 12.

9 Brian J. Foley, *Applied Legal Storytelling, Politics, and Factual Realism*, 14 Legal Writing 20 (2008). A later contributor notes that Applied Legal Storytelling "aspires to be concrete, accessible, and useful to lawyers, judges, and students." Derek H. Kiernan-Johnson, *A Shift to Narrativity*, 9 Legal Comm. & Rhetoric 81, 87 (2012).

10 Robbins, *supra* note 1, at 12.

an interest in the theories that underlie legal storytelling—for example narrative, rhetorical, or semiotic;[11] in the ethical implications of legal storytelling;[12] and in the presence of legal themes in literary works—a central concern of Law and Literature.[13] In doing so, she implicitly acknowledges that the initial definition of Applied Legal Storytelling could be enlarged beyond its purported focus on law practice. And the conference presentations and articles that have emerged since 2007 partially confirm her suspicion.

Both Robbins and Foley also wisely stop short of offering a definitive description of Applied Legal Storytelling. Robbins looks to the conferences that will follow the 2007 conference, as well as to the accompanying scholarship, for her claim that the definition could grow as the movement grows.[14] Foley, like Robbins, sees the movement as too young to define.[15] This article makes no attempt at that definitive description, but it does offer a listing of the scholarship on Applied Legal Storytelling that has followed since 2007. The bibliography will show that Applied Legal Storytelling now has many branches.

Finally, any discussion of the Applied Legal Storytelling movement must acknowledge the broader turn in legal scholarship toward narratives and storytelling in the law, beginning at least as far back as the 1970s. The publication of James Boyd White's *The Legal Imagination* in 1973 is often cited as a starting point.[16] White's work is often identified with the Law and Literature movement, but in 1981 another pair of scholars, Lance Bennett and Martha Feldman, looked in a different direction—at the role of stories in trial practice, in *Reconstructing Reality in the Courtroom*.[17] In 1989, the Michigan Law Review devoted an entire issue to legal storytelling, offering a scholarly approach to narratives and the law.[18] Both Patricia Williams and Richard Delgado began using storytelling in discussions of critical race theory.[19] Peter Brooks and Paul Gewirtz assembled an important collection of essays on law's stories.[20] And

11 *Id.* at 10.

12 *Id.* at 9.

13 *Id.* at 10.

14 *Id.* at 14.

15 Foley, *supra* note 9, at 52.

16 James Boyd White, The Legal Imagination (1973); *see also* James Boyd White, *Telling Stories in the Law and in Ordinary Life*, *in* Heracles' Bow: Essays on the Rhetoric and Poetics of the Law ch. 8 (1985).

17 W. Lance Bennett & Martha S. Feldman, Reconstructing Reality in the Courtroom (1981).

18 87 Mich. L. Rev. 2073 (1989).

19 Patricia J. Williams, The Alchemy of Race and Rights (1992); Richard Delgado, *Storytelling for Oppositionists and Others*, 87 Mich. L. Rev. 2411 (1989).

20 *See* Peter Brooks & Paul Gewirtz, Law's Stories: Narrative and Rhetoric in the Law (1998).

Anthony Amsterdam and Jerome Bruner dug deeply into narratives in the law in two of the chapters in their treatise *Minding the Law*.[21] All of these works make significant contributions to the legal scholarship on narratives and storytelling in the law. But for the purposes of this bibliography, these works and the scholarly trends that they represent lie outside the Applied Legal Storytelling movement as it has been defined thus far.[22]

II. Structure of the bibliography on applied legal storytelling

This updated bibliography, like the original, continues to use the biennial conferences on Applied Legal Storytelling as the center of gravity for its listing of articles and books.[23]

The bibliography also lists a few articles that pre-date the 2007 conference, but that could be called precursors to Applied Legal Storytelling. This first, pre-2007 section is selective, and no doubt other articles might arguably belong in it. But because the bibliography in general focuses on work that has emerged from the Applied Legal Storytelling conferences, this section has been kept in check. It contains articles that represent earlier efforts to apply storytelling to law and law practice (as opposed to articles that offer more general discussions of narrative and the law); articles that have often been mentioned as precursors to applied legal storytelling, either at the applied legal storytelling conferences or in the articles that have emerged from those conferences; and in a few cases, articles that have been directly suggested as belonging in the bibliography.[24]

Next, the bibliography lists articles on Applied Legal Storytelling from 2007 to the present.[25] The overwhelming majority of these articles began as presentations at one of the Applied Legal Storytelling conferences, and the sheer number of them points to the liveliness of the academic conversations that these conferences have triggered.[26] The articles in that larger

21 *See* Anthony G. Amsterdam & Jerome Bruner, Minding the Law chs. 4–5 (2000).

22 In his 2014 book, Philip Meyer comments on the distance between the interests of legal academics in narrative and the interests of practitioners and law students in storytelling. *See* Philip N. Meyer, Storytelling for Lawyers 204–05 (2014).

23 The Applied Legal Storytelling conferences have continued regularly and robustly since the assembling of the original bibliography. The 2015 conference was held at the Seattle University School of Law, in Seattle, Washington; the 2017 conference at the American University Washington College of Law, in Washington, D.C.; and the 2019 conference at the University of Colorado Law School, in Boulder, Colorado. The 2021 conference (as of this writing) will be hosted by Mercer University's Walter F. George School of Law. (Hosted virtually, that is, given the global pandemic that is still widespread as of the time of this writing.)

24 See the discussion of "methodology" further down in this article.

25 Fall 2020.

26 The original article contained, by my count, ninety-five. This update adds fifty-seven new pieces. Like the entries in the original, these new entries are works that either originated as a presentation at one of the Applied Legal Storytelling

section are not sub-categorized within the bibliography itself,[27] but a number of different emphases emerge. Here is a quick overview of those emphases.

1. Application of fiction-writing techniques to storytelling in law practice

These articles take the phrase "applied legal storytelling" literally and address the original topic most centrally. Early examples would be:

Foley, Brian J. & Robbins, Ruth Anne, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 Rutgers L.J. 459 (2001).

Koehlert-Page, Cathren, *Come a Little Closer So that I Can See You My Pretty: The Use and Limits of Fiction Point of View Techniques in Appellate Briefs*, 80 UMKC L. Rev. 399 (2011).

Koehlert-Page, Cathren, *Not So Very Bad Beginnings: What Fiction Can Teach Lawyers about Beginning a Persuasive Legal Narrative before a Court*, 86 Miss. L.J. 315 (2017).

Meyer, Philip N., *Vignettes from a Narrative Primer*,12 Legal Writing 229 (2006).

2. The uses of storytelling in law practice

These articles show how storytelling more generally (as opposed to specific fiction-writing techniques) can be used in law practice. Some examples include:

Chestek, Kenneth D., *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ALWD 1 (2010).

Fajans, Elizabeth & Falk, Mary R., *Untold Stories: Restoring Narrative to Pleading Practice*, 15 Legal Writing 3 (2009).

Sneddon, Karen J., *The Will as Personal Narrative*, 20 Elder L.J. 355 (2013).

conferences or that make a substantive mention of the movement. I might add that a quick glance at the names of the authors reveals that a number of them have focused much of their recent scholarly output on legal storytelling, resulting in multiple contributions to the bibliography—a testament to the liveliness of the conversation within the movement.

27 Some of the articles, for example, could easily belong to more than one subcategory—an inevitable classification problem for a group of articles as diverse as this one.

3. The uses of storytelling in legal pedagogy

These articles discuss the uses of storytelling in legal pedagogy. Some examples include:

Krieger, Stefan H. & Martinez, Serge A., *A Tale of Election Day 2008: Teaching Storytelling Through Repeated Experiences*, 16 Legal Writing 117 (2010).

McPeake, Robert, *Fitting Stories into Professional Legal Education—The Missing Ingredient*, 41 Law Teacher: Int'l J. Legal Educ. 303 (2007).

Shanks, Laurie, *Whose Story Is It, Anyway?—Guiding Students to Client-Centered Interviewing Through Storytelling*, 14 Clinical L. Rev. 509 (2008).

4. The uses of storytelling in legal scholarship

These articles discuss the uses of storytelling in legal scholarship. Some examples include:

Levit, Nancy, *Reshaping the Narrative Debate*, 34 Seattle U. L. Rev. 751 (2011).

Meyer, Philip N., *Will You Be Quiet, Please? Listening to the Call of Stories*, 18 Vt. L. Rev. 567 (1994).

5. Law's stories

Some articles discuss stories in the law, whether historical or contemporary—or mythic. A few examples include:

Edwards, Linda H., *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 Tenn. L. Rev. 885 (2010).

Maatman, Mary Ellen, *Justice Formation from Generation to Generation: Atticus Finch and the Stories Lawyers Tell Their Children*, 14 Legal Writing 207 (2008).

Mayo, Jessica, *Court-Mandated Story Time: The Victim Narrative in U.S. Asylum Law*, 89 Wash. U. L. Rev. 1485 (2012).

Rackley, Erika, *Judicial Diversity, the Woman Judge and Fairy Tale Endings*, 27 Legal Stud. 74 (2007).

Sirico, Jr., Louis J., *Benjamin Franklin, Prayer, and the Constitutional Convention: History as Narrative*, 10 Legal Comm. & Rhetoric 89 (2013).

6. Narrative theory and legal storytelling

Some articles use narrative theory to analyze legal storytelling and, in turn, its uses. See, for example:

Ralph, Anne E., *Not the Same Old Story: Using Narrative Theory to Understand and Overcome the Plausibility Pleading Standard*, 6 Yale J.L. & Human. 1 (2014).

Rideout, J. Christopher, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 Legal Writing 53 (2008).

7. Psychology, cognitive science, and legal storytelling

Some articles explore the connection between cognitive science and legal storytelling. Examples include:

Jewel, Lucy, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 S. Cal. Interdisc. L.J. 237 (2010).

Vaughn, Lea B., *Feeling at Home: Law, Cognitive Science, and Narrative*, 43 McGeorge L. Rev. 999 (2012).

8. Legal storytelling and metaphor

Applied Legal Storytelling conferences have often included presentations on metaphor, as a few articles reveal, for example:

Berger, Linda L., *How Embedded Knowledge Structures Affect Judicial Decision Making: An Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. Cal. Interdisc. L.J. 259 (2009).

Oseid, Julie A., *The Power of Metaphor: Thomas Jefferson's "Wall of Separation between Church and State,"* 7 J. ALWD 123 (2010).

9. Applied legal storytelling as a movement

Some articles discuss Applied Legal Storytelling itself, as a movement. See, for example:

Foley, Brian J., *Applied Legal Storytelling, Politics, and Factual Realism*, 14 Legal Writing 17 (2008).

Kiernan-Johnson, Derek H., *A Shift to Narrativity*, 9 Legal Comm. & Rhetoric 81 (2012).

10. Limitations of legal storytelling

A few articles investigate the limits of legal storytelling, for example:

Johansen, Steven J., *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ALWD 63 (2010).

Kaiser, Jeanne M., *When the Truth and the Story Collide: What Legal Writers Can Learn from the Experience of Non-Fiction Writers about the Limits of Legal Storytelling*, 16 Legal Writing 163 (2010).

11. Using storytelling to broaden our understanding of law and law practice

Some articles use legal storytelling as a way of broadening our discussion of what we do in law and law practice, an important conversation that emerges from Applied Legal Storytelling. See, for example:

Gallacher, Ian, *Thinking like Non-Lawyers: Why Empathy is a Core Lawyering Skill and Why Legal Education Should Change to Reflect Its Importance*, 8 Legal Comm. & Rhetoric 109 (2011).

McArdle, Andrea, *Using a Narrative Lens to Understand Empathy and how it Matters in Judging*, 9 Legal Comm. & Rhetoric 173 (2012).

Miller, Binny, *Telling Stories about Cases and Clients: The Ethics of Narrative*, 14 Geo. J. Leg. Ethics 1 (2000).

Whalen-Bridge, Helena, *The Lost Narrative: The Connection Between Legal Narrative and Legal Ethics*, 7 J. ALWD 229 (2010).

12. Storytelling in literature and law

Despite their alleged distinction from the Law and Literature movement, from the beginning Applied Legal Storytelling conferences have included presentations about law in literature, most amusingly those that later ended up in the collection on *The Law and Harry Potter*.[28]

13. The uses of storytelling to explore social or racial justice

An emerging trend, added here to the updated version of the bibliography, is articles that use applied legal storytelling to explore social or racial justice. Examples include:

28 The Law and Harry Potter (Jeffrey E. Thomas & Franklin G. Snyder eds., 2010). The following chapters of the book were presented at either the 2007 or 2009 Applied Legal Storytelling conference: Mary Beth Beazley, *Which Spell? Learning to Think Like a Wizard*; Eric J. Gouvin, *The Magic of Money and Banking*; Sue Liemer, *Bots and Gringotts: Anglo-Saxon Legal References in Harry Potter*; Ruth Anne Robbins, *Harry Potter as Client in a Lawsuit*; Heidi Mandanis Schooner, *Gringotts: The Role of Banks in Harry Potter's Wizarding World*; Aaron Schwabach, *Harry Potter and the Unforgiveable Curses*.

Desnoyer, Brad & Alexander, Anne, *Race, Rhetoric, and Judicial Opinions: Missouri as a Case Study*, 76 Md. L. Rev. 696 (2017).[29]

Keene, Sherri, *Victim or Thug? Examining the Relevance of Stories in Cases Involving the Shootings of Unarmed Black Males*, 58 How. L. J. 845 (2015).

14. Other

Some articles manage to apply storytelling or narrative in creative ways. Two examples of this are:

Eyster, James Parry, *Using Significant Moments and Obtuse Objects to Enhance Advocacy*, 14 Legal Writing 87 (2008).

Kiernan-Johnson, Derek H., *Telling Through Type: Typography and Narrative in Legal Briefs*, 7 J. ALWD 87 (2010).

Following the comprehensive section below on articles dating from 2007 to the present is a section on books and textbooks that could be included within the Applied Legal Storytelling movement, whether wholly or in part. Some of the books are directly about legal storytelling; others contain chapters or sections on legal storytelling; and one, although not directly about legal storytelling, originated with a presentation at an Applied Legal Storytelling conference and has narrative at its core. Of particular note for this section, the updated version of the bibliography lists an addition to the LWI Monograph Series, Volume 10, which contains foundational articles on legal storytelling.[30] Finally, the bibliography ends with a section on articles that mention Applied Legal Storytelling as a sub-disciplinary movement.

A quick note on methodology. The original article began as an effort to accumulate citations to the many publications that had grown out of the first four Applied Legal Storytelling conferences, in preparation for the fifth conference, held in July 2015.[31] After four conferences, the conversation on Applied Legal Storytelling had been well under way, and a bibliography could offer a means to summarize what had come before, encourage potential presenters for 2015 to take the next step in the conversation, and offer those new to Applied Legal Storytelling a way in.

29 This article is part of a symposium on race and rhetoric that was published in the Maryland Law Review in 2017. The symposium includes other articles that use storytelling approaches, including articles by Carrie Sperling and Kimberly Holst; Lucy Jewel; Sherri Lee Keene; and Donald Caster and Brian Howe. Those other articles are all listed below in the bibliography.

30 Legal Writing Inst. Monograph Series, Vol. 10: Legal Storytelling (Anne E. Ralph ed., forthcoming 2021).

31 At the Seattle University School of Law, July 21–23, 2015.

This updated version of the bibliography continues that effort and adds citations to articles that originated in the most recent three conferences, of 2015, 2017, and 2019.

For both the original and the updated bibliographies, calls went out on the listservs of the Legal Writing Institute and the Clinical Legal Education Association for people to suggest items for the bibliography.[32] These calls emphasized articles and books that either began as presentations at one of the Applied Legal Storytelling conferences or were inspired by one of the conferences.[33] A number of presentations ended up in one of three journals—*Legal Writing: The Journal of the Legal Writing Institute*; *Legal Communication and Rhetoric: JALWD*;[34] or *The Law Teacher: The International Scholarly Journal of the Association of Law Teachers*—each of which at various times also devoted a special issue to articles based on conference presentations.[35]

The Applied Legal Storytelling movement emerged from earlier work on legal narratives and legal storytelling, work that pre-dated the conferences, and so the original 2014 search for bibliographic items was broader than the updated search, both in the listserv calls that went out and through online searches.[36] The updated search has confined itself to articles that had their origins in one of the Applied Legal Storytelling conferences.

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32 In June and August of 2014 for the original bibliography and in July and August 2020 for the updated bibliography.

33 But contributors were invited to suggest other bibliographic items besides those that were conference-related.

34 Previously titled *J. ALWD: The Journal of the Association of Legal Writing Directors.*

35 Those special issues are volume 41 of *The Law Teacher: The International Journal of Legal Education* (2007); volume 14 of *Legal Writing* (2008); volume 7 of *J. ALWD: Journal of the Association of Legal Writing Directors* (2010); and volume 48, number 2, of *The Law Teacher: The International Journal of Legal Education* (2014).

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