



LEGAL ANALYSIS
and COMMUNICATION

Trailers, Transitions, and Tracking:
How Screenwriting Techniques Can
Enhance Lawyers' Storytelling

Lawyers as Storytellers

“Stories are essential ingredients in human interaction... Even though law is allegedly about something other than stories, i.e. “logic” and “reasoning,” stories nevertheless are there to guide logic and reasoning.”

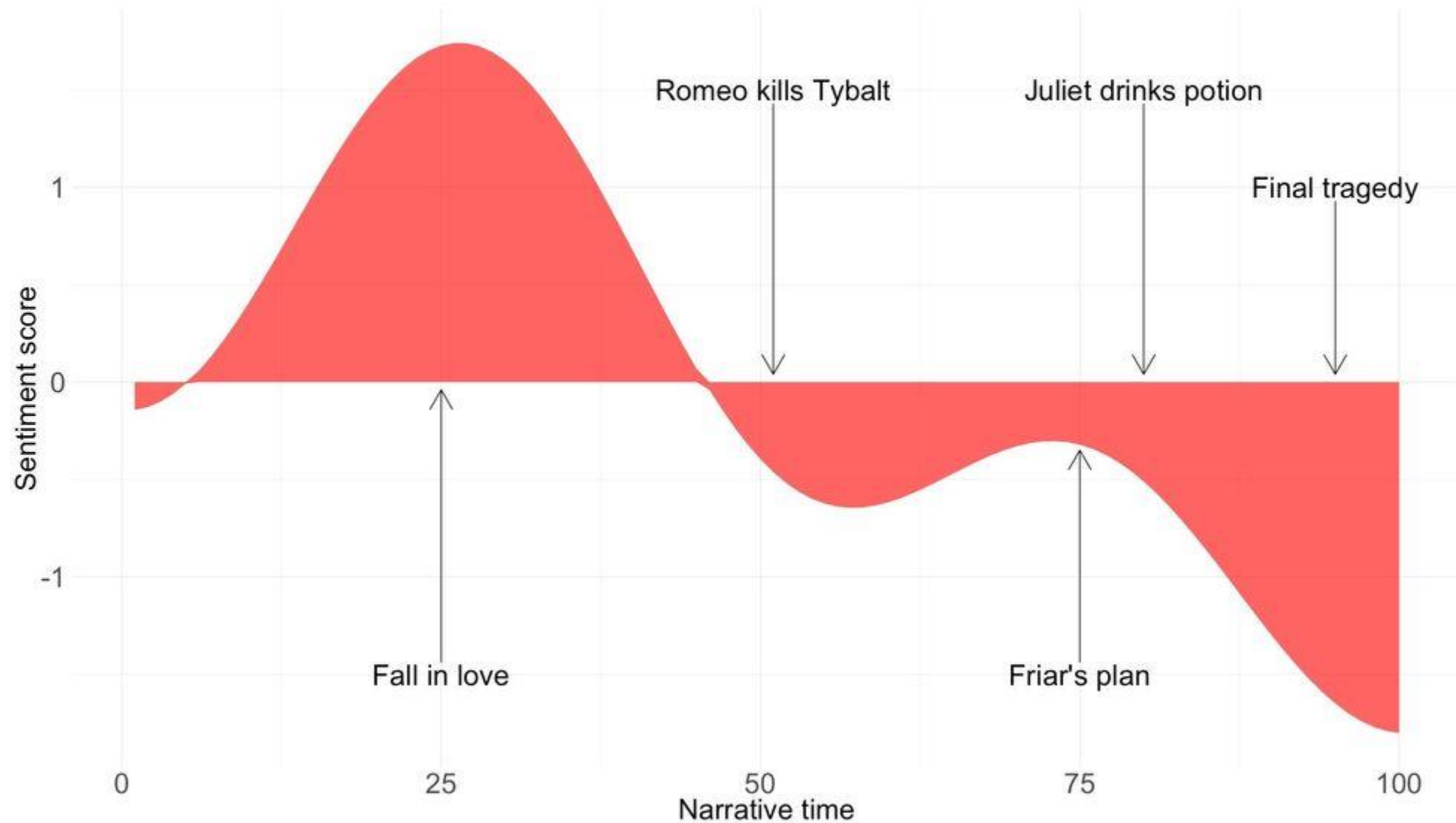
Ruth Ann Robbins, pioneer in the field of Applied Legal Storytelling

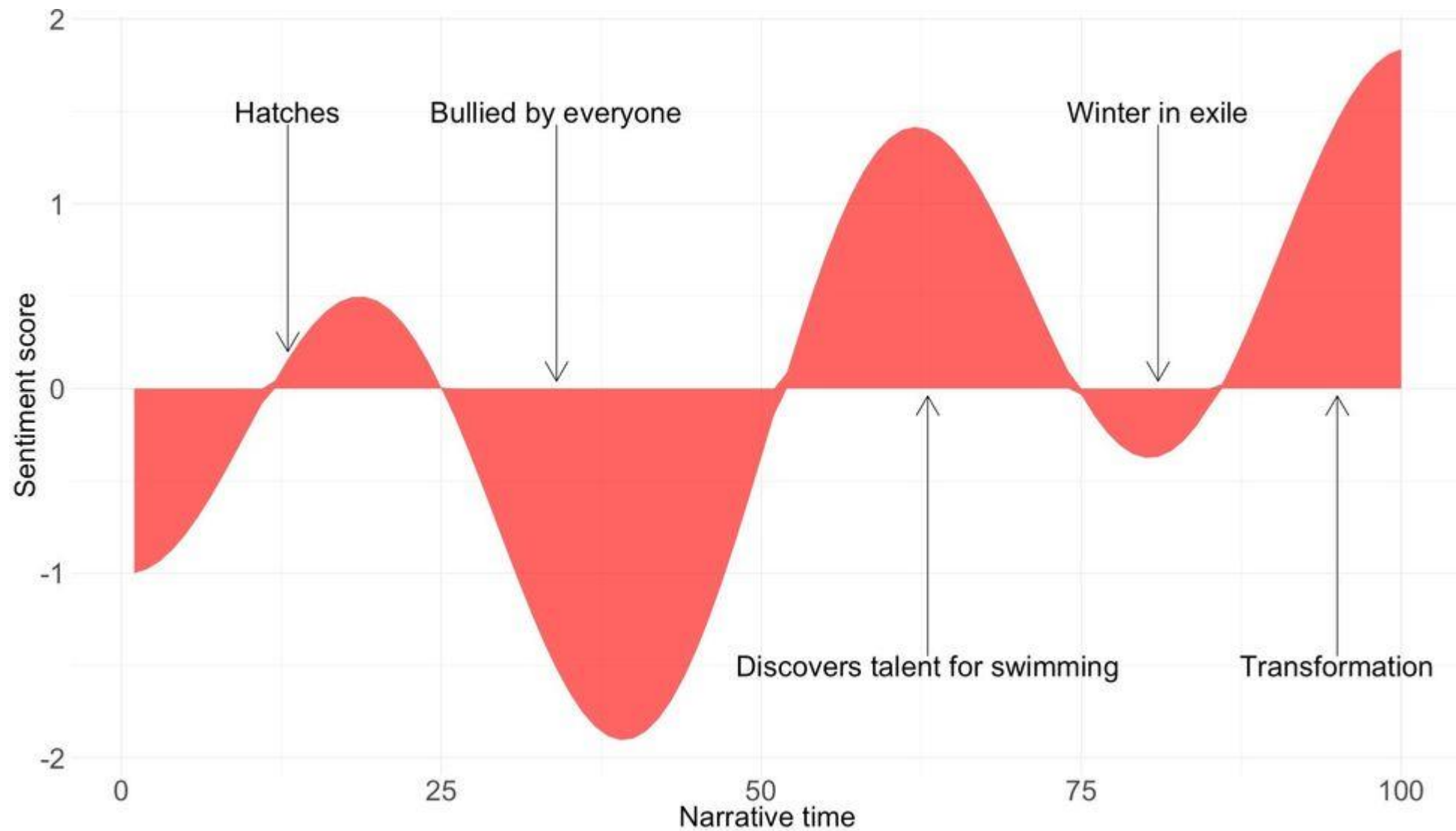
Lawyers as Storytellers:

- Madman
- Architect
- Carpenter
- Judge

Aristotle & Vonnegut--The Six Stories:

1. Rags to riches – a steady rise from bad to good fortune
2. Riches to rags – a fall from good to bad, a tragedy
3. Icarus – a rise then a fall in fortune
4. Oedipus – a fall, a rise then a fall again
5. Cinderella – rise, fall, rise
6. Man in a hole – fall, rise





Trailers: Establish a Theme

Transitions: Drive the Storytelling

Tracking: Organize for Impact

Walt Disney Pictures
presents



Screenplay Structure: Three Acts

Act One: Setup

Act Two: Confrontation

Act Three: Resolution

Screenplay Structure: Three Acts

ACT I

Exposition

A young boy named Andy has a collection of toys he plays with, his favorite of which is a cowboy named Woody. When Andy is gone, the toys come to life and have a meeting about Andy's upcoming birthday.

Inciting Incident

Andy's birthday party arrives and the toys are worried about Andy's new toys. Andy runs in and moves Woody over for his new toy Buzz Lightyear. When Andy leaves, Buzz impresses all the other toys except for Woody.

Plot Point One

Out of jealousy, Woody sets a trap and Buzz falls out of the window. The other toys accuse Woody of killing Buzz. Andy can't find Buzz and takes Woody to Pizza Planet. Buzz sees Andy and Woody leaving and grabs onto the minivan.

Screenplay Structure: Three Acts

ACT II

Rising Action

Woody and Buzz get left as they argue at a gas station. Woody convinces Buzz they must go to Pizza Planet for Buzz to return home. They sneak onto a Pizza Planet delivery car to get driven to where Andy is.

Midpoint

Sid, Andy's evil neighbor, wins Buzz and Andy from a claw machine. Sid takes them home. They meet all of the Frankenstein-like toys Sid pieced together. Woody and Buzz must work together to escape from Sid's house.

Plot Point Two

In the process of escaping, Buzz sees a TV commercial for the Buzz Lightyear toy and has an existential crisis as he realizes he's just a toy. He attempts to fly to prove he is the real Buzz Lightyear, but tragically falls and loses his arm.

Screenplay Structure: Three Acts

ACT III

Build Up

Woody tries to rally Buzz to escape and almost does by stringing Christmas lights to Andy's house. The other toys almost help reel them in, but see Buzz's lost arm and think Woody murdered Buzz.

Climax

Sid straps a rocket to Buzz, Sid's other toys attack him, allowing Buzz and Woody to escape. Woody and Buzz get to the house, but the moving van just left. Woody lights the rocket on Buzz's back and the two get to the moving van.

Finale

During Christmas at Andy's new house, Buzz and Woody wait to hear of any new Christmas toys for Andy. To their surprise, he gets a dog.

Trailers: Establish a Theme



Establishing a Theme:

- The narrative is where the theme develops, but it is not the retelling of the events that creates the story; the theme is the concept that underlies those events

Establishing a Theme:

- *Faci Dicionis Rei Audentes*
- Cicero: drawing the audience into the story

A cowboy doll is profoundly threatened and jealous when a new spaceman figure supplants him as top toy in a boy's room.



Case No. 05-50472

In The United States Court of Appeals
for the Fifth Judicial Circuit

MARIA ANTONIETA MARTINEZ-AGÜERO,
Plaintiff - Appellee,

v.

HUMBERTO GONZÁLEZ,
Defendant - Appellant.

Interlocutory Appeal from the United States District Court
for the Western District of Texas, El Paso Division

Civil Action No. EP-03-CA-0411-KC

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It does not require a court ruling for a state official to know that even an excludable alien may not be denied the fundamental liberty interest to be free of gross physical abuse in the absence of some articulable, rational public interest that may be advanced by such conduct.

—Lynch v. Cannatella¹

I. INTRODUCTION

More than 100 years ago, the Supreme Court ruled that the protection of our Constitution reaches all people within the territory of the United States regardless of their citizenship. In *Yick Wo v. Hopkins*,² the Court held that the Fourteenth Amendment's pledges of due process and equal protection apply "to all persons within the territorial jurisdiction [of the United States]," explaining that "[t]he rights of petitioners . . . are not less because they are aliens." That same year, in *Wong Wing v. United States*,³ the Court held that "all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth Amendments]," stating that "even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law." Repeatedly

¹ 810 F.2d 1363, 1373 (5th Cir. 1987).

² 118 U.S. 356, 368-69 (1886).

³ 163 U.S. 228, 238 (1896).

It does not require a court ruling for a state official to know that even an excludable alien may not be denied the fundamental liberty interest to be free of gross physical abuse in the absence of some articulable, rational public interest that may be advanced by such conduct. —Lynch v. Cannatella

Thus, despite *Verdugo*, aliens whose entire “connection” to the United States is premised on their *illegal status* and circumvention of immigration law have nonetheless been accorded Fourth Amendment protections. It therefore cannot be that Martinez-Agüero falls outside those protections when she had been issued a border crossing card and routinely and used it routinely and lawfully to enter the United States.

V. CONCLUSION

More than a century after the Supreme Court’s pronouncements in *Yick Wo* and *Wong Wing*, González asks the Court to re-examine the Constitution’s protection of aliens who come within the territory of the United States. He asks this—not in the context of an criminal alien facing deportation proceedings, nor with regard to an enemy combatant in military confinement, nor in connection with an illegal alien who has clandestinely set foot upon our shores. Nothing of the sort. Instead, he asks the Court to deny constitutional protections to a border resident who was attacked and beaten while attempting to visit the United States lawfully, in what the district court concluded was “legitimate[] rel[iance] on an official statement of the law . . . by a consular official.”¹⁶⁰ González asks the Court to deny that Martinez-Agüero was on U.S. territory, deny that she is one of “the people,”

United States v. Millan, 36 F.3d 886 (9th Cir. 1994).

¹⁶⁰ R.E. tab 3, R. 263, Dist. Ct. Op. at 36.

and deny the Constitution’s power to protect her at the border. But some truths are self-evident. In light of precedent, in keeping with this nation’s commitment to justice, and in response to the principles embodied in the Constitution, the Court must reject this request.

Respectfully submitted,

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Transitions: Drive the Storytelling

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Evaluation of “Good” Legal Writing

- Accuracy
- Clarity / Simplicity
- Concision
- Tone
- Organization

Characteristics of Plain English

- Readers, even legal ones, prefer the simplicity of plain English:
 - Short sentences (or well drafted complex sentences)
 - Definite, concrete, everyday language
 - Active voice
 - Separate paragraphs and sections, with headings, for separate concepts
 - The absence of overly legal jargon, highly technical business terminology, Latin, or other foreign terms
 - The absence of double or multiple negatives

Martinez-Agüero and her aunt turned to leave, heading back towards Mexico. Martinez-Agüero told her aunt that she would call her husband to take them to a different bridge. Then González yelled at them to “stop in the name of the law.” He grabbed Martinez-Agüero forcefully, twisted her arms behind her back, and pushed her into a concrete barrier. González then began to “hit her with his fists and knees,” kneeling her repeatedly in her lower back.

~ excerpt from *Martinez-Agüero v. González*, Brief of Appellee, Background Facts

Common Issues:

- Poor structure / rambling organization
- Awkward / ambiguous clauses
- Clutter / wordiness
- Grammar/usage issues / poor proofreading

Phrasing Errors

- Often, unclear phrasing is a result of “misplaced modifiers,” or the internal disorganization of a sentence.
- Consider: The position of a word within a sentence often establishes the word’s relationship to other words in the sentence.
- Modifiers should be placed as close as possible to what they modify. If placed too far away, the meaning may be lost or obscured.
 - Unclear: Workers meet to discuss the problem of inefficiency in the office.
 - Clear: Workers meet in the office to talk about the problem of inefficiency.

Artful Phrasing

- The “flow” of writing can be improved simply by varying your sentence structure. Often varied writing “sounds” more intelligent!
- Using the same sentence structure to express your ideas over and over leads to a monotonous reading experience.
- **Simple sentence: One independent clause (one subject, one predicate)**
 - Ex: The new product is unlikely to be profitable.
- **Compound sentence: Two independent clauses (joined by a coordinating conjunction)**
 - Ex: The new product is unlikely to be profitable, *and* management should not invest in its development.

Artful Phrasing

- **Complex sentence: One independent clause, one dependent clause (joined by a subordinating conjunction)**
 - Ex: *Because* the new product is unlikely to be profitable, management should not invest in its development.
- **Compound-complex sentence: Two independent clauses, one with an associated dependent clause.**
 - Ex: *Because* the new product is unlikely to be profitable, management should not invest in its development, *but* other new products may show more promise.

Discretionary Writing Choices

*For all our “dos-and-don’ts,” some hotly-contested,
discretionary choices persist!*

Discretionary Writing Choices

Use of the Oxford comma?

Discretionary Writing Choices

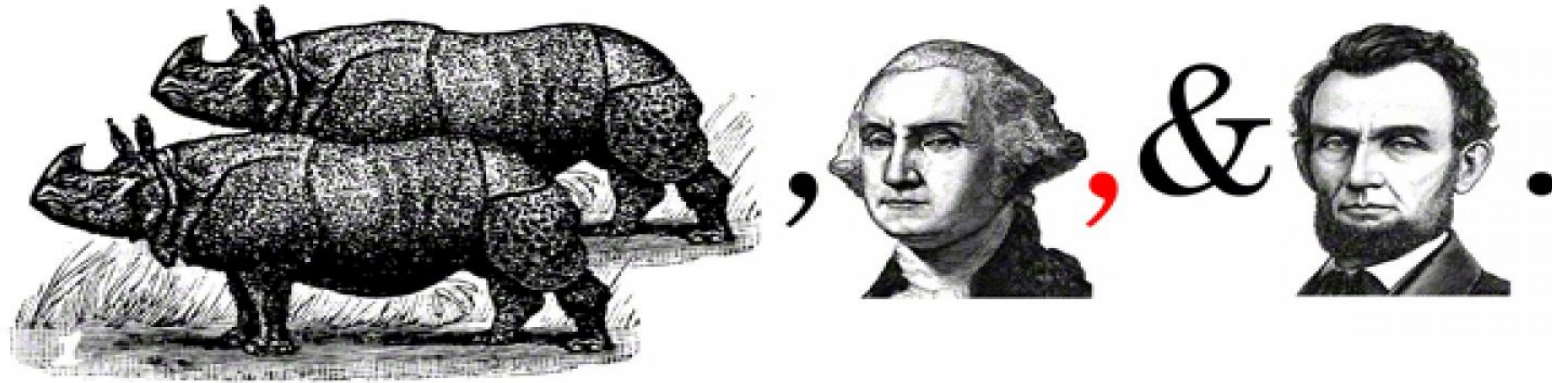
Use of the Oxford comma?

- 56% prefer the Oxford comma
- 21% prefer no Oxford comma
- 23% are indifferent

(Note: All Survey results via Ross Guberman's blog)

With the **Oxford Comma**:

We invited the rhinoceri, Washington, and Lincoln.



Without the Oxford Comma:

We invited the rhinoceri, Washington and Lincoln.



Use the Oxford Comma!

- In 2014, missing Oxford comma prompted litigation between Oakhurst Dairy and its drivers.
- Three truck drivers sued the dairy for what they said was four years' worth of overtime pay they had been denied.

Oakhurst Dairy (cont.)

- Maine law required time-and-a-half pay for each hour worked after 40 hours, but it carved out exemptions for:

The canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of:

- (1) Agricultural produce;
- (2) Meat and fish products; and
- (3) Perishable foods.

- First Circuit took issue with the phrase “packing for shipment or distribution of.”
- Court ruled that it was not clear whether the law exempted the distribution of the three categories that followed, or if it exempted *packing for* the shipment or distribution of them.

There is very little case law interpreting or applying the “substantial connection” test, but the principal opinion in *Verdugo* mentions several factors or types of connections it considered, seemingly in no particular order: citizenship, residency, voluntariness and lawfulness of prior entries, acceptance of societal obligations, and location of the search (or seizure).

~ excerpt from *Martinez-Agüero v. González*, Brief of Appellee, Argument

Discretionary Writing Choices

Use contractions in formal legal writing?

Discretionary Writing Choices

Use of contractions?

- 37% prefer no contractions
- 42% allow contractions
- 21% don't care

Discretionary Writing Choices

One space or two between sentences?

Discretionary Writing Choices

One space or two between sentences?

- 62% prefer two spaces after a period
- 21% prefer one space after a period
- 17% are indifferent

III. SUMMARY OF THE ARGUMENT

González cannot justify his attack on Martinez-Agüero. He does not even try. Instead, in an attempt to avoid liability, González asks the Court to create new law piecemeal out of dicta and doctrine borrowed from marginally-related case law. The new proposition of law he advances—that nonresident aliens such as Martinez-Agüero have no constitutional rights even when present on U.S. soil—flies in the face of more than 100 years of Supreme Court precedent and contrary holdings of this Court.

Tracking: Organize for Impact

What is Tracking?

- The essence of tracking in legal writing is **Organization**.
- Tracking from a screenwriting perspective involves the audience being able to follow or “track” the logic or premise smoothly.
- When we engage in legal writing we want our audience to follow or “track” our theme or conclusion smoothly throughout the brief.

Tracking from a Screenwriting Perspective

- Consider *The Office*
 - An example of GREAT tracking!



- Now Consider *Nikita*
 - Not so great...



- What about *Toy Story*?



Tracking from a Screenwriting Perspective – The Camera Shot

<https://youtube.com/clip/Ugkxessps49tEaKH8INVraJ6i-DQOfMpj17N>

How does this apply to brief writing?

- We want the audience to “track” or follow our theme or conclusion through the brief
- Like in the video clip, our audience wants to know two things: 1) what is our conclusion? and 2) how is it supported?

Three Principles to Facilitate Effective “Tracking” in Legal Writing

- 1) Speak Human
- 2) Lead From the Top
 - Develop a strong theme
 - Reveal it early and repeat it often
- 3) Guide Your Readers
 - Organization and Structure are key

Lead From the Top

- If you tell your audience what's important from the outset, they'll look for that information as they read.
- When you make it clear from the beginning they don't have to waste time and brainpower on trying to figure it out as they are reading.

Lead From the Top

- **Lead** a brief with your conclusion
- **Lead** a section with a substantive heading
- **Lead** a paragraph with a summary sentence
- **Lead** an email with a strong subject line

Lead From the Top

- Your leads also help **track your theme** throughout the brief.
- Your leads all function as transitions.
- And they prime your readers about what to look for.

Guide Your Readers

- **Sane people don't read briefs for pleasure.**
- They read briefs because they're expected to.
- In fact, they don't "read" them so much as they "**use**" them.

Guide Your Readers

- They want to know what to do next and your job is to tell them.
- What are you asking the court to do? How can the judges and clerks get there?
- A well-crafted theme carefully woven throughout the brief will help your reader see and understand (and hopefully adopt) your conclusion.

Using Structure to Hold Your Readers' Attention



Back to the Basics

- Remember **CREAC**?
 - **C** – Conclusion
 - **R** – Rules
 - **E** – Explanation
 - **A** – Application
 - **C** – Conclusion
- While your unique writing style has evolved over the years, following the CREAC formula, even loosely will help your writing.
 - Organization
 - Understanding
 - Tracking

Conclusion and Rules

- Let your reader know where you are going up front.
 - Start with the bottom line.
 - If you **tell** your audience what's important, they'll look for that information as they read.
- Make your governing rules clear by displaying them prominently

Explanation and Application of the Law

An effective explanation and application of the law will:

- 1) Identify and explain the legal rule
- 2) Present facts, the court's holding, and court's reasoning of the precedential case
- 3) Explicitly compare facts between the precedential case and your case
- 4) Apply reasoning to reach your proposed outcome

Explanation and Application of the Law

An effective explanation and application of the law can take several forms

- Separate case illustration and application paragraphs
- Case illustration and application in one paragraph
- Make sure to “connect the dots” for the reader with explicit analogies

Explanation and Application of the Law

Two Methods

1) Rule Based Reasoning

- E.g. Speed Limit, Dependent
- Applies the facts to an unambiguous rule or statute

Explanation and Application of the Law

Two Methods

2) Analogical Reasoning

- Precedent – How has the court dealt with the issue in the past?
- Draws analogies from past cases to your client's case
- Fact intensive

Explanation and Application of the Law

Analogical Reasoning

- Start with your case illustrations. Make sure to have:
 1. Hook
 2. Trigger Facts
 3. Court's Holding
 4. Court's Reasoning

Explanation and Application of the Law

Analogical Reasoning

- Hook
 - This is the topic or thesis sentence.
 - What is important in the case? What is the “take away”?
- Facts
 - Legally significant facts
 - What will you use in your analogies?
(similarities/differences from your case).

Explanation and Application of the Law

Analogical Reasoning

- Court's Holding – What the court decided
- Court's Reasoning – Why they reached that decision

Explanation and Application of the Law

Analogical Reasoning

Once you have given a case illustration(s), it is time to apply the law.

- Compare or distinguish your facts to/from the facts in the case illustration(s).
- Use explicit analogies

Explanation and Application of the Law

For Example...

Comparison: “Like the defendant in *Davis* who intentionally shot his wife after finding her in bed with another man, Russell strangled his wife after finding out she cheated.”

Distinction: “Unlike the defendant in *Davis* who killed his wife intentionally, the death of defendant Campbell’s wife was purely accidental.”

Explanation and Application of the Law

Analogical Reasoning – Applying the Law

- Use parallel structure
- Conclude your application with a sentence about how the court should find pursuant to your reasoning.
- Finally, don't be afraid of unfavorable cases.

Explanation and Application of the Law

Does your “E” . . . ?

- Feature strong topic sentences that preview the importance of the case you are offering?
- Offer key facts to explain the holding (facts you can analogize to/distinguish from in your “A” section)?
- Offer key reasons to support the holding (reasonings you can analogize to/distinguish from in your “A” section)?
- Cite every sentence?
- Use the past tense?

Explanation and Application of the Law

Does your “A” . . . ?

- Feature strong topic sentences that preview the content of the paragraph that follows?
- Avoid being vague or abstract by:
 - Offering key facts from cases that you analogized to/distinguished the instant case from?
 - Offering key reasons from cases to support the holdings (reasonings you have analogized to/distinguished from)?
- Cite where necessary?

“Tracking” Tips

Use Point Headings

- Use informative headings, preferably full sentences that amount to succinct propositions or one sentence conclusions of law

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“Tracking” Tips

Use Umbrella/Roadmap Paragraphs

- Include an umbrella/roadmap paragraph before your headings and subheadings.
- Show the court a trailer.
- Set the stage for the headings and subheadings that follow.

E. The Fourth Amendment

Without the benefit of the entry-fiction doctrine, González's Fourth Amendment argument fares little better than his position on the Fifth Amendment. Because Martinez-Agüero and all relevant conduct were within the territory of the United States, González's mistreatment of Martinez-Agüero was actionable under *Bivens* and the Fourth Amendment's protections against wrongful arrest and excessive force.¹¹³ González's contrary argument, if adopted, it would require overruling firmly-entrenched precedent.

Citing exclusively to *United States v. Verdugo-Urquidez*¹¹⁴ and its test for *extraterritorial* application of the Fourth Amendment, González maintains that Martinez-Agüero cannot invoke the Fourth Amendment because purportedly (1) under the entry fiction, the Court should consider her to have been outside the territory of the United States even though she was not and (2) under his reading of *Verdugo*, her connections with the United States were insubstantial even though the district court found they were not.¹¹⁵ Both of these arguments are wrong.

1. The Fourth Amendment Protects Aliens Once They Are Within the Territory of the United States.

-excerpt from *Martinez-Agüero v. González*,
Brief of Appellee

“Tracking” Tips

Use of Key Terms and Repetition

- Include key terms/“terms of art” often
- Strategic use of repetition helps your audience “track” your theme/conclusion and bind together facts and legal theories



“Tracking” Tips

End with a Strong Conclusion

- The last thing in your audience reads should be the conclusion you want the court to reach.
- Make it strong and direct.



To Infinity and Beyond