

POST-WORKSHOP ASSIGNMENT (IF WANT KAHOOT QUESTIONS)

To play the kahoot game, click the link on slide 4 of this PowerPoint. Choose "Writing Workshop on Effective Brief Writing." Click "start now" and then "classic." Once game pin is generated, copy the pin and open kahoot.it in a new window. Enter game pin. Enter a nickname and hit "go." You will then have to open the original tab and the kahoot.it tab. Use the original tab to start the game and see the questions and answers. Use the kahoot.it tab to enter your response.

EFFECTIVE BRIEF WRITING TIPS – GLEANED FROM FEDERAL COURT OPINIONS AND BEYOND

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DISCLAIMER

- General tips with some specialized for Fifth Circuit
- In event of conflict with Fifth Circuit judges' tips, use their tips when in their court
- Not a brief-writing manual
- Not meant to ID every problem you may encounter
- YOU must READ and FOLLOW the FRAP, Fifth Circuit Rules, and I.O.P.s
- Get cozy with the Fifth Circuit's Practitioner's Guide (FCPG)

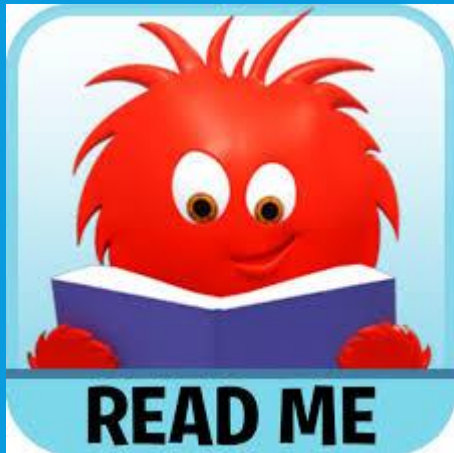


KAHOOT.IT TIME

- <https://play.kahoot.it/#/k/ff1f7221-995e-4512-9aco-3oab9f476d45>
- From this link, you choose the game, get the game code, and then enter it in a new tab (window) at kahoot.it <https://kahoot.it>
- Add screen name
- Now you are ready to play the game
 - However, you have to RUN the game from the original link's tab and PLAY the game from the kahoot.it tab
- The questions we did not get to in the presentation addressed grammar and citation.

GET IT READ!

- Content
- Persuasion
- Polish



CONTENT

- Rule-compliant
- Useful info
 - Issue selection
 - Obtain desired relief/not harmless error
 - Triggers SOR
 - Accurate info
 - Relevant info
 - Adequate info



PERSUASION



- Structure
- Support
- Format
- Writing
- Key places to persuade
 - Statement re: oral argument
 - Issue format, phrasing, and placement
 - Point heading use, placement, and construction

POLISH

- Clear
 - Organized
- Clean
 - No typos, grammos, or style errors
- Compliant
- Citation
 - Accurate
 - Proper format



GETTING CALLED OUT

- *Bradshaw v. Unity Marine Corp.*, 147 F. Supp. 2d 668 (S.D. Tex. 2001)
 - Another disclaimer: harsh words for counsel; judge later impeached for other behavior
 - Neither condone nor commend
- *Factac, Inc. v. King (In re King)*, Ch. 7 Case No. 05-56485-C, Adv. No. 05-5171-C (W.D. Tex. Feb. 21, 2006)
 - Shallow analysis
 - Inaccurate info
 - Irrelevant info
 - Hidden issues
 - Pore writing
 - See what I mean?
 - Poor citation

BRADSHAW V. UNITY MARINE CORP.

- Shallow analysis
 - “in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed” *Id.* at 670.
 - “by submitting a Motion that relies upon only one legal authority” *Id.*
 - “Defendant, however, does not even cite to *Erie*, but to a mere successor case, and further fails to even begin to analyze why the Court should approach the shores of *Erie*” *Id.*
 - “neglects to provide any analysis whatsoever of why his claim versus Defendant Phillips is a maritime action” *Id.*
 - “does *nothing* to explain why, on the facts of *this* case, Plaintiff has an admiralty claim against Phillips” *Id.* at 671.
 - “Plaintiff failed to file his action versus Defendant Phillips within that two-year time frame. Plaintiff has offered no justification, such as the discovery rule or other similar tolling doctrines, for this failure” *Id.* at 672.
- Irrelevant info
 - “it stands simply for the bombshell proposition that torts committed on navigable waters (in this case an alleged defamation committed by the controversial G. Gordon Liddy aboard a cruise ship at sea) require the application of general maritime rather than state tort law” *Id.* at 671.
 - “Court cannot even begin to comprehend why this case was selected for reference. It is almost as if Plaintiff’s counsel chose the opinion by throwing long range darts at the Federal Reporter (remarkably enough hitting a nonexistent volume!)” *Id.*
- Hidden issues
 - “As vaguely alluded to by the parties, the issue in this case turns upon which law—state or maritime—applies to each of Plaintiff’s potential claims versus Defendant . . . and despite Plaintiff’s and Defendant’s joint, heroic efforts to obscure it, the answer to this question is readily ascertained” *Id.* at 671.
 - “After this remarkably long walk on a short legal pier, having received no useful guidance whatever from either party, the Court has endeavored, primarily based upon its affection for both counsel, but also out of its own sense of morbid curiosity, to resolve what it perceived to be the legal issue presented” *Id.* at 672.
- Poor writing
 - “faced with the daunting task of deciphering their submissions” *Id.* at 670.
 - “evidence to create a fact issue some [sic] element of defendant’s asserted affirmative defense” *Id.* at 670.
- Poor citation
 - “Defendant does not even provide a cite to its desired Texas limitation statute” *Id.* at 670.
 - “neglects to provide a pinpoint citation for what . . . turned out to be a forty-page decision” *Id.* at 671.
- Inaccurate info
 - “points to a nonexistent Volume “1886” of the Federal Reporter” *Id.* at 670.

FACTAC, INC. V. KING (IN RE KING)

- Order Denying Motion for Incomprehensibility
- “Defendant’s Motion to Discharge Response to Plaintiff’s Response to Defendant’s Response Opposing Objection to Discharge”
- “The court cannot determine the substance, if any, of the Defendant’s legal argument, nor can the court even ascertain the relief that the Defendant is requesting. The Defendant’s motion is accordingly denied for being incomprehensible.”
- “Or in the words of the competition judge to [Billy Madison] after [he] had responded to an answer that sounded superficially reasonable but lacked any substance”
- <https://youtu.be/WtNHuqHWefU>
- “Deciphering motions like the one presented here wastes valuable chamber staff time, and invites this sort of footnote.”



CONTENT: ISSUE SELECTION

- The Need
 - Pick the best
 - Get client's desired relief
 - Strongest supporting arguments
 - Stop at a few
- The Process
 - ID perceived errors (pre, during, post-trial rulings; reasons for judgment)
 - Brings desired relief if court agrees it was error?
 - Harmless error?
 - Preserved by objection or proffer?
 - Depth of supporting and counter arguments?



CONTENT: ISSUE SELECTION

- Obvious choice



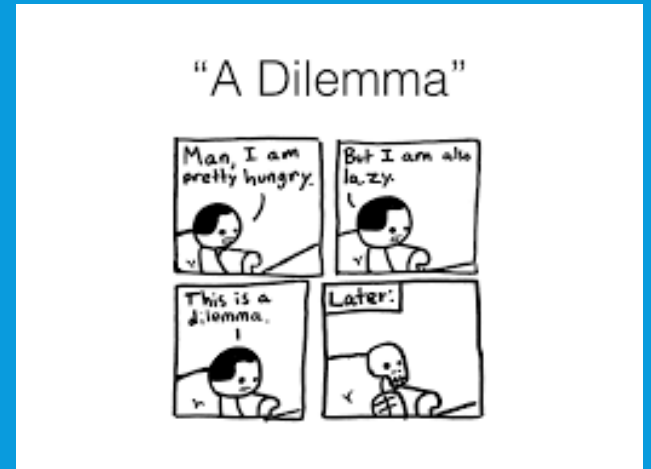
- Tough Choice



- Avoid the bad choices (rotten eggs)



- Make a choice (all bad? Cut losses: settle/dismiss)

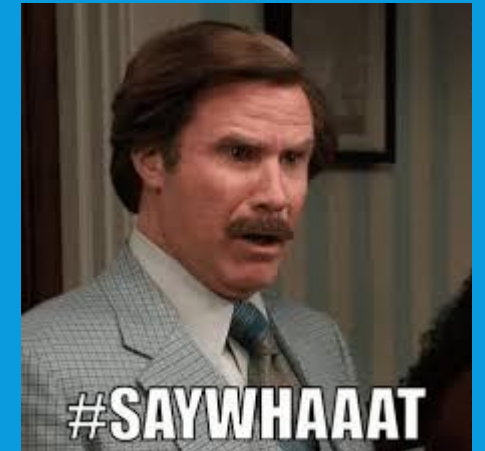


CONTENT: STANDARD OF REVIEW

- Appellant:
- Errors that require no deference; legal errors
- Use caution raising errors reviewed with high deference level
 - Factual findings
 - <http://www.youtube.com/watch?v=BngI6yAtTLE&feature=email>
 - <https://youtu.be/VAiBSOHd1Mc>
- Must ID SOR in brief with support
 - “clearly identified in a separate heading before discussion of the issues” FCPG
- If error requiring preservation at trial court through objection, must ID record page where objection was made

CONTENT: ACCURATE INFORMATION

- Record references
 - Court limited to record in deciding
 - Send court to precise record page
 - Consistent (and 5th Cir. R. 28.2.2-compliant) form
 - ROA.37. (for EROA – need only page #)
 - ROA.17-12744.58. (for EROA in consolidated appeals – incl. app. case #)
 - If no EROA, use USCA5 vol. & pg. #
 - Appear in SOC, SROA, SOA, Arg. Sections
 - Failure erodes credibility; frustrates court; precludes reliance if can't find record support for relevant info.
- Statutory references
 - Correct statute ID'd, used, and accurately referenced
 - Use precise language when meaning of language is at issue
 - Include pincites to relevant subsections
 - If which statute applies is an issue, prove which governs
 - Include supporting authority if exists; rebut competing statute's applicability to issue



CONTENT: ACCURATE INFORMATION

- Precedent references
 - Binding precedent
 - Use and cite to it if exists
 - If ID's rule, state rule and follow with cite
 - If demonstrates application to similar facts, explain the relevant aspects (and cite to it)
 - Criteria: **Kahoot.it time again (4Qs)**
 - Opinion by same or higher court with jurisdiction over deciding court
 - Same cause of action; same issue; similar material facts (facts that impacted outcome)
 - Holding binds (judgment + material facts); dicta does not bind
 - In Fifth Circuit, alternate rationale provided in opinion for same outcome also binds
 - *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir. 1991)



CONTENT: ACCURATE INFORMATION

- Precedent references

- Persuasive precedent

- Use if no binding precedent

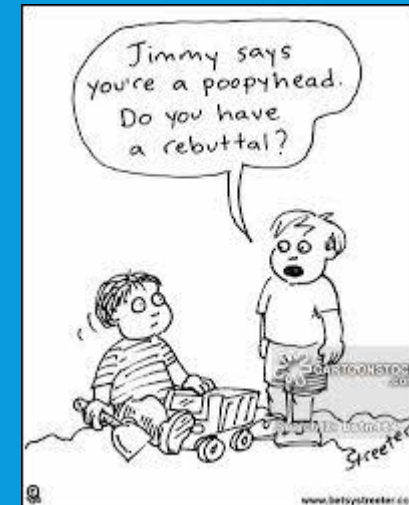
- If same c/a & issue but different material facts, show how reasons still apply to different facts
 - If same material facts but different c/a or issue, show how reasons still apply despite different c/a or issue
 - If same everything but from non-governing jurisdiction, show why reasoning and result is ideal resolution

- Use to rebut adverse binding precedent (difficult because must also convince court to overrule binding)

- Precedent references

- Adverse precedent

- If it concerns you, rebut it
 - Distinguish
 - Work with reasons and facts of client's case to show why adverse precedent result is wrong for client's case



CONTENT: ACCURATE INFORMATION

- Citation Accuracy
 - Things to look for
 - Transposed numbers in vol. or pg. refs.
 - Missing or inaccurate numbers in vol. or pg. refs.
 - Missing or inaccurate reporter
 - Missing or inaccurate court ID
 - Missing or inaccurate date
 - Include Pincites
 - Sends court to specific page of opinion where support for stated proposition is located
 - Do this even if just stating facts from precedent
- Unpublished Opinions
 - Identified by banner/legend on first page
 - **Kahoot.it time again! (2 Qs)**
- Prohibited? 5th Cir. R. 28.7, 47.5.3, 47.5.4
 - Precedential value depends on date of decision (post-1995, with limited exceptions, have NO precedential value)
 - No prohibition to citing to unpublished opinions (differs from FRAP 32.1, which precludes courts' prohibition of citing to post-2006 unpublished opinions)
- How to use?
 - See *Bluebook* B10.1.4
 - Include docket number and WL or LEXIS unique database identifier along with case name and court/date parenthetical

CONTENT: ADEQUATE INFORMATION

- Depth of analysis matters
 - Greater the depth, greater the odds court will understand the argument
 - Greater the support (quality not quantity), greater the odds the court will buy the argument
 - Weight of authority
 - Use of authority
 - showing links between the authority's content and the appellate record's
 - Rebutting troublesome counter arguments
- Organization of analysis
 - Rank strength of support arguments
 - Lead with strongest; scratch the weak
- NOT just quantity (but do include multiple paths to result if all paths are logical)



CONTENT: RELEVANT INFORMATION

- Targeted case presentations
 - Include relevant information
 - Don't dirty things with irrelevant information
- Show connections between precedent & appealed case
 - Connections that impact outcome



PERSUASION: GETTING ORAL ARGUMENT

- Statistics
 - Need reversal? Get oral argument!
 - 2016-2017: 2% without OA; 17% with
 - < 25% get OA per FCPG
- Process (in 5th Cir.)
 - Attorney's duty
 - Great SROA needed; convince screening panel
 - No boilerplate request
 - Case's impact beyond involved parties
 - Case presents *res nova* issues or ones not clearly resolved (I.O.P.)
 - Case presents difficult and complex legal issues (I.O.P.)
 - Case has complex facts; OA helps clarify natural confusion
 - Large sum of money at stake
 - *En banc* argument needed b/c binding 5th Cir. authority requires result that the facts don't warrant in light of changes in policy or prior reasons
 - Court's duty
 - Screening panel decides summary disposition or OA docket
 - Starts with staff attorney's screen & recommendation
 - Goes to OA as long as 1 of 3 screening panel members wants OA

- 5th Cir. R. 28.2.3, 34.2, & I.O.P. following FRAP 34



PERSUASION: ISSUES & POINT HEADINGS

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October 2, 2017

POLISH: CLEAR

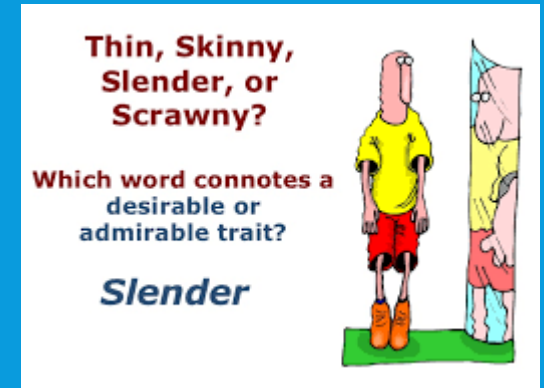
- Organization
 - Pre-writing key; tweak in revising;
 - ID different reasons that get desired relief
 - ID support for each different reason
 - Point headings play into this
 - <https://youtu.be/ZCXUBNYbVLk>



- **CREACC** needed for each different reason/layer of support
 - Won't need all steps every time
 - Opening C not needed if preceding point heading provided same info.
 - **R**: ID's governing legal standard; may need multiple sentences/paragraphs
 - **E**: Often involves relevant precedent; may be based on reason; quality over quantity
 - **A**: Original thoughts enter here; links and connections made for court; don't assume court will make implied links – risk it inferring something different
 - **C**: Rebut scary counters; may require own **CREACC**; don't "waste space" rebutting hopeless counters per FCPG
 - C: Succinctly restate desired conclusion (especially if lengthy analysis)

POLISH: CLEAR

- Phrasing & Placement
 - Word order and choice problems
 - Send different message than intended
 - Solutions:
 - Shorter sentences
 - Shorter paragraphs
 - Simple language
 - Topic sentences
 - Active voice
 - Specificity where needed
 - Know pronoun references
 - Kahoot.it time (3 Qs)



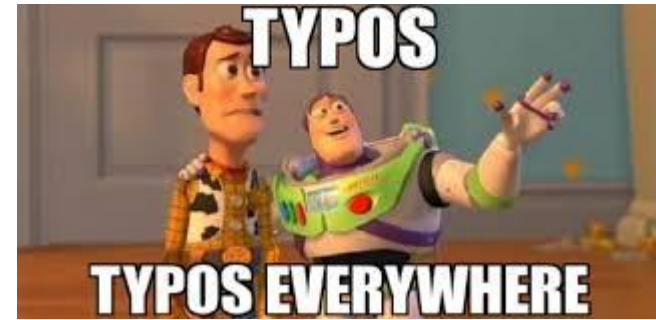
POLISH: CLEAN

The Cold Hard Typo Truth

Your readers, customers, and colleagues
often will notice a typo or error before
they will notice an incorrect fact or
agree/disagree with your premise

POLISH: CLEAN

- Mistake-free
 - Grammos
 - Typos
- Quality proofreading
 - Take a break first
 - Multiple layers
 - Customized checklist
 - Autocorrect & spell check dangers



4 Enlist a Second Set of Eyes



POLISH: CLEAN

- Grammar
- Complete sentences
- Punctuation
 - Joining clauses
 - ID type of clause
 - Coordinating conjunction FANBOYS
 - Quotations
 - Oxford comma
 - Possessives
- Capitalization
 - court
 - plaintiff, defendant, appellant, appellee
- Traps
 - Abbreviation use
 - Contractions
 - Pronoun choice
 - S/V number agreement
 - Missing words
 - Homophone www.homophone.com
 - lead led; NOT lead lead
- More Kahoot.it time (8 Qs)

POLISH: COMPLIANT

MATERIALS BY: KATHY SIMINO, ASSISTANT PROFESSOR OF PROFESSIONAL PRACTICE
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- Find, know, and follow court rules
 - FRAP
 - 5th Cir. Rules
 - I.O.P.
- Purpose
 - Ensure fairness & orderliness
 - Provide consistent framework
- Rules are friends
 - ID required content
 - ID process
- Don't try to circumvent
 - Lose credibility
- Did you know?
 - Actual name or lower court party designations preferred for party references?
 - Reproduction of statutes, rules, & regulations must be in addendum to brief or in pamphlet
- Form requirements
 - ECF attorney filers in 5th Cir. must include paper copies
 - Clerk of Court uses checklist (Appendix E to FCPG) to ensure compliance with rules
 - Notified of errors and have deadline to correct
 - Paper size and typeface size requirements
 - Double-spaced text required; 1" margins
 - Page limits & type-volume limits



POLISH: COMPLIANT

- Notable content notes:
 - Color requirements for cover
 - Certificate of interested persons (to ID potential conflicts)
 - Statement regarding oral argument
 - Table of Contents
 - Table of Authorities
 - Statement of Jurisdiction
 - Statement of Issues
 - Concise statement of the case
 - Summary of the argument
 - Argument with clearly ID'd standard(s) of review
 - **Conclusion – short and stating PRECISE relief sought**
 - Counsel or party signature
 - **Certificates** (of service & compliance)
 - Notice of docket activity not a replacement
 - In 5th Cir. must ID word-processing software used; material misrepresentation can cause striking and sanctions
 - Appellee's brief may omit some parts (jurisdictional statement, issues, statement of the case, and standard of review)
- Record excerpts
 - Purpose
 - Assist judges in screening for OA and preparing for OA
 - Use
 - 5th Cir. uses original record as provided by district court
 - Parties file excerpts in lieu of FRAP 30 appendix
 - Only need to excerpt parts of record that will help purpose
 - Serve opposing counsel with copy of excerpts
 - Rules ID mandatory and optional content of excerpts
 - Rules ID form of excerpts

POLISH: CITATION

Needed?

- Whenever not own original thought
- ID source referenced in sentence
- ID source of quotation
- Citations strengthen argument

Type of authority?

- Find *Bluebook* rule for components and order of information for respective type of source
- Bluepages v. rules?
- Initial reference or subsequent reference?
 - Initial requires full form
 - Subsequent warrants short form

POLISH: CITATION

Placement options

- Citation sentence
- Citation clause
- Textual reference with or without embedding
- In footnotes



The great footnote debate

- Materials contain links to articles
- Love/hate thing for most
- Check for rules allowing/prohibiting
- Look at opinions by judges for personal preferences
- Won't know which judges have your case at time you file brief

POLISH: CITATION

- Level of support
- Use signals to send message about authority with a few characters
- Helps to accompany with explanatory parenthetical
- Don't overuse string cites
- [Kahoot.it](#) (last) time (3 Qs)



PARTING ADVICE

- Be effective
 - Be selective in content
 - Phrase and place to persuade
 - Follow the rules
 - Spend the time it takes to make it shine
- Get it read
- Be refreshing

