

LEGAL WRITING: A JUDGE'S PERSPECTIVE ON THE SCIENCE AND RHETORIC OF THE WRITTEN WORD

By Bob Bacharach
Tenth Circuit Court of Appeals

3 PRINCIPLES OF CLARITY

O1

Create context before detail.

O2

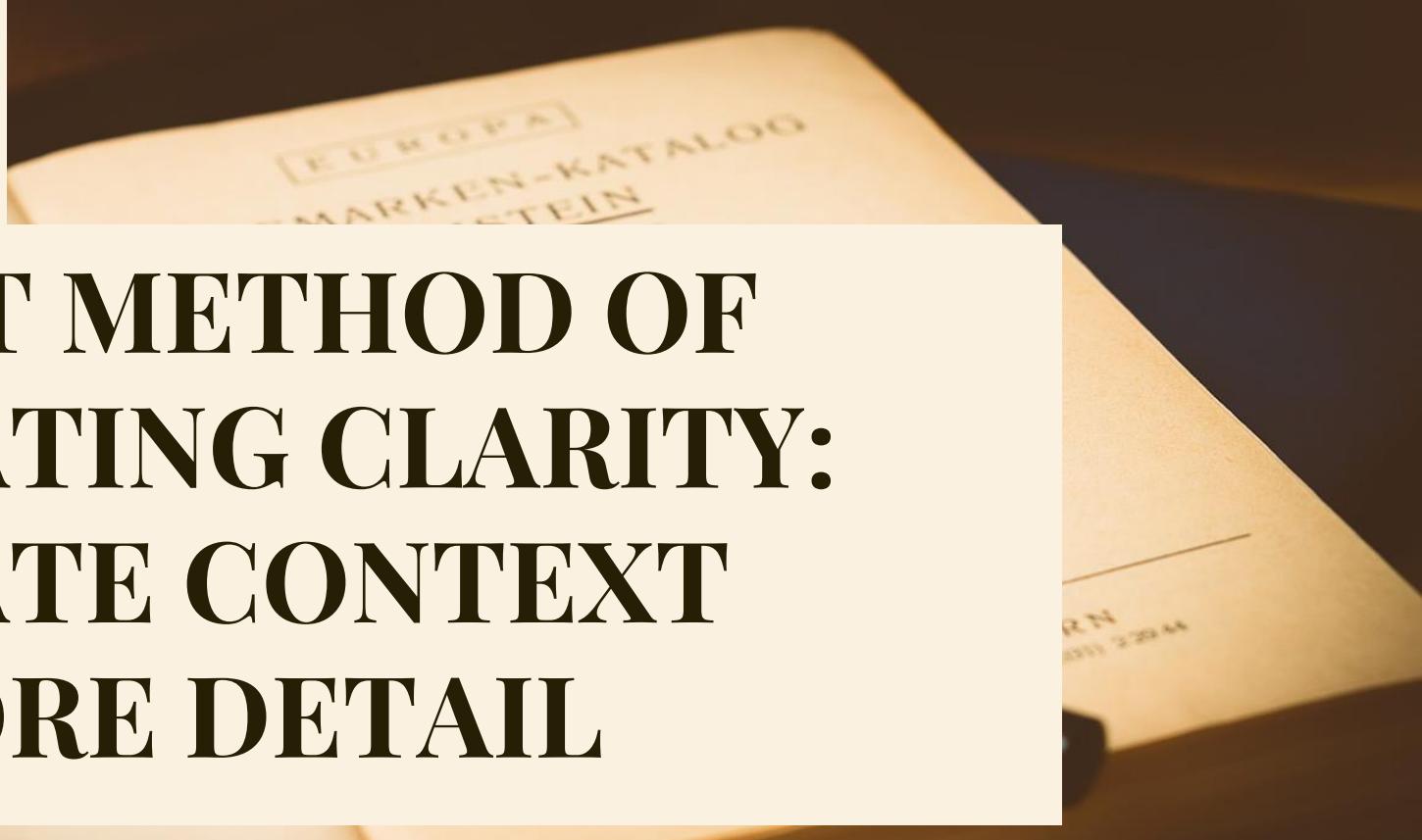
Link the information in your sentences.

O3

Convey the information in manageable chunks.

01

FIRST METHOD OF CREATING CLARITY: CREATE CONTEXT BEFORE DETAIL



“The procedure is actually quite simple. First you arrange things into different groups depending on their makeup. Of course, one pile may be sufficient depending on how much there is. If you have to go somewhere else due to lack of facilities that is the next step. It is important not to overdo it. It is better to do too few things at once than too many.”

– Study by Bransford and Johnson, 1972

A black and white photograph showing a row of industrial washing machines. The machines are tall and have large circular doors at the bottom. Above each door is a small window or display screen. To the left of the machines, a sign with the word "SERVICE" is partially visible. The machines are set against a wall with a window.

Washing Clothes

“The procedure is actually quite simple. First you arrange things into different groups depending on their makeup. Of course, one pile may be sufficient depending on how much there is. If you have to go somewhere else due to lack of facilities that is the next step. It is important not to overdo it. It is better to do too few things at once than too many.”

– Study by Bransford and Johnson, 1972

FOUR FACTS

#1

A sells land to B on May 1, 2015

#2

B sells the land to C in 2016

#3

In 2017, C learns that A hadn't recorded the deed

#4

In 2020, C sues B for breach of contract



The court must decide whether C is a bona fide purchaser for value. For this decision, the court should consider four facts:

1. A sells land to B on May 1, 2015.
2. B sells the land to C in 2016.
3. In 2017, C learns that A hadn't recorded the deed.
4. In 2020, C sues B for breach of contract.

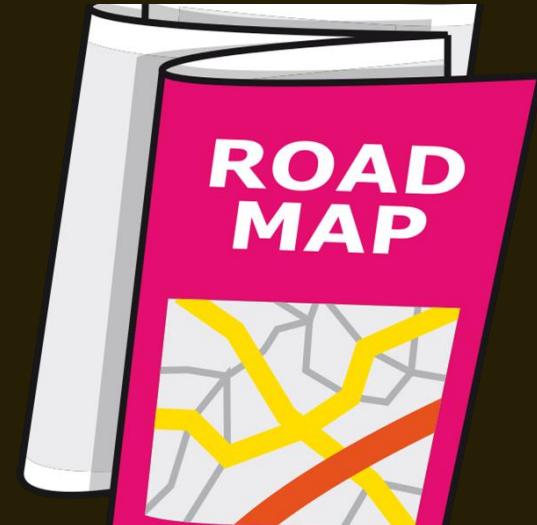
WAYS TO PROVIDE CONTEXT FOR THE ARGUMENT

1. Give an informative introduction.
2. Provide meaningful headings.
3. Provide topic sentences.

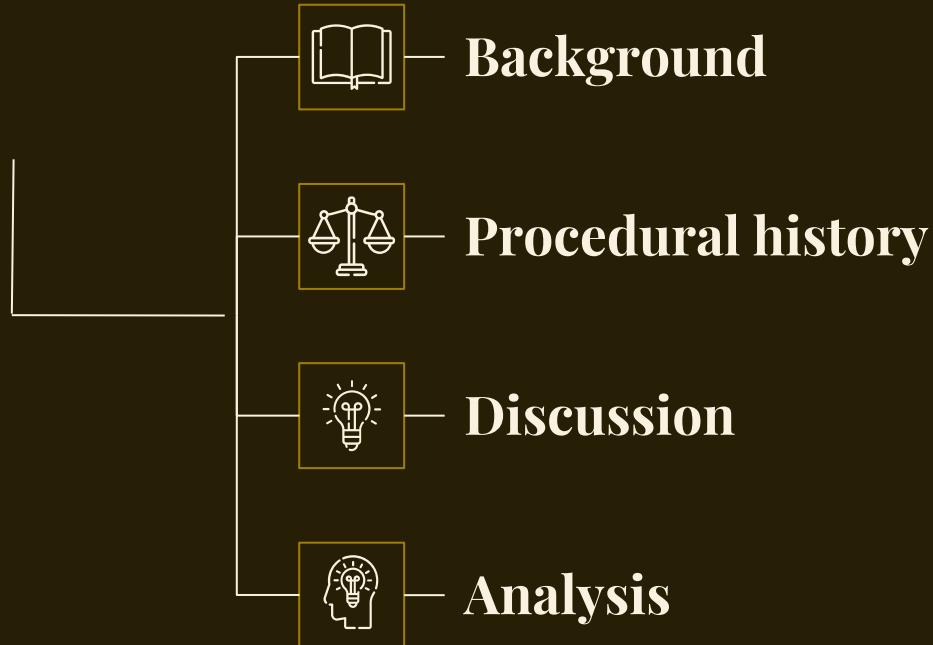


IN THE INTRODUCTION, PROVIDE A ROADMAP

"People make mistakes. Even administrators of ERISA plans. That should come as no surprise, given that the Employee Retirement Income Security Act of 1974 is 'an enormously complex and detailed statute,' *Mertens v. Hewitt Associates*, 508 U.S. 248, 262 , 113 S. Ct. 2063, 124 L.Ed.2d 161 (1993), and the plans that administrators must construe can be lengthy and complicated. (The one at issue here runs to 81 pages, with 139 sections.) We held in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948, 103 L.Ed.2d 80 (1989), that an ERISA plan administrator with discretionary authority to interpret a plan is entitled to deference in exercising that discretion. The question here is whether a single honest mistake in plan interpretation justifies stripping the administrator of that deference for subsequent related interpretations of the plan. We hold that it does not. (*Conkright v. Frommert*, 559 U.S. 506, 509 (2010) (Roberts, C.J.)).



EMPTY HEADINGS



GREGORY GARRE'S HEADINGS (IN BRIEF)

UNITED STATES V. ZUKERMAN, NO. 17-948 (2D CIR.)

- A. This court is not a “rubber stamp” and must overturn any unreasonable sentence.
- B. The \$10 million fine is substantively unreasonable.
 - 1. The fine is vastly larger than the fines imposed on comparable defendants.
 - 2. The fine greatly exceeds the maximum of the applicable sentencing guidelines range, without any compelling justification.
 - a. *Gall* requires the huge variance in this case to be supported by a sufficiently compelling justification.
 - b. The statutory sentencing goals do not justify the variance, especially given other aspects of Zukerman's punishment.
 - c. The district court's asserted justifications for the variance lack merit.
 - d. The probation office's analysis confirms that the variance is not justified.



Chris Landau's Petition for en banc consideration

"The time has come for this Court, sitting en banc, to reconsider *Williams*. Indeed, it is hard to interpret the Supreme Court's remand of this case as anything other than an invitation to do just that. Over the dissent of four Judges, this Court denied plaintiffs' motion for initial hearing en banc to reconsider *Williams*, and a panel summarily disposed of the appeal based on *Williams*. The Supreme Court, however, granted plaintiffs' petition for certiorari, vacated the judgment, and remanded the case for this Court to consider a preclusion argument raised by the Government in opposition to the petition for certiorari. That course of action would be inexplicable if the Supreme Court were convinced that *Williams* had correctly applied *Will*; the Court could simply have denied the petition. To the contrary, the remand order goes out of its way to note that "[f]urther proceedings after decision of the preclusion question are for the Court of Appeals to determine in the first instance." Now that a panel of this Court has unanimously rejected the Government's preclusion argument, the path is clear for the en banc Court to reconsider *Williams*."

CREATE CONTEXT BEFORE DETAIL

- Readers should be able to instantly see why the details are important while reading them.
- Supply an informative introduction with the legal and factual underpinnings for your argument.
- Use meaningful headings (declaratory sentences) to focus the reader on each chunk of your argument.
- Use topic sentences to focus the reader on the details in your paragraphs.



**SECOND METHOD OF
CREATING CLARITY:
LINK THE INFORMATION IN
YOUR SENTENCES**

COMMON TRANSITIONS

- Furthermore
- Moreover
- In addition
- And
- But
- On February 15, 2000 . . .





Our greatest primary task is to put people to work. This [putting people to work] is no unsolvable problem if we face it wisely and courageously. It [putting people to work] can be accomplished in part by direct recruiting by the government itself, treating the task as we would treat the emergency of a war, but at the same time, through this employment, accomplishing greatly needed projects to stimulate and reorganize the use of our natural resources.

Hand in hand with this [direct recruiting by the government itself] we must frankly recognize the overbalance of population in our industrial centers and, by engaging on a national scale in a redistribution, endeavor to provide a better use of the land for those best fitted for the land. The task [engaging on a national scale in a redistribution] can be helped by definite efforts to raise the values of agricultural products and with this the power to purchase the output of our cities. It [raising the power to purchase the output of our cities] can be helped by preventing realistically the tragedy of the growing loss through foreclosure of our small homes and our farms. It [raising the power to purchase the output of our cities] can be helped by insistence that the federal, state, and local governments act forthwith on the demand that their cost be drastically reduced. It [raising the power to purchase the output of our cities] can be helped by the unifying of relief activities, which today are often scattered, uneconomical, and unequal. It [raising the power to purchase the output of our cities] can be helped by national planning for and supervision of all forms of transportation of communications and other utilities which have a definitely public character.



“It was dark and stormy the night the millionaire died. The killer left no clues for the police to trace.”

(Study by Just and Carpenter, 1978)



“It was dark and stormy the night the millionaire
was murdered. The killer left no clues for the
police to trace.”

(Study by Just and Carpenter, 1978)



HAVILAND AND CLARK STUDY

FIRST SENTENCE PAIR:

- We got some beer out of the trunk. The beer was warm.”

SECOND SENTENCE PAIR:

- We checked the picnic supplies. The beer was warm.”



JFK'S SPEECH IN BERLIN



Freedom is indivisible, and when one man is enslaved, all are not free. When all are free, then we can look forward to that day when this city will be joined as one and this country and this great continent of Europe in a peaceful and hopeful globe.

When that day finally comes, as it will, the people of West Berlin can take sober satisfaction in the fact that they were in the front lines for almost two decades.

All free men, wherever they may live, are citizens of Berlin, and, therefore, as a free man, I take pride in the words *Ich bin ein Berliner.*



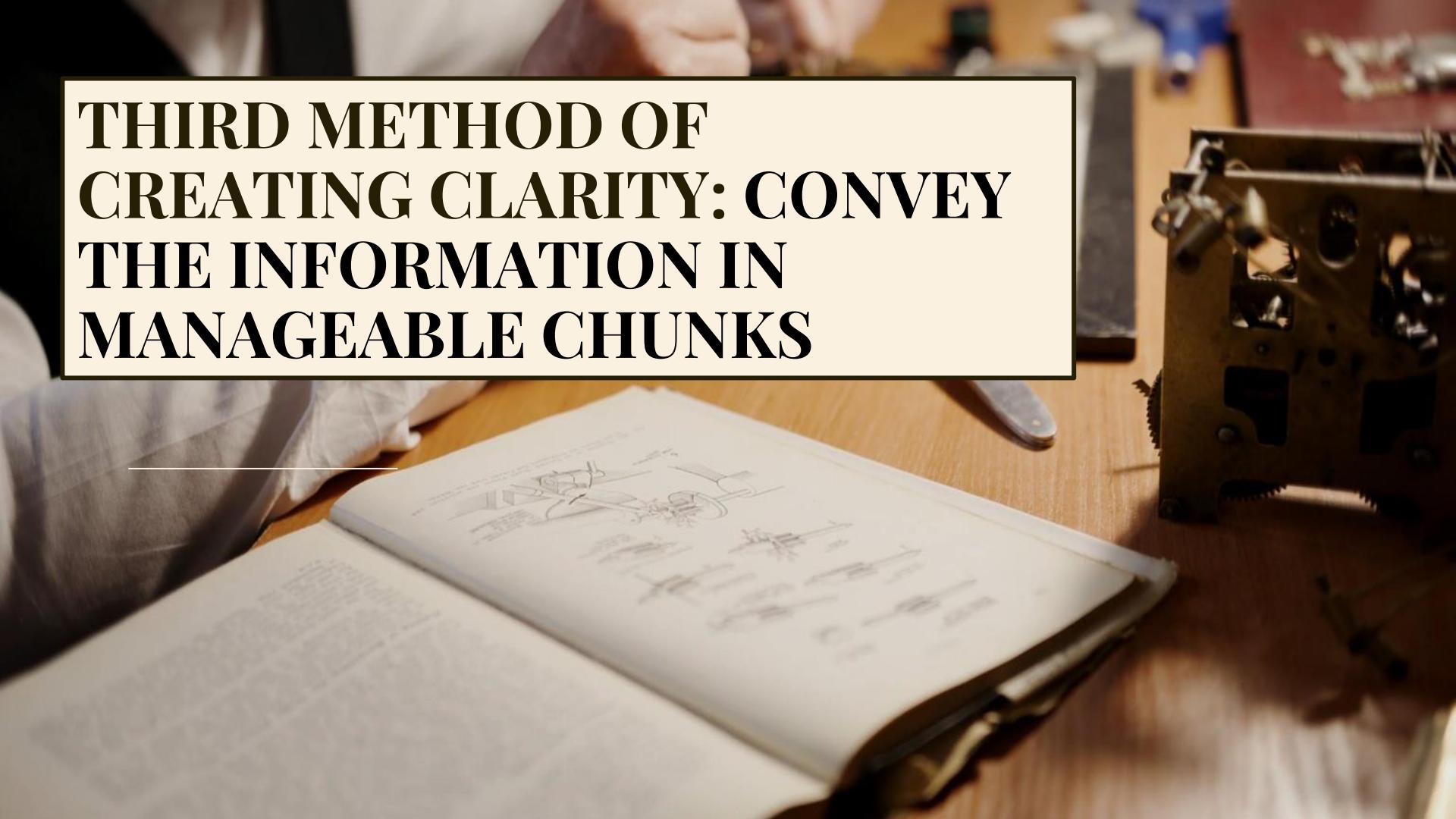
PETER KEISLER'S CERT. PETITION

Federal law requires airlines to report to the Transportation Security Administration (TSA) any and all potential security threats to civil aviation. TO ENCOURAGE SUCH REPORTS, the Aviation and Transportation Security Act (ATSA) provides airlines with a broad grant of immunity, shielding them from all civil liability, including liability for state-law defamation, for disclosing potential threats to aircraft or passenger safety. THE ONLY EXCEPTION TO THIS IMMUNITY is for disclosures made “with actual knowledge that the disclosure was false, inaccurate, or misleading” or “with reckless disregard as to the truth or falsity of that disclosure.”

LINK THE INFORMATION IN YOUR SENTENCES

Make the reader able to instantly see the relationship between old and new information.

THIRD METHOD OF CREATING CLARITY: CONVEY THE INFORMATION IN MANAGEABLE CHUNKS



PHONE NUMBER



W/O CHUNKS

5511525312



W/ CHUNKS

(551) 152-5312



[First chunk] But when you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; **[second chunk]** when you have seen hate-filled policemen curse, kick and even kill your black brothers and sisters; **[third chunk]** when you see the vast majority of your twenty million Negro brothers smothering in an airtight cage of poverty in the midst of an affluent society; **[fourth chunk]** when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year-old daughter why she can't go to the public amusement park that has just been advertised on television, **[fifth chunk]** and see tears welling up in her eyes when she is told that Funtown is closed to colored children, and see ominous clouds of inferiority beginning to form in her little mental sky, **[sixth chunk]** and see her beginning to distort her personality by developing an unconscious bitterness toward white people; **[seventh chunk]** when you have to concoct an answer for a five-year-old son who is asking: "Daddy, why do white people treat colored people so mean?"; **[eighth chunk]** when you take a cross-country drive and find it necessary to sleep night after night in the uncomfortable corners of your automobile because no motel will accept you; **[ninth chunk]** when you are humiliated day in and day out by nagging signs reading "white" and "colored"; **[tenth chunk]** when your first name becomes "nigger," your middle name becomes "boy" (however old you are) and your last name becomes "John," and your wife and mother are never given the respected title "Mrs."; **[eleventh chunk]** when you are harried by day and haunted by night by the fact that you are a Negro, living constantly at tiptoe stance, never quite knowing what to expect next, and are plagued with inner fears and outer resentments; **[twelfth chunk]** when you are forever fighting a degenerating sense of "nobodiness"-then you will understand why we find it difficult to wait.

42-WORD SENTENCE WITHOUT SEPARATION OF CHUNKS

The district judge imposed not only a remarkably severe 70-month prison sentence but also inexplicably imposed a staggering and vastly above-guideline fine without any warning, any explanation, or even an attempt to square Zukerman's punishment with that meted out to similar offenders.

GREGORY GARRE'S BRIEF (FOR DEFENDANT ZUKERMAN) UNITED STATES V. ZUKERMAN, NO. 17-948 (2D CIR.)

“In the initial round of sentencing [Chunk 1], she imposed a staggering, vastly above-Guidelines fine [Chunk 2] with no warning [Chunk 3], no plausible explanation [Chunk 4], and no attempt to square Zukerman’s punishment with that meted out to similar offenders [Chunk 5] – and all this on top of a 70-month prison sentence that is itself remarkably severe. [Chunk 6]”

(48 words)



CONVEY THE INFORMATION IN MANAGEABLE CHUNKS

- Be mindful of the reader's short-term memory.
- Make the chunks easy to spot.



CONCLUDING THOUGHTS

- CREATE CONTEXT BEFORE DETAIL.
- LINK THE INFORMATION IN YOUR SENTENCES.
- CONVEY THE INFORMATION IN MANAGEABLE CHUNKS.