References and Suggested Reading


www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/Standards-of-Review.pdf (Georgetown Law article on the same topic)

Law Review articles on using quotations, analogies and metaphors:

• Jacob Carpenter, PERSUADING WITH PRECEDENT: UNDERSTANDING AND IMPROVING ANALOGIES IN LEGAL ARGUMENT, 44 Capital Univ. L. Rev. 461 (2016).

• Michael Smith, LEVELS OF METAPHOR IN PERSUASIVE LEGAL WRITING, 58 Mercer L. Rev. 919 (2007).


Regarding Erie:

• Shady Grove Orthopedic Assoc. v. Allstate Ins. Co., 599 U.S. 393 (2010). Note in particular, Justice Ginsburg’s dissent in this 5-4 judgment, 4-1-4- plurality decision, which gives a good history of the Erie doctrine. The fact that the Court split 5-4 regarding the proper interplay of Erie and F.R.C.P. 23, as follows, shows that this issue is a genuine legal “sticky wicket” of the non-political variety: Scalia, Sotomayor, Thomas, Stevens, Roberts – Ginsberg, Alito, Kennedy, Breyer.

• Makeff v. Trump University, LLC, 736 F.3d. 1180 (9th Cir. 2013). Order denying en banc review. The concurrence and the dissent from the denial showcase the on-going disagreement within the Ninth Circuit regarding the interaction of the Federal Rules of Civil Procedure with the Erie Doctrine.

• Jay Tidmarsh – PROCEDURE, SUBSTANCE, AND ERIE, 64 Vand. L. Rev. 877 (2011). This article tries to sort out, post-Shady Grove, what is procedural and what is substantive for purposes of the interplay between Erie and the Federal Rules of Civil Procedure.

• Edward K. Cheng – ERIE AND THE RULES OF EVIDENCE, 65 Vand. L. Rev. 231 (2012) – this article does the same for the interplay between Erie and the Federal Rules of Evidence, and the knotty Erie problems caused, for example, by application of the federal Daubert rule to expert testimony in a diversity case. This is a very Montana-specific topic because the Montana Supreme Court does not follow Daubert. See, e.g., McClue v. Safeco Ins. Co. of Illinois, 354 P.3d 604, 609 (Mont. 2015) (“[i]n contrast to its status in the federal system, Daubert is not generally applicable in Montana”).
• Allen Mendenhall, the Diversity Chart (referred to on the slide entitled **BUT DIVERSITY IS COMPLICATED**), please see –


