Sports in the Courts: How Sports References Strengthen Written Advocacy and Judicial Opinions (Part II)

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SPORTS IN THE COURTS: HOW SPORTS REFERENCES STRENGTHEN WRITTEN ADVOCACY AND JUDICIAL OPINIONS (PART II)

Douglas E. Abrams

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This two-part article examines the proliferation, since the early 1970s, of sports references in Supreme Court and lower court opinions in cases that raise no claim or defense concerning sports. Part I, in the Spring issue of Precedent, said that careful use of sports references normally strengthens written advocacy and judicial opinions by enhancing the reader’s understanding, but that the particularly high stakes at issue in some cases may make a sports reference seem inconsistent with the dignity and decorum that sustain the judicial role. Such “high stakes” cases incompatible with sports references are few. The example set by the Supreme Court itself, where high stakes cases are the norm, should encourage thoughtful inclusion of sports references in briefs and opinions.

Part I surveyed the use of sports references in the Supreme Court, and began surveying that use in the lower courts. The lower-court survey began with football, baseball and basketball. Part II now resumes with ice hockey and various other sports. Part II concludes by describing how sports references, already familiar rhetorical tools in the courts, can invigorate written advocacy and judicial opinions.

Sports References in Lower Court Opinions (Continued)

Ice Hockey

Since the National Hockey League expanded from six to 12 teams for the 1967-68 season, ice hockey has assumed a more prominent place on the American sports scene. Twenty-four of the NHL’s 30 teams are now based in U.S. cities, and a growing percentage of the league’s players are now American citizens or veterans of United States collegiate teams.

As Chief Justice Roberts demonstrated in Brigham City v. Stuart, the decision that opened Part I of this article, courts have taken notice of ice hockey. In one case, for example, the U.S. Court of Appeals for the 7th Circuit noted that the trial court’s spectator section was “separated from the proceedings by a transparent barrier, similar to that in a hockey rink.”

In United States v. Rodriguez-Rivera, the U.S. Court of Appeals for the First Circuit rejected the robbery defendant’s contention that the district judge had favored the prosecution by interrupting defense counsel more often than she interrupted the prosecutor during their respective examinations of witnesses. The Rodriguez-Rivera panel did “not consider this sort of comparison to be any more reliable an indicator of a biased judge than the relative number of penalties called against each side in a hockey game indicates a biased referee.”

Lower courts have frequently cited professional hockey’s reputation for fighting – conduct that remains outside the rules. Judges have referenced hockey’s penalty box, a small bench adjacent to the playing surface but separate from the team’s bench, where an offending player sits as punishment for fighting or other rule violations. For example, a collateral party or witness may be entitled to an

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interlocutory appeal rather than have
to wait in a “judicial penalty box” for
the main suit to reach final judgment.7
Discussing particularly weak claims
made by the plaintiff and his counsel,
one federal district court expressed
disappointment that “the law has
no equivalent of the penalty box in
hockey, in which a lawyer (or the
lawyer’s client) could somehow suf-
f er some adverse consequence in the
litigation game for having committed
a foul (in this instance, for advancing
a truly frivolous argument).”8

Golf

Golf’s Senior Tour and 59-year-old
Tom Watson’s inspiring run at the
2009 British Open remind Americans
that golf is a classic “carryover” or
“lifetime” sport.9 An estimated 25
million Americans play golf through-
out adulthood, enabling courts to
assume readers’ familiarity with the
sport and its basics.10

In Pacific Insurance Co. v. Catho-
lic Bishop of Spokane, the plaintiff’s
insurance company contended that
the alleged negligence of the diocese
in connection with its priests’ alleged
sexual abuse was not an “accident”
der state law, and thus that the
company had no duty to defend or
insure the diocese under the rel-
evant liability policies.11 The federal
district court denied the company’s
summary judgment motion on the
ground that “[t]he performing of
intentional acts does not mean that
every such act that results in injury to
another is an ‘intentional’ excluded
act under a comprehensive liability
insurance policy.”12

The Pacific Insurance Co. court
explained the nuance with an analogy
to golf: “Clearly, a covered person
intentionally striking a golf ball with
the intention that it land on its as-
signed fairway or green, but which
sharply diverts from its intended
course and strikes a player on an
adjacent fairway, does not mean that
the intended launching of the golf ball
excludes coverage for any negligence
involved in failing to warn the adja-
cent players with a time honored (and
expected) ‘fore!!!.’”13

Other golf analogies also appear
in the case law. Like a golfer who
readies to play a hole, a party “tees
up” evidence for the trial court.14
Performance by a party or counsel
that meets expectations is “par for
the course.”15 An ineffective as-
sistance of counsel claim fails un-
less the petitioner demonstrates a
reasonable probability that “had her
performance been up to par, the result of the proceeding . . . would have been different.”16 In Enzo
Therapeutics, Inc. v. Yeda Research
& Development Co., the plaintiff failed
to meet the court’s expectations, and
thus shot a “bogey,” the term for one
stroke over par on a hole.17

Soccer

Courts sometimes explain concepts
of fair play with references to soc-
cer, the world’s most popular sport
and one familiar to Americans from
World Cup television coverage, pro-
essional leagues in the United States,
and vibrant youth league, high school
and collegiate programs. In Portnoy
v. Cryo-Cell International, Inc., for
example, a chief executive officer,
allegedly knowing that the company’s
incumbent board lacked votes needed
for reelection, engaged in delaying
tactics designed to give the incum-
bents more time to seek votes.18 The
Delaware Court of Chancery found
the CEO’s conduct “analogous to a
corrupted soccer referee, intent on
adding extra time so that the game
would end only when her favored
team had a sure lead.”19

In Alton & Southern Railway Co.
v. Brotherhood of Maintenance Way
Employees, the federal district court
expressed concern that undue resort
to the Railway Labor Act’s dispute
resolution mechanisms might upset
the balance reached earlier in the
parties’ collective bargaining agree-
ment.20 “Any piecemeal alteration
to this balancing act could result in a
situation more akin to the unfairness
of a soccer game played on a hill; one
team forced to run up and one team
permitted to run down.”21

In Niehus v. Liberio, the U.S.
Court of Appeals for the 7th Circuit
affirmed a damages award against
police officers for using excessive
force.22 The court rejected the defen-
dants’ contention that it was physi-
cally impossible for them to have
kicked the suspect in the left side
of the face because that side of his
face was against the floor. “Imagine
kicking a soccer ball,” Judge Richard
A. Posner wrote for the panel. “The
foot goes under the ball. And so with
a head: a sharp kick to a face lying
on the floor is quite likely to go under
the face. . . .”23

Track and Field

Track and field – a staple of the
Summer Olympics and interscholastic
and intercollegiate programs – fea-
tures various individual and team
events, several of which have found
their way into judicial opinions.
When a person advances a claim,
takes a position or does an act prema-
turely, for example, the person makes
a “false start”24 or “jumps the gun,”25
similar to a runner who leaves the
starting block before the starting gun
fires. Two products with markedly
different capacities are not “function-
ally equivalent” because “[o]ne surely would not argue that a track athlete who only runs the 100 yard dash is “functionally equivalent” to a [10-event] decathlon competitor because the two athletes use the same track for their respective 100 yard dash races.”

In McKnight v. General Motors Corp., the federal district judge initially limited the length of the impending trial. Midway through the trial, he cut two hours from each side’s allotted time for argument. The 7th Circuit warned that this practice threatened to “turn a federal trial into a relay race” in which one lawyer follows another in the rush toward the finish line. Other courts have compared a party’s responsibilities at trial to passing the baton, “a key factor in any relay race” because it signals the finish of one runner’s lap and the beginning of the teammate’s lap. Dropping the baton, a ground for disqualification in a relay race, similarly connotes a setback in legal proceedings for failure to fulfill a responsibility.

Field events surfaced in Anderson v. Westinghouse Savannah River Co. Dissenting from the court’s denial of a motion for en banc rehearing, Judge Roger L. Gregory of the U.S. Court of Appeals for the 4th Circuit concluded that the unsuccessful employment discrimination plaintiffs had proved a statistically significant disparity. By requiring an even greater showing, he wrote, the majority “set the bar too high. . . . [W]hat was a high jump has now become a pole vault that must be accomplished without a pole.”

**Boxing**

Professional boxing has appeared on television for decades, public attention often focuses on heavyweight title bouts, and former heavyweight champion Muhammad Ali has been one of the world’s most recognizable faces for more than a generation. Judges frequently summon basic notions of a “fair fight,” the overarching goal in the boxing ring and the courtroom. In Love v. State, for example, the court likened criminal trials to “boxing matches, where the state and defense trade punches within defined rules of engagement.” In Barefield v. DPIC Cos., the dissenting judge argued that by punishing an insurer “simply for being adversarial,” the majority created a situation “about as fair as a boxing match where one boxer has a hand tied behind his back.”

Courts say that premature claims or wasteful pretrial proceedings may amount to “shadow boxing,” a fighter’s effort to develop stamina by boxing an imaginary opponent before entering the ring to face the real opponent. A particularly powerful precedent or argument may deliver a “knockout punch.” It may also inflict a “body blow,” a decisive assault that inflicts pain on a fighter or ends the bout. A party suffering rapid, successive setbacks takes a “one-two punch,” an immediate combination of blows designed to inflict maximum punishment on a fighter. A party unable to defend against the opponent’s barrage of factual or legal arguments may find itself “on the ropes,” the disadvantageous position in the ring where an opponent can continue to deliver blows with little or no opportunity for effective self-defense or retaliation. Even worse, the party may go “down for the count,” much like the boxer who is floored by an opponent and must rise to his feet before the referee finishes the 10-count.

Struggling parties who receive a second chance late in court proceedings, such as by the tolling or extension of a deadline, are “saved by the bell,” similar to a fighter who gets knocked down with less than 10 seconds remaining in a round, insufficient time to be counted out by the referee. Where a party abandons a weak argument or voluntarily abandons the trial, the party “throws in the towel,” the signal given by the handlers of an outmatched or bloodied boxer signifying that the referee should immediately stop the bout and declare the opponent the winner before the boxer suffers greater punishment. Where opposing litigants present arguments that appear equally strong, “the legal and factual issues [are] fully duked out to a draw,” much like boxers who leave the ring without declaration of a victor. In Akers v. Nicholson, the U.S. Court of Appeals for the Federal Circuit denied attorney’s fees and expenses under the Equal Access to Justice Act, which permits awards to “prevailing parties.” Because the court below had remanded the cases for reconsideration, Akers held that neither applicant had prevailed. “A boxer thrown out of the ring and then allowed back in to continue the fight has not prevailed.”

The court may accuse a party of “rope-a-doping” for raising time-wasting, frivolous claims that induce the opponent to wear itself out and deplete its resources in the trial court. (Rope-a-doping is a boxing style popularized by Muhammad Ali in his 1974 “Rumble in the Jungle” heavyweight title bout against George Foreman. A boxer assumes a protected stance against the ropes, shielding his torso and face with his arms and hands, and allows the opponent to
hit him. The boxer anticipates that the opponent carelessly will tire himself out and commit errors so the boxer can mount an effective counterattack.)

**Wrestling**

For years, televised professional wrestling has provided mass public entertainment, popular even among viewers unfamiliar with interscholastic and intercollegiate wrestling programs. Judges have recognized that parties and courts often “wrestle” with difficult factual and legal questions. Police officers taking turns questioning a suspect form a “tag team” similar to professional wrestling teams whose members take turns grappling with opponents. A court with an unobstructed close-up view of a conflict between parties has a “ringside seat” similar to the expensive seats closest to a wrestling or boxing ring. A powerful argument may “pin” an opponent “to the mat,” enabling the proponent to emerge victorious.

In *Daniels v. Bursey*, the federal district court chastised both attorneys for their incivility directed at one another throughout the trial. “Our system of justice,” the court lectured, “does not work, or at least does not work well, if lawyers act like professional wrestlers hyping the next match rather than as members of the honorable profession to which they belong.” When individuals allow anger or spite to influence strategy or witness examination, courts criticize the descent into a “no-holds-barred” slugfest, similar to the mayhem of an unregulated wrestling match.

**Horse Racing**

Horse racing has been a popular spectator sport since America’s colonial days, and today the racetrack and its finish line conjure images of a litigant’s quest for final judgment. In *Zanesville Metropolitan Housing Authority v. Callipare*, for example, the appellate court rejected the plaintiff authority’s effort to change its theory of the case for the third time. The court found that the authority “changed horses in the middle of the trot to judgment,” first “[coming out of the chute],” then “around the bend,” into the “backstretch,” and finally, the “homestretch.” The court instructed that the plaintiff “must ride the same horse through all the hurdles of the race.”

In court, a party will be “put through the paces,” much as a jockey guides the horse through a race or practice run. Parties showing a strong initial burst of energy charge “out of the starting gate,” similar to a horse at the beginning of a race. A party with an apparent advantage before or during a lawsuit may have the “inside track” and a shorter path to victory, similar to a horse that has a shorter path to the finish line. A federal court may decline to abstain or grant a stay when a pending state court action is “neck and neck,” similar to two horses that are nearly tied in a race toward the finish line. When narrowly meeting a court deadline, a party gets in “just under the wire,” similar to a horse that barely beats a competitor. When suffering a narrow defeat in court, a party loses “by a nose,” similar to a horse that finishes a few inches behind a competitor.

**Gymnastics**

Inviting images of the contortions that frequently accompany gymnasts’ moves, dozens of lower courts have spoken of the interpretive, linguistic or mathematical “gymnastics” needed to argue or decide a case. Other courts have emphasized the subjective and frequently fact-intensive nature of judging in gymnastics; judicial application of a discretionary test may be “more similar to deciding how many points to award a gymnast than deciding whether a football has crossed the line.”

**Other Sports**

Since *Flood v. Kuhn*, judges have also paid attention to bowling, figure skating, and fencing. In *Joker Club, L.L.C. v. Hardin*, the plaintiff seeking to open a poker club requested a declaratory judgment that poker is a lawful game of skill, rather than an unlawful game of chance. The court held that because chance predominates over skill, poker is a game of chance that depends on the cards that are drawn. The panel distinguished poker from bowling “where the player’s skill determines whether he picks up the spare,” that is, whether a bowler knocks down all the remaining pins with the second roll of the ball.

In *Connor v. Mid South Insurance Agency*, the federal district court awarded the plaintiff attorney’s fees of more than $151,000 in an action brought under the Employee Retirement Income Security Act (ERISA). The court rejected the defendants’ contention that a lower figure was appropriate because the assertedly “simple” case did not require the attorneys’ customary level of expertise. “Like a world-class figure skater who ‘effortlessly’ lands triple axels” (a particularly difficult jump with 3-1/2 rotations), “a well-prepared and highly skilled attorney can make difficult legal problems seem easy.”

A fencer scores only when the foil, the light and flexible sword-like weapon, strikes an opponent’s torso. In *State v. Pearson*, the Iowa Supreme Court upheld the defendant’s
conviction for second-degree sexual abuse, which required proof of sexual contact between him and his 8-year-old victim. The dissenting justice argued that sexual contact could not occur through layers of clothing because “[t]he contact experienced . . . by the fencer touched by the foil on his mask is not the type of harmful contact sought to be reached and criminalized.”

Using Sports References in Written Advocacy and Judicial Opinions

In the Supreme Court and lower courts alike, the wholehearted contemporary embrace of sports references dispels any notion that sports is out of place in written advocacy or judicial opinions. The central question now is not whether to use a sports reference, but when. These references may help advocates and judges explain themselves, but in relatively few cases might also detract from the dignity and prestige that sustain the courts. This section examines the balance.

Reasoning-by-analogy is an effective tool for orienting readers, particularly when the legal writer seeks to explain intricate questions of law or fact. Pacific Insurance Co. v. Catholic Bishop of Spokane, discussed earlier in this Part II, illustrates the point. The case concerned insurance coverage arising from serious allegations of sexual abuse, and 18 major law firms filed appearances to argue complex issues of causation on behalf of the various plaintiffs and the defendant insurance companies. The federal district court’s golf analogy helped explain intricate insurance law issues, not only to lawyers for the immediate parties, but likely also to lawyers who examine the published opinion for precedential value in future cases.

A sports reference enhances communication, however, only when the writer uses it in the proper context. The federal district court missed the point in Booth v. Carrill, which held that the Prisoner Litigation Reform Act of 1995 (PLRA) did not compel dismissal of the state prisoner’s federal action. The decision turned on the act’s “three strikes” provision, which requires dismissal of suits by incarcerated or detained prisoners who have brought three or more federal suits previously dismissed as “frivolous, malicious, or fail[ing] to state a claim upon which relief may be granted.” The district court held that one of prisoner Booth’s prior three federal suits did not count as a “strike” because it had been dismissed without prejudice for failure to exhaust administrative remedies.

The Booth district judge accepted the magistrate judge’s report, which misapplied Chief Justice Roberts’ statement that it is the judge’s “job to call balls and strikes.” Booth’s baseball analogy added nothing to the reader’s understanding of the PLRA because the Chief Justice’s statement concerned only his approach to judging generally, without any application to federal or state “three strikes” legislation. At the Senate Judiciary Committee confirmation hearings on his nomination to become Chief Justice, then-Judge Roberts assured Senator Arlen Specter that, “I come before the committee with no agenda. . . . I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. . . . And I will remember that it’s my job to call balls and strikes and not to pitch or bat.”

As advocates and judges consider whether to use a sports reference in its proper context, they write from distinct perspectives and address distinct audiences. Advocates write as representatives of their public or private clients; judges write as public officers vested with constitutional and statutory authority to apply the law to decide disputes properly brought before them. Written advocacy directly addresses the court and opposing parties; judicial opinions address a potentially broader audience – first the parties, and then future courts and litigants weighing the precedent, academic researchers, and (this invites spirited debate) perhaps lay readers when the decision touches on matters of social concern.

In turn, distinct perspectives and audiences raise distinct considerations for advocates and judges to weigh as they consider using a sports reference.

Considerations for Advocates: “Make It Interesting”

An advocate might worry that the court would dismiss a brief’s sports reference, or even think less of the advocate’s argument, for detracting from the formality of the proceedings. The uninterrupted pattern of the courts’ own use of sports references in the past generation and more, however, leaves little reason for this concern.

“Legal briefs are necessarily filled with abstract concepts that are difficult to explain,” advises Justice Antonin Scalia. “Nothing clarifies their meaning as well as examples.” Examples drawn from sports (a favorite of the Justices themselves, as Part I of this article showed) will not win the argument; sports
examples, however, can help explain the argument by (as Justice Scalia puts it) “caus[ing] the serious legal points you’re making to be more vivid, more lively, and hence more memorable.”83

For advocates concerned about how the court might react to a sports reference, perhaps the tiebreaker is the advice that Justice Scalia provides brief writers: “Make it interesting.”84

Considerations for Judges: Dignity and Prestige

The overarching concern of the ABA Model Code of Judicial Conduct for maintaining the dignity and prestige of judicial office may sometimes counsel restraint in the use of sports references. The Model Code’s Preamble instructs that “[j]udges should maintain the dignity of the judicial office at all times. . . .” and Rule 1.3 of the Model Code provides that “A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge. . . .”

The Model Code does not regulate the references a written opinion may invoke, but overarching concerns for dignity and prestige may invite a court to consider whether using a sports reference would appear incompatible with the solemnity of a particular civil or criminal case. On the one hand, Part I of this article explained that images of sports as mere fun-and-games incompatible with formal writing are misplaced in contemporary American culture. On the other hand, however, civil actions may implicate millions of dollars or sunder intimate relationships, serious business indeed for parties and the fabric of the law, and sometimes arguably too serious for allusion to sports where no claim or defense concerns sports. With state-imposed loss of life or liberty normally in the balance, criminal cases may call for even greater circumspection.

In Cooper v. Taylor in 1996, for example, concerns about judicial dignity and prestige emerged when the sharply divided en banc U.S. Court of Appeals for the 4th Circuit invoked baseball to deny the habeas corpus petition of Cooper, who had been sentenced to life in prison for murder.85 The eight-member majority found the alleged constitutional error harmless because the evidence on record, taken as a whole, powerfully and overwhelmingly demonstrated guilt.86 Judge Paul V. Niemeyer wrote that “the jury witnessed the government score 14 runs with its evidence and the defense score none.”87 Judge Niemeyer continued that “If . . . we were required to invalidate what we would expect Cooper to characterize as a government grand-slam home run, the remaining 10-0 score would still have left the jury’s verdict the same.”88

Dissenting Judge Clyde H. Hamilton argued that “because this case involves a man who is sentenced to life in prison, the majority’s analogy to baseball trivializes the serious nature of this case.”89 In the court’s internal deliberations, the en banc majority doubtlessly heard this objection before declining to remove the analogy from the draft opinion. Judge Hamilton evidently lost on his objection, but his dissent nonetheless countered with a lengthy baseball analogy of his own.90

When carefully used consistent with the Model Rules’ overarching concern for dignity and prestige, sports references can help humanize judges, who are sometimes said to lead isolated, “monastic” lives once they ascend to the bench.91 This lifestyle description invites discussion about the nature of judging and the role, if any, that a judge’s life experiences should play when resolving close legal questions.92 One need not choose a side in this spirited jurisprudential debate, however, to acknowledge that sports references can help reassure litigants, lawyers, and other observers that a judge deciding high-stakes issues of public or private law has followed a cultural path similar to the paths followed by legions of other Americans in our “sports-minded society.”93

In the final analysis, the decision whether to use a sports reference rests with the court’s discretion, exercised in light of the judge’s role as a public officer sustained by the formality that marks the judicial process. It is fanciful to suggest that a particular opinion’s use of a sports reference would affect the outcome, but it is not fanciful to suggest that in relatively rare cases the reference might appear to detract from the professional and public esteem on which judges and courts depend for institutional integrity.

Conclusion: “The Sports Page Records People’s Accomplishments”

The recent generation of Supreme Court Justices are not the first members of the Court to recognize the influence of professional and amateur sports on contemporary American culture. Chief Justice Earl Warren, for example, proudly called himself an “ardent fan of most sports” who found athletics “an important phase of American life.”94 He particularly loved baseball, and reportedly received serious consideration to become Major League Baseball Commissioner in 1950.95 Earl Warren, Jr. recalled that
his father might have publicly signaled willingness to become Commissioner if he had not recently announced his candidacy for re-election as Governor of California.96

The baseball position continued to hold Warren’s keen interest until President Eisenhower appointed him to the Court three years later.97 One biographer noted that when the Court reaffirmed Major League Baseball’s antitrust exemption in Toolson v. New York Yankees, Inc. in 1953 on the new Chief Justice’s first opinion day, “[f]ew knew how close Warren had come to representing baseball in this case, rather than judging it.”98

For several years, Chief Justice Warren brought the other Justices and their wives to Philadelphia for the Army-Navy football game.99 He rarely missed a Washington Redskins home football game, attended as many Washington Senators baseball games as his schedule permitted, and attended at least one World Series game whenever it was played in a city near Washington.100 Justice Potter Stewart recalled that the Chief Justice would come to his chambers “to watch the World Series because . . . my secretary had the only television set in the building. . . . He was like a little boy playing hooky.”101 Messengers would deliver World Series scores to the Chief Justice and his colleagues during oral arguments and in the Court’s conferences.102

The Warren Commission’s general counsel explained how the panel would relieve tension-filled days in the mid-1960s during its deliberations on President Kennedy’s assassination: “When they got too bad, the Chief Justice would break it up by talking about other things, baseball, for instance. He was always good for a couple of minutes on the pleasure of watching Willie Mays catch a fly or the speed of Sandy Koufax’s fast ball.”103

Chief Justice Warren cheerfully explained his unorthodox practice of reading the daily newspaper from back to front: “I always turn to the sports page first,” he said, because “[t]he sports page records people’s accomplishments; the front page, nothing but man’s failure.”104

Since the early 1970s, the proliferation of sports references in federal and state court opinions has reaffirmed Chief Justice Warren’s passion for athletics as a reflection of American life. The courts have assured a prominent place for sports references in written advocacy and opinion-writing, but advocates and judges would be wise to remember Chief Justice Warren’s formula. In his memoirs, he wrote freely about his private passion for baseball and other sports, but his official writing used sports references carefully, and never in a way that would compromise the Court’s institutional dignity or prestige.105


Endnotes

3 See Lambert v. McBride, 365 F.3d 557, 563-64 (7th Cir. 2003).
4 473 F.3d 21 (1st Cir. 2007).
5 Id. at 27.
6 See, e.g., Martinez v. Hooper, 148 F.3d 856, 857 (7th Cir. 1998).
12 Id. at 1206.
13 Id.
16 Muff v. Dragovich, 310 F. App’x 522, 524 (3d Cir. 2009) (unpublished opinion); see also, e.g., United States v. Rodriguez, 53 F.3d 1439, 1448 (7th Cir. 1995).
19 Id. at 77.
21 Id. at 20.
22 973 F.3d 526, 527 (7th Cir. 1992).
23 Id. at 527-28 (emphasis by the court).
26 Ad Hoc Telecommunications Users
Ins. Co., round”). and save its knockout punch for the second to feint and weave at the initial hearing, 1287, 1292 (11th Cir. 2009) (“[s]ystemic
600 S.E.2d 256, 281 (W. Va. 2004)
37 See, e.g., Williams v. McNeil, 557 F.3d 1287, 1292 (11th Cir. 2009) (“[s]ystemic efficiencies would be frustrated and the magistrate judge’s role reduced to that of a mere dress rehearsal if a party were allowed to feint and weave at the initial hearing, and save its knockout punch for the second round”).
38 See, e.g., Shaw v. Nat’l Union Fire Ins. Co., 605 F.3d 1250, 1253 n. 6 (11th Cir. 2010); Posada v. Lamb County, 716 F.2d 1066, 1070 (5th Cir. 1983).
39 See, e.g., Rosenviust-Giasto e Servicios LDA v. Virgin Enters. Ltd., 511 F.3d 437, 450 (4th Cir. 2007); Bethesda Lutheran Homes & Servs., Inc v. Born, 238 F.3d 853, 856 (7th Cir. 2001); 216 Sutter Bay Assocs. v. County of Sutter, 68 Cal. Rptr.2d 492, 499 (Cal. App. 1997).
41 See, e.g., Pourgharaiishi v. Flying J, Inc., 449 F.3d 751, 762 (7th Cir. 2006); Blackburn v. Snow, 771 F.2d 556, 578 (1st Cir. 1985) (Aldrich, J., dissenting).
42 See, e.g., Nat’l Indus., Inc. v. Republic Nat’l Life Ins. Co., 677 F.2d 1258, 1270 (9th Cir. 1982).
46 Id. at 1360.
47 Id.; see also, In re Wilson, 2007 WL 4248134, at *4 (Bankr. N.D. Ohio Nov. 30, 2007) (ruling that “even a boxer has to avoid the needless, draining effort of throwing wild punches”).
50 See, e.g., Doody v. Schirro, 596 F.3d 620, 622-23 (9th Cir. 2010); see also, e.g., Gay Officers Action League v. Commonwealth of Puerto Rico, 247 F.3d 288, 298 (1st Cir. 2001); State v. Monroe, 645 F.2d 363, 366 (Idaho 1982).


68 643 S.E.2d 626 (N.C. Ct. App. 2007).

69 Id.; see also, e.g., Stitos v. City of New York, 663 N.E.2d 321, 322 (N.Y. 1995) (likening automobile driver’s predicament to “a bowling ball in the gutter lane”).


71 Id. at 668.

72 Id. at 669.

73 514 N.W. 2d 452 (Iowa 1994).

74 Id. at 458 (Snell, J., dissenting).


77 See Booth, 2007 WL 295236, at * 4. 78 Id.

79 See id. at *1; see also, e.g., Todd S. Purdum & Robin Toner, Roberts Pledges He’ll Hear Cases With “Open Mind,” N.Y. Times, Sept. 13 2005, at 1.

80 See Purdum & Toner, supra note 79 (emphasis added).

81 Compare, e.g., Bernard J. Ward, The Federal Judges: Indispensable Teachers, 61 Tex. L. Rev. 43, 46 (1982) (judges are “the indispensable teachers of the American people,” conducting seminars “every day from the classrooms of [their] courtrooms”), with William H. Rehnquist, Act Well Your Part: Therein All Honor Lies, 7 Pepperdine L. Rev. 227, 227-28 (1980) (“The Supreme Court does not ‘teach’ in the normal sense of that word at all. In many cases we hand down decisions which we believe are required by some Act of Congress or some provision of the Constitution for which we, as citizens, might have very little sympathy and would not choose to make a rule of law if it were left solely to us.”).


83 Id. at 112.

84 Id. See also, e.g., Ruggero J. Aldisert, Winning on Appeal: Better Briefs and Oral Argument § 9.2, at 152 (rev. 1st ed. 1996) (“It is not unconstitutional to be interesting.”).

85 103 F.3d 366 (4th Cir. 1996) (en banc).

86 Id. at 371.

87 Id. at 370.

88 Id.

89 Id. at 375 (Hamilton, J., dissenting).

90 Id.

91 See, e.g., David Lightman, Leiby Sees Justice In Place By October, Chi. Trib., May 4, 2009, at 11 (quoting Sen. Patrick Leiby on Supreme Court nominations: “I would like to see more people from outside the judicial monastery, somebody who has had some real-life experience.”); Mark B. Rotenburg, Politics, Personality and Judging: The Lessons of Brandeis and Frankfurter on Judicial Review, 74 Colum. L. Rev. 1863, 1863 n.1 (1974) (quoting Justice Felix Frankfurter: “this Court has no excuse for being unless it’s a monastery”).


95 See Leo Katcher, Earl Warren: A Political Biography 247-48 (1967) (interviewing Earl Warren, Jr., who said that in early 1950 his father “received either a definite offer, or a very strong feeler, from some source asking him if he would take the job of commissioner of baseball”); see also John Drebinger, Webb of Yanks Says Majors Plan No Immediate Action on Chandler, N.Y. Times, Feb. 6, 1951, at 44.

96 See Katcher, supra note 95, at 247-48 (interviewing Earl Warren, Jr.); see also John Drebinger, supra note 95.


98 346 U.S. 356 (1953) (per curiam); see also Katcher, supra note 95, at 314.

99 See Warren, supra note 94, at 348; see also CHRISTINE L. COMPSTON, EARL WARREN: JUSTICE FOR ALL 103 (2001).


101 See Schwartz, supra note100, at 132-33.

102 See Compston, supra note 99, at 104; see also BILL SEVERN, MR. CHIEF JUSTICE: EARL WARREN 143 (1968); Warren, supra note 94, at 283 (editors’ note).

103 See Katcher, supra note 95, at 461.


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