

Perspectives from Thirty Years of Family Law Practice

By

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PowerPoint by Diane Cloutman
Animation by Stephen M. Orsinger



The Lone Ranger takes Tonto and Jim to an abandoned miner's cabin



and shows Tonto and Jim the hidden entrance to a secret silver mine



The Lone Ranger tells Jim to keep all the silver he wants but cast silver bullets for the Lone Ranger to shoot



The Lone Ranger vowed never to shoot to kill—his silver bullets are a symbol that means justice by law





© 2005 Sanborn

Image © 2005 EarthSat

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Pointer 32°46'32.45" N 96°48'34.62" W elev 397 ft Streaming ||||| 100%Eye alt 445 ft

Practical Considerations



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CLEAR LEGAL WRITING

- do an outline
- state your purpose
- only important facts
- cite authority
- edit ruthlessly

George Orwell, *Politics and the English Language* (1946)

1. Never use a metaphor, simile, or other figure of speech which you are used to seeing in print.
2. Never use a long word where a short one will do.
3. If it is possible to cut a word out, always cut it out.
4. Never use the passive where you can use the active.
5. Never use a foreign phrase, a scientific word, or a jargon word if you can think of an everyday English equivalent.
6. Break any of these rules sooner than say anything outright barbarous.

Ecclesiastes, 9:11

I returned and saw under the sun, that the race is not to the swift, nor the battle to the strong, neither yet bread to the wise, nor yet riches to men of understanding, nor yet favour to men of skill; but time and chance happeneth to them all.

Bureaucratese

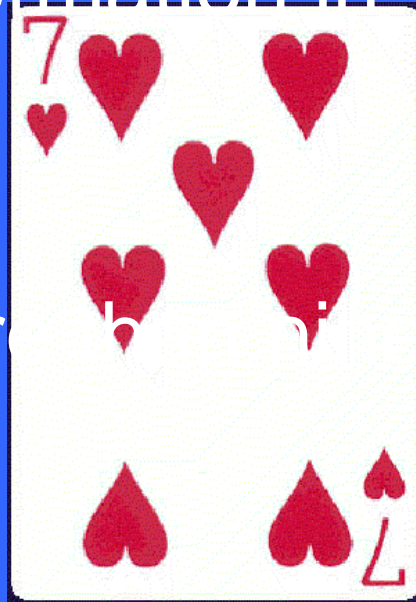
Objective considerations of contemporary phenomena compel the conclusion that success or failure in competitive activities exhibits no tendency to be commensurate with innate capacity, but that a considerable element of the unpredictable must invariably be taken into account.

Edited Ruthlessly

*Sh*t Happens!*

“The Magical Number Seven”

- Present all information in small “chunks”



- Include no more than seven separate items

- As the information gets more complex, the chunking limit goes down

Recoding

“The point is that recoding is an extremely powerful weapon for increasing the amount of information that we can deal with.”

George A. Miller, Ph.D. (1956)

80/20 Rule



Vilfredo Pareto, 1848-1923

80% of consequences flow
from 20% of causes.

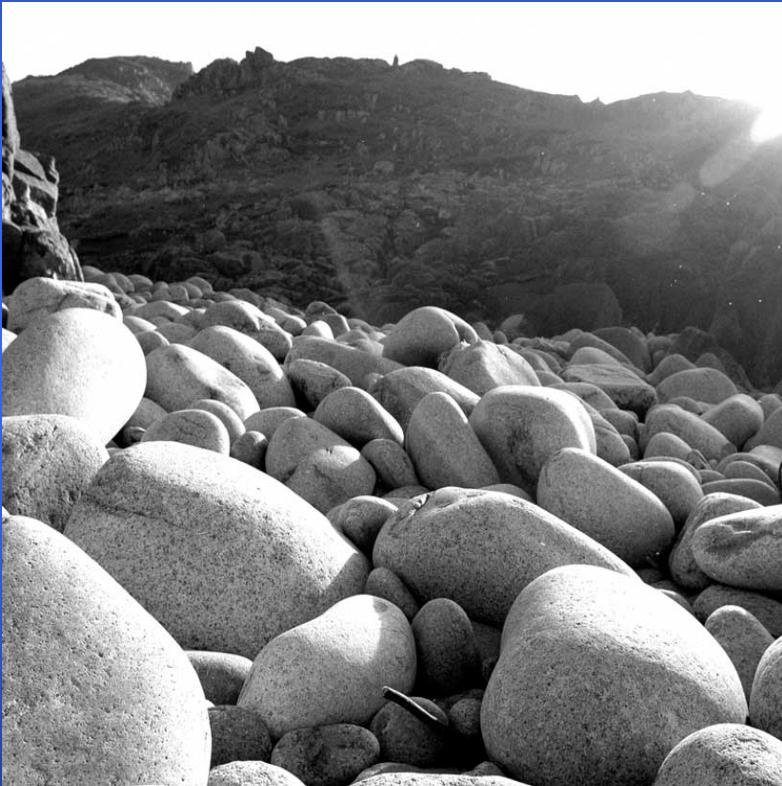
80% of wealth owned by
20% of the people

80% of employee absentees
caused by 20% of the
employees





You can't turn over every stone but
you can turn over the big stones.

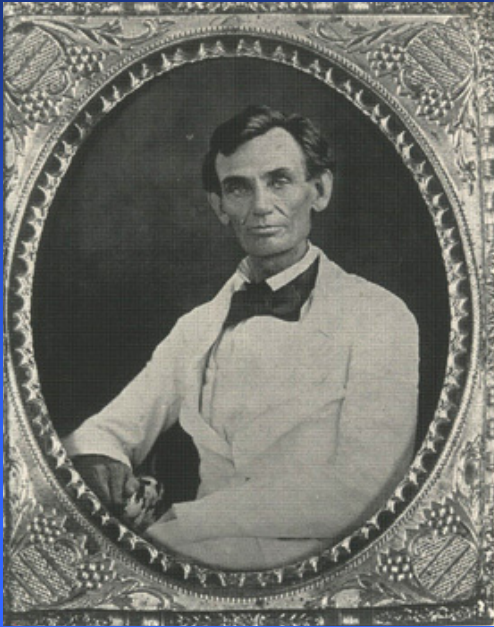


Ethics Credit

- Rule 1: Always respond to the grievance committee.
- Rule 2: Never commingle client trust funds with your funds.

Procrastination





May 7, 1858

“The leading rule for the lawyer, as for the man of every other calling, is diligence. Leave nothing for to-morrow which can be done to-day.”

Abraham Lincoln
Attorney-at-Law

Procrastination - Simple Causes

- difficulty
- time consuming
- lack of understanding
- fear

Procrastination - Complex Causes

- perfectionism
- anger/hostility
- avoid frustration/pressure
- fear of failure

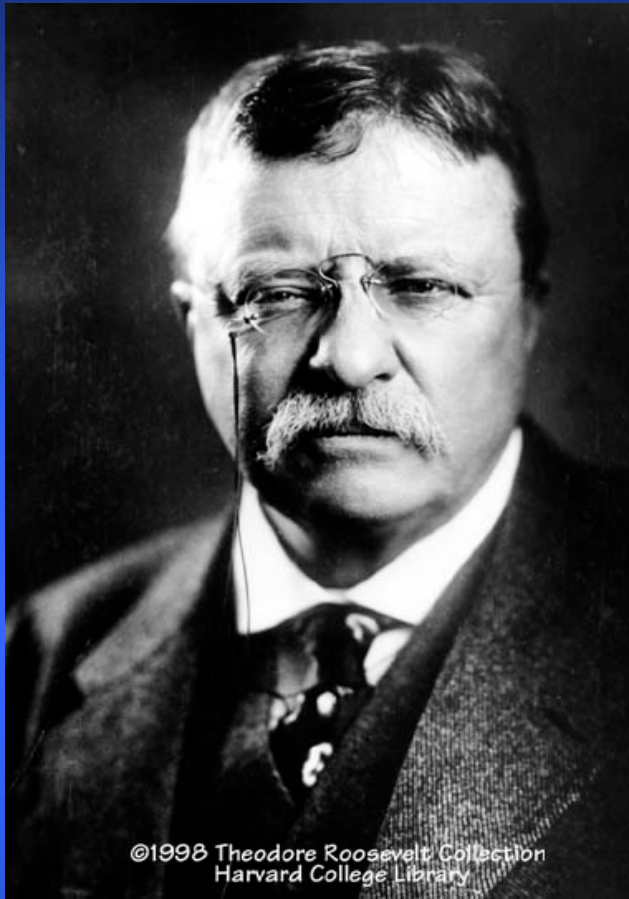
Procrastination - Solutions

- diminish task
- short segment
- create peer pressure
- eliminate distractions
- reminders
- rewards
- pre-work

Procrastination – (in others)

- pre-work
- create deadline
- face-to-face
- force preparation

Accepting Tasks



“Whenever you are asked if you can do a job, tell ‘em, ‘Certainly I can!’ Then get busy and find out how to do it.”

Theodore Roosevelt

Message to Garcia, Elbert Hubbard (1899)



Managing Projects

Parkinson's Law

“Work expands so as to fill the time available for its completion.”

Murphy's Law

“Anything that can go wrong will go wrong.”

Controlling a Project

- Building extra “time buffers” into the schedule to accommodate Murphy’s Law, invites workers to procrastinate and expand work to fill the time
- Instead of revealing the “time buffers” to workers, hold them in reserve, and make smaller assignments with shorter deadlines
- Use the “time buffers” to absorb Murphy’s Law problems without triggering Parkinson’s Law

Risks to your law practice

- uncertainty – must estimate not calculate
- limited resources – can't eliminate all risk

Sources of Risk (External)

- politics
- economy
- disaster
- competition

Sources of Risk (Internal)

- employees problems
- accident
- disruption
- obsolescence
- declining profitability



Weakest Link Analyses

Responses to Risk

- avoid
- transfer
- mitigate
- accept

Legal Matters

Evergreen Retainer

If the amount of your Trust Deposit falls below \$5,000.00 at any time, you agree to pay an additional Trust Deposit in an amount sufficient to replenish the Trust Deposit to the amount of the Initial Fee of \$10,000.00.

Lis Pendens

- Legal procedure
- When to file
- Management rights
- Personal property

Tracing

- Community-out-first Rule
- *Sibley* case (1955)
- *McKinley* case (Tex. 1973)
- Brokerage Accounts

Express Trusts

- Merger
- Spendthrift trusts
- Self-settled trusts
- Revocable trusts
- Discretionary distribution
- Distributed income
- Commingling inside trust
- Maturity

Burdens of Proof

- Burden to produce evidence
- Burden of persuasion

Presumptions

- Assign burden of proof
- Some vanish, some don't

Parental Presumption

- *Brook v. Brook* (Tex. 1994)
- *In re V.L.K.* (Tex. 2000)
- *Troxel v. Granville* (U.S. 2000)

Marital Property

- Presumption of community
- Parent-child presumption of gift
- Titling separate property on other spouse
- Interspousal gift includes future income
- ~~Partition of assets includes future income~~

(9/1/05)

Shifting Burdens of Proof

- Party destroys evidence (*Wal-Mart v. Johnson*)
- Party with exclusive knowledge (*Dessommes*)
- Fiduciary relationship (*Dickson*)

Enforcing Pre- and Post-Marital Agreements

- Premarital agreement
- Partition agreement
- Spousal income agreement
- Community property survivorship
- Converting separate to community

Enforcing Pre- and Post-Marital Agreements

- Premarital agreement
- Partition agreement
- S
 - voluntariness
 - unconscionability
 - ~~contract defenses~~ (9-1-93)
- C
- C

Enforcing Pre- and Post-Marital Agreements

- Premarital agreement
- Partition agreement
- Spousal income agreement
- Community property survivorship
 - Proof of death
 - Requisite formalities

Enforcing Pre- and Post-Marital Agreements

- Premarital agreement
- Partition agreement
- Spousal income agreement
- Community property survivorship
- Converting separate to community
 - Voluntariness
 - Fair and reasonable disclosure of legal effect (safe harbor language)

Severability

“[W]here the consideration for the agreement is valid, an agreement containing more than one promise is not necessarily rendered invalid by the illegality of one of the promises. In such a case, the invalid provisions may be severed and the valid portions of the agreement upheld provided the invalid provision does not constitute the main or essential purpose of the agreement.”

Williams v. Williams, 569 S.W.2d 867, 871 (Tex. 1978)

Grandparent Custody/Access

- *Troxel v. Granville* (U.S. 2000)
- Substantive due process
- Six opinions

Agreement of Justices

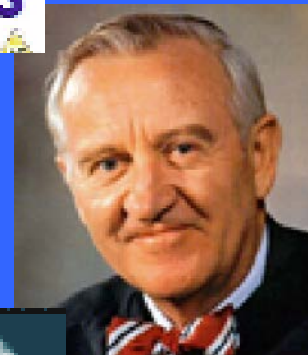
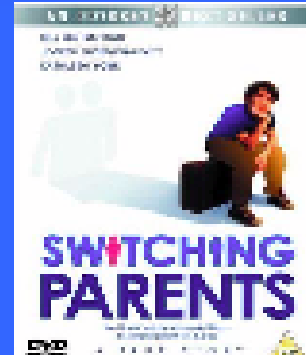
- 8 – 14th A. applies to P-C relationship
- 5 – presumption for fit parent
- 4 – special factors must justify intrusion

Subsequent Litigation

- Some held constitutional
- Some held constitutional after fixing
- Some held unconstitutional
- *In re Pensom* [San Antonio 2003] – prove parent unfit or denial of access would significantly impair physical or emotional

Children as Litigants

- Gregory K (1992)
- Justice Stevens
(*Troxel*)
- Hillary Rodham



Children as Litigants

- Hillary Rodham

“the presumption of identity of interests between parents and their children should be rejected whenever the child has interests demonstrably independent of those of his parents“

Harvard Education Review (1973)

Making a Constitutional Attack

- Raise in trial court
- Must suffer injury
- Presumption of validity
- Interpret to avoid unconstitutionality

Types of Constitutional Attacks

- Facial Invalidity

- “As

The statute cannot be held constitutional under any circumstances

A statute otherwise constitutional may be declared unconstitutional in its operation as applied to particular persons, circumstances, or subject matter

Family Law Experts

- Torts

- Co

- Intentional torts, fraud, gross negligence
- Clear and convincing evidence
- Unanimous verdict on liability for, and amount of, exemplary damages

- Fiduciary

- Equity

Family Law Experts

- Torts

Fraud Remedies

- C

Elements of Fraud

- Fiducia

- Material representation
- False
- Knowing or reckless about falsity
- Intent to be relied upon
- Relied upon
- Injury

- Equity

Family Law Experts

- Torts
- Contracts
 - Contract formation
 - Proof of contract
 - Contract construction
 - Breach
 - Recission vs. damages
- Fidu
- Equ

Family Law Experts

- Torts
- Contracts
- Fiduciary
- Equ

Fiduciary Relationship

- Arising as a matter of law
- Arising as a matter of fact
- Reverses burden of proof
- Actual vs. constructive fraud
- Exemplary damages

Procedure and Evidence

Jury Selection

- Goal in jury selection
- Challenge for cause
- Broad form submission of questions

Offer for a Limited Purpose

- Proponent offers hearsay for all purposes.
- Opponent objects based on hearsay; objection is sustained.
- Proponent reoffers the hearsay for limited purpose.
- Opponent renews hearsay objection.
- Court overrules hearsay objection.
- Opponent requests limiting instruction.

Expert as Conduit for Hearsay

- *Birchfield* case (Tex. 1987)

- TF *Birchfield*
"ordinarily an expert witness should not be permitted to recount hearsay conversation with a third person, even if that conversation forms part of the basis of his opinion."

Expert as Conduit for Hearsay

TRE 705

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

- (a) **Disclosure of Facts or Data.** The expert may testify in terms of opinion or inference and

“The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data.”

- (b) **Voir dire.** Prior to the expert giving the expert’s opinion or disclosing the underlying facts or

“exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert’s opinion outweighs their value as explanation or support or are unfairly prejudicial.”

provide a sufficient basis for the expert’s opinion under Rule 702 or 703, the opinion is inadmissible.

- (d) **Balancing test: limiting instructions.** When the underlying facts or data would be

“a limiting instruction by the court shall be given upon request.”

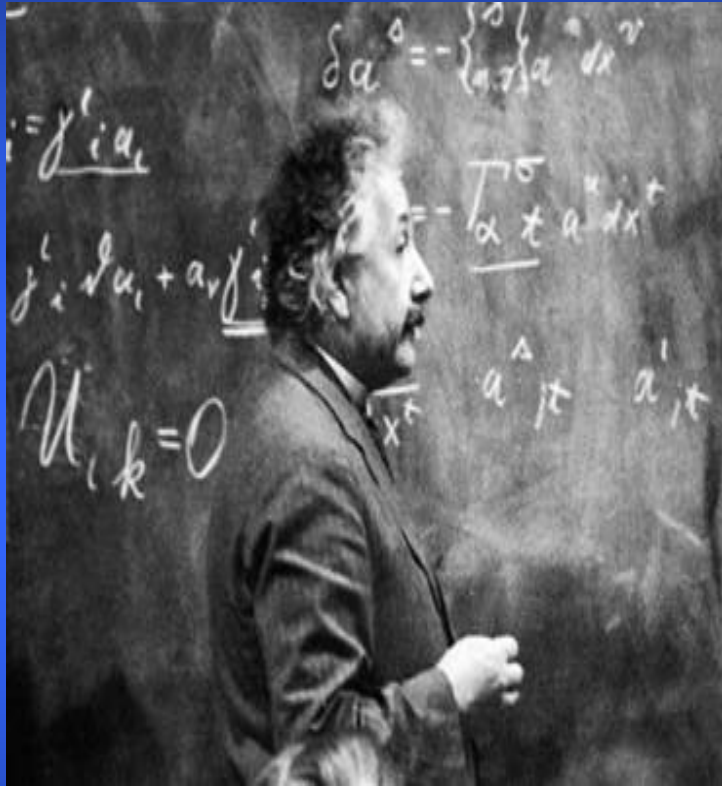
their value as explanation or support or are unfairly prejudicial. If otherwise inadmissible facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

Running Objections

Volkswagen of America Inc. v. Ramirez, 159 S.W.3d 897, 907 (Tex. 2005)

Because Volkswagen's initial objection to the evidence complied with Texas Rule of Appellate Procedure 33.1(a) and its requested running objection clearly identified the source and specific subject matter of the expected objectionable evidence prior to its disclosure to the jury, recognition of the running objection for more than one witness was appropriate.

Financial Considerations



“Compound interest is the greatest mathematical discovery of all time.”

Albert Einstein

$$E=mc^2$$

How Long Will Savings Last?

moneychimp

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econ corner

Confused by the economy? Try the guide to [Economic Indicators](#); trace the components of the [Gross Domestic Product](#); learn the twisty little logic of [Government Spending](#) and [Tax Cuts](#); worry about [inflation](#).

[How Finance Works](#):
interactive graphs explain [bond yield](#), [compound interest](#), [present value](#), [stock valuation](#), [mortgages](#)...



Annuity Calculator

Inputs	
Starting Principal:	\$ <input type="text" value="120,000.00"/>
Growth Rate:	<input type="text" value="5"/> %
Years to Pay Out:	<input type="text" value="5.4"/>
<input type="button" value="Calculate"/>	
Results	
Annual Payout Amount:	\$ <input type="text" value="24,671.28"/>

Compound Interest
Present Value
Return Rate / CAGR
▶ Annuity
Bond Yield
Mortgage
Retirement

Put a calculator on
your site for free ...
[details](#)

See "How Finance Works" for the annuity [formula](#).

Present Value

- CPA
- Tables
- TI Business Calculator
- Internet

TABLE ONE

The Present Value of \$1,000.00 paid in a lump sum at the end of the indicated period of years, discounted at the specified rate:

Years	1 yr	2 yrs	3 yrs	4 yrs	5 yrs	6 yrs	7 yrs	8 yrs	9 yrs	10 yrs
5%	\$952.38	907.03	863.84	822.70	783.53	746.22	710.68	676.84	644.61	613.91
6%	\$943.40	890.00	839.62	792.09	747.26	704.96	665.06	627.41	591.90	558.39
7%	\$934.58	873.44	816.30	762.90	712.99	666.34	622.75	582.01	543.93	508.35

TABLE TWO

The Present Value of \$1,000.00 paid at the end of each year, for the indicated period of years, discounted at the specified rate:

Years	1 yr	2 yrs	3 yrs	4 yrs	5 yrs	6 yrs	7 yrs	8 yrs	9 yrs	10 yrs
5%	\$952.38	1,859	2,723	3,546	4,329	5,076	5,786	6,463	7,108	7,722
6%	\$943.40	1,833	2,673	3,465	4,212	4,917	5,582	6,210	6,802	7,360
7%	\$943.58	1,808	2,624	3,387	4,100	4,767	5,389	5,971	6,515	7,024

TABLE THREE

The Present Value of \$1,000.00 paid at the end of each month, for the indicated number of years, discounted at the specified rate:

Years	1 yr	2 yrs	3 yrs	4 yrs	5 yrs	6 yrs	7 yrs	8 yrs	9 yrs	10 yrs
5%	\$11,681	22,794	33,366	43,423	52,991	62,093	70,752	78,990	86,826	94,282
6%	\$11,619	22,563	32,871	42,580	51,725	60,340	68,453	76,095	83,293	90,073
7%	\$11,557	22,335	32,386	41,760	50,502	58,655	66,257	73,348	79,960	86,127

TABLE FOUR

The Present Value of \$120,000.00, paid (i) in a lump sum at the end of 10 years (ii) in annual installments of \$12,000.00; and (iii) in monthly installments of \$1,000.00, discounted at the specified rate:

	Lump Sum	Annual Payments	Monthly Payments*
5%	\$73,669.59	92,660.82	94,677.62
6%	\$67,007.37	88,321.04	90,523.82
7%	\$61,001.92	84,282.98	86,643.85

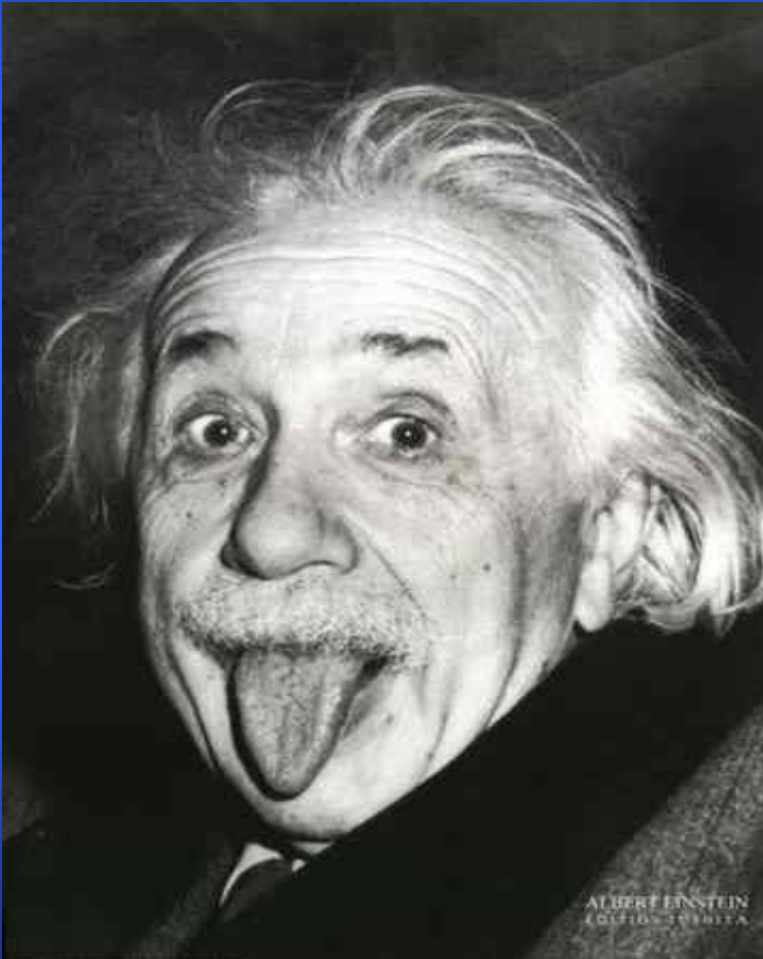
*Assumes monthly payments are paid on the first day of the month (annuity due)

Risk

- Time value of money (5%)
- Additional discount for risk of non-payment (___%)

Rule of 72

Albert Einstein discovered the Rule of 72. To estimate the number of years it will take to double your money, divide the interest rate into 72.



Actuarial Armageddon

RATIO OF NUMBER OF WORKERS PER RETIREE

	1995	2050
USA	4.2	2.3
U.K.	2.7	2.1
Canada	3.6	1.6
Japan	2.6	1.5
Germany	2.3	1.2
Italy	1.3	0.7



United Airlines

Plans will pay only 2/3 of benefits owed

PBGC

- 4-15-05, only 69% of big plans covered
- Total shortfall of all plans \$450+ billion
- PBGC has a \$23.3 billion deficit
- Investigate your plan

Underfunded Pensions

25 most underfunded pensions

The rebound in the stock market the past two years hasn't done much to help fix Corporate America's underfunded pension problem (story, 1B). These are the 25 most underfunded companies in the S&P 500.

Company	Funded status (in billions)
Ford Motor	-\$11.7
ExxonMobil	-\$10.1
General Motors	-\$8.6
Boeing	-\$6.7
IBM	-\$5.8
Delta Air Lines	-\$5.7
Delphi	-\$4.1
United Tech.	-\$3.7
Raytheon	-\$3.5

Lockheed Martin	-\$3.5
DuPont	-\$3.2
Goodyear Tire & Rubber	-\$2.8
ConocoPhillips	-\$2.3
Exelon	-\$2.3
Dow Chemical	-\$2.3
Pfizer	-\$2.2
Motorola	-\$2.0
Procter & Gamble	-\$2.0
Chevron	-\$2.0
Tyco International	-\$1.9
Alcoa	-\$1.9
Hewlett-Packard	-\$1.9
Altria	-\$1.9
Caterpillar	-\$1.8
Deere	-\$1.8

Source: Standard & Poor's

Social Security & Medicare

- Determine client's benefits
- Determine age of retirement
- 1950, max. tax paid, age 66, \$2,056/mo

Social Security & Medicare

- Actuarially unsound
- To fix it today would take:

- 15% increase in payroll taxes
or
- 13% reduction in benefits

The longer we wait
the worse it gets

Old Age & Survivors Insurance Fund (OASI)

- Negative cashflow 2018
(with interest 2028)
- Exhausted in 2043

Disability Insurance Fund (DI)

- Negative cashflow 2005
- Exhausted in 2027

Medicare

- Hospital Insurance (HI) insolvent in 2014
- Supplemental Medical Insurance (SMI) funded from federal budget

Life Expectancy

	<u>M</u>	<u>F</u>
• At birth 1950	66.5	72.2
• At age 65, 2002	16.6	19.5
• At age 75, 2002	10.3	12.3

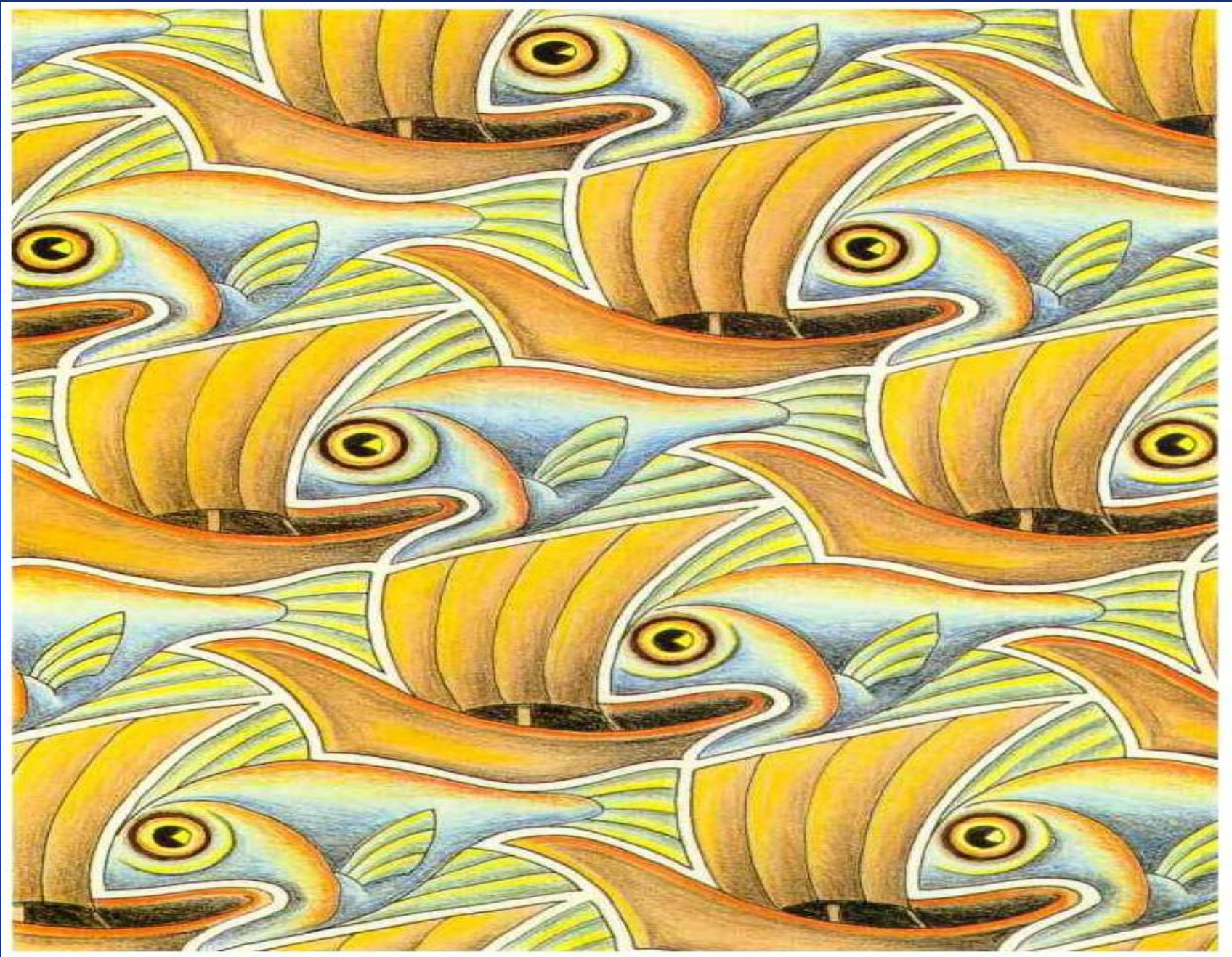
Health Care

- 6% of employees' compensation is health insurance
- 2004, 11.2% increase in cost of medical insurance (4 times inflation rate)
- Annual premium for family \$9,950 (2004)
- Next year, increase to \$14,500

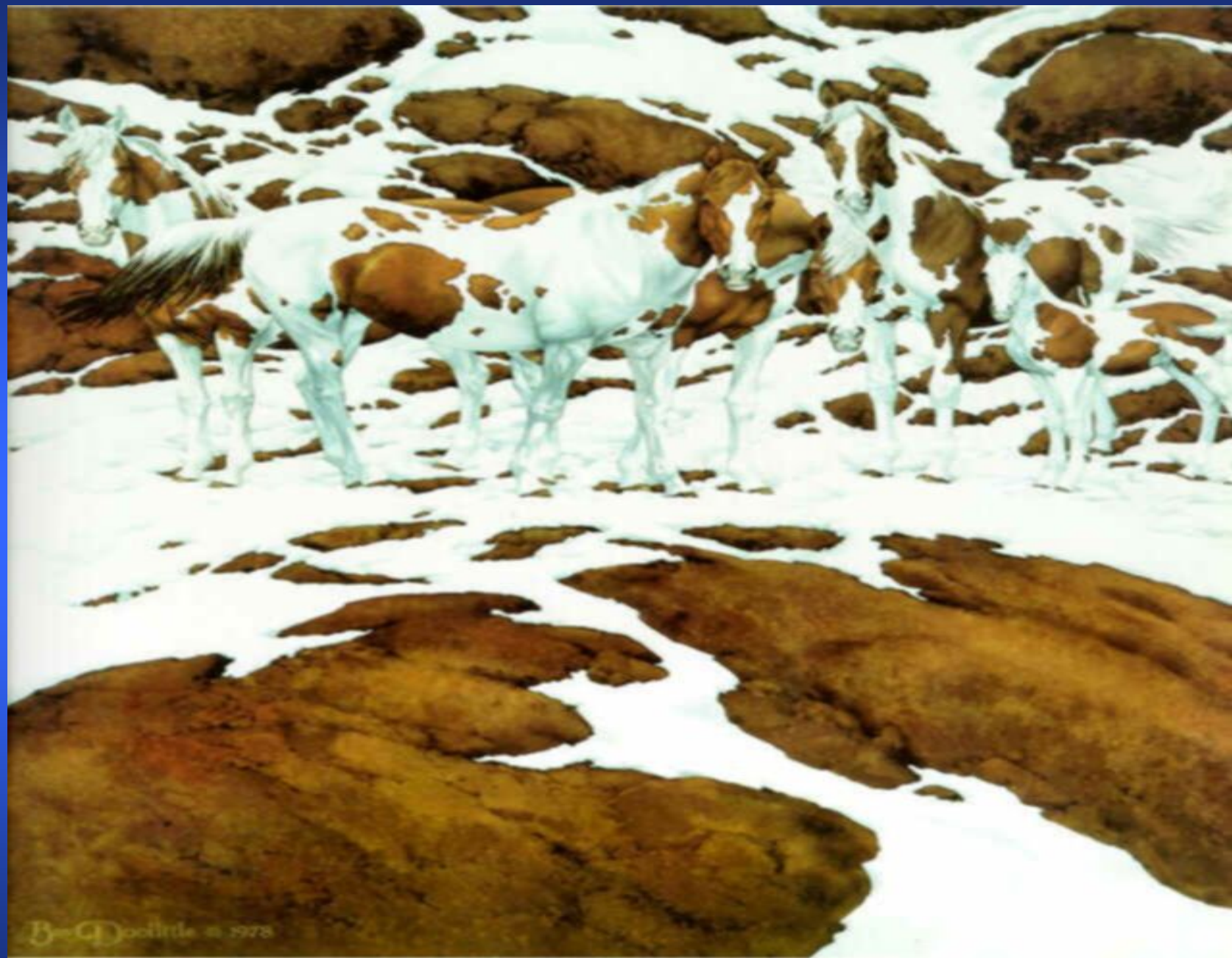
Big Ideas

Framing & Reframing



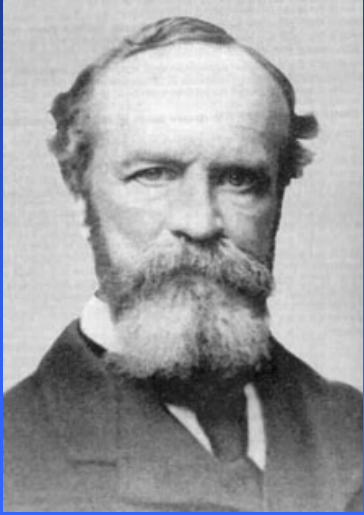






B. G. Doolittle © 1978

Attitude



“Human beings, by changing the inner attitudes of their minds, can change the outer aspects of their lives.”

William James (1842 - 1910)



“I am still determined to be cheerful and happy, in whatever situation I may be; for I have also learned from experience that the greater part of our happiness or misery depends upon our dispositions, and not upon our circumstances.”

Martha Washington (1732 - 1802)

And now
a final word...



Reminder 2nd Annual AFLC Cigar Tasting

* * *

Javier's 5:00 p.m.
Tuesday