

# Appellate Tech Talk

Presented at the University of Texas  
Conference on State and Federal Appeals  
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Boies: ... it's possible to demonstrate a nexus by showing that speed was very important to Google in getting Android out, and by copying they accelerated that.



Judge: We heard the testimony of Mr. Bloch. I couldn't have told you the first thing about Java before this problem. I have done, and still do, a significant amount of programming in other languages. I've written blocks of code like `rangeCheck` a hundred times before. I could do it, you could do it. The idea that someone would copy that when they could do it themselves just as fast, it was an accident. There's no way you could say that was speeding them along to the marketplace. You're one of the best lawyers in America, how could you even make that kind of argument?



Boies: I want to come back to rangeCheck.



Judge: rangeCheck! All it does is make sure the numbers you're inputting are within a range, and gives them some sort of exceptional treatment. That witness, when he said a high school student could do it--



Boies: I'm not an expert on Java -- this is my second case on Java, but I'm not an expert, and I probably couldn't program that in six months. Let me come back to rangeCheck after I've reminded the Court about the test files....



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# The Appellate Courtroom

# The new podium



*McNatt v. Lawther*, 223 S.W. 503, 505 (Tex. Civ. App. – Amarillo 1920, no writ)

“It was probably the purpose of this legislation to make it clear that the early English decisions, which held labor unions under certain circumstances to be unlawful, and our own laws against trusts and combinations in restraint of trade apply to labor unions.”

City of Round Rock v.  
Rodriguez (Dec. 8, 2011)



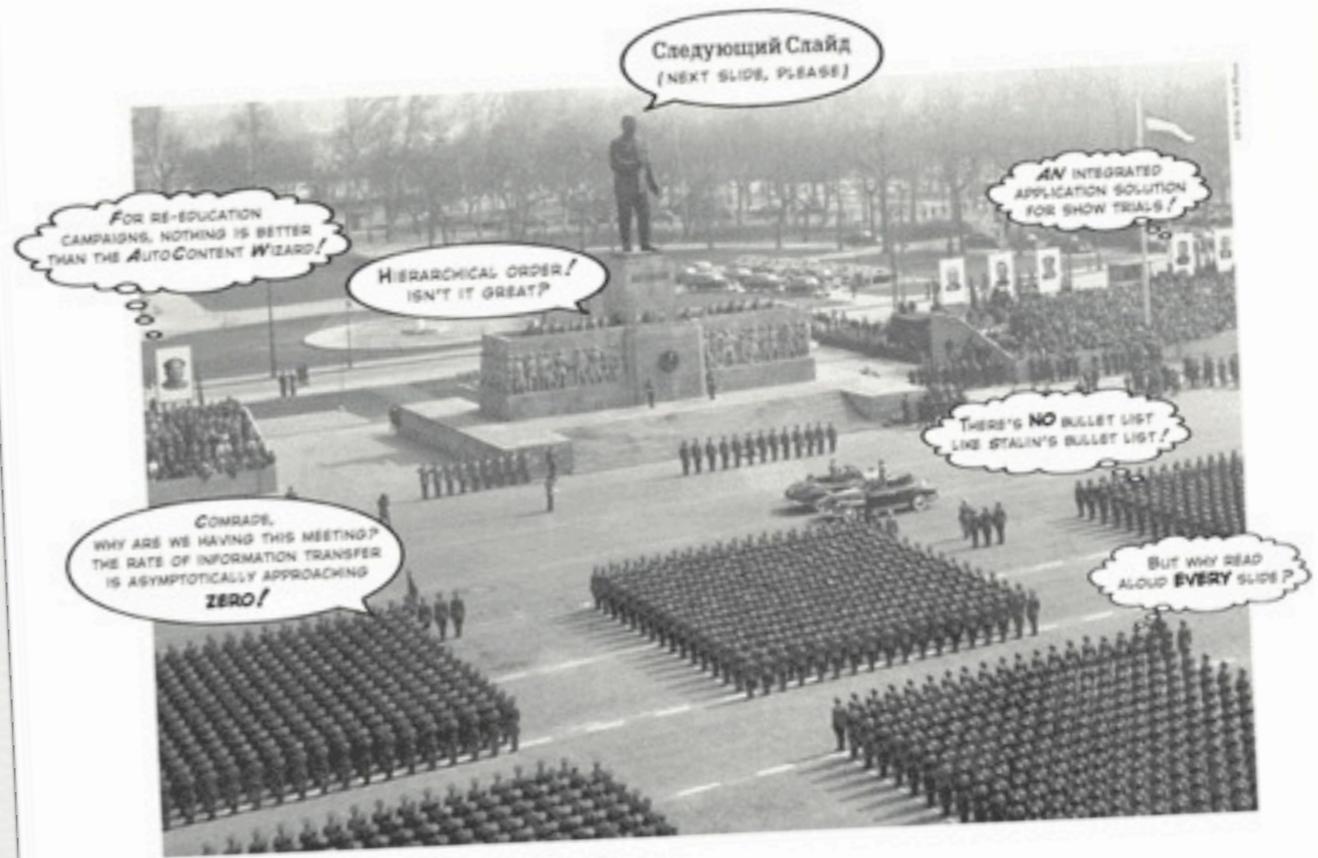
# A few details

- Call Blake at least a week in advance.
- There's a telestrator on the touch screen.
- Justices who bring their laptops can see a smaller image on that screen. Others can see the large TV monitor in the room.
- Advocates can bring their own laptop/iPad rather than using the court's laptop.

SECOND EDITION

Edward R. Tufte

# The Cognitive Style of PowerPoint: Pitching Out Corrupts Within



Military parade, Stalin Square, Budapest, April 4, 1956.

# One famous “anti-pattern”: The Space Shuttle Challenger disaster

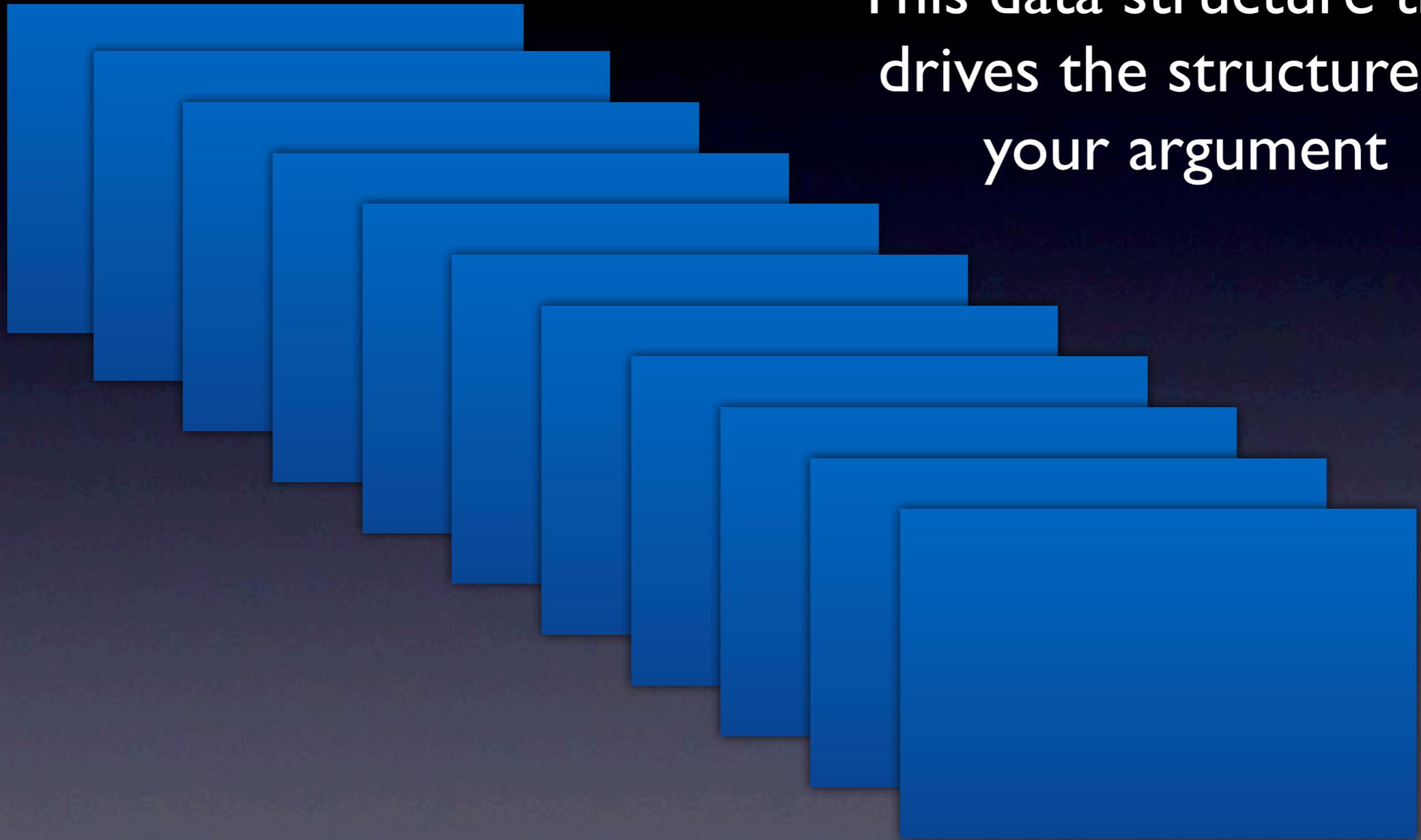
## Review of Test Data Indicates Conservatism for Tile Penetration

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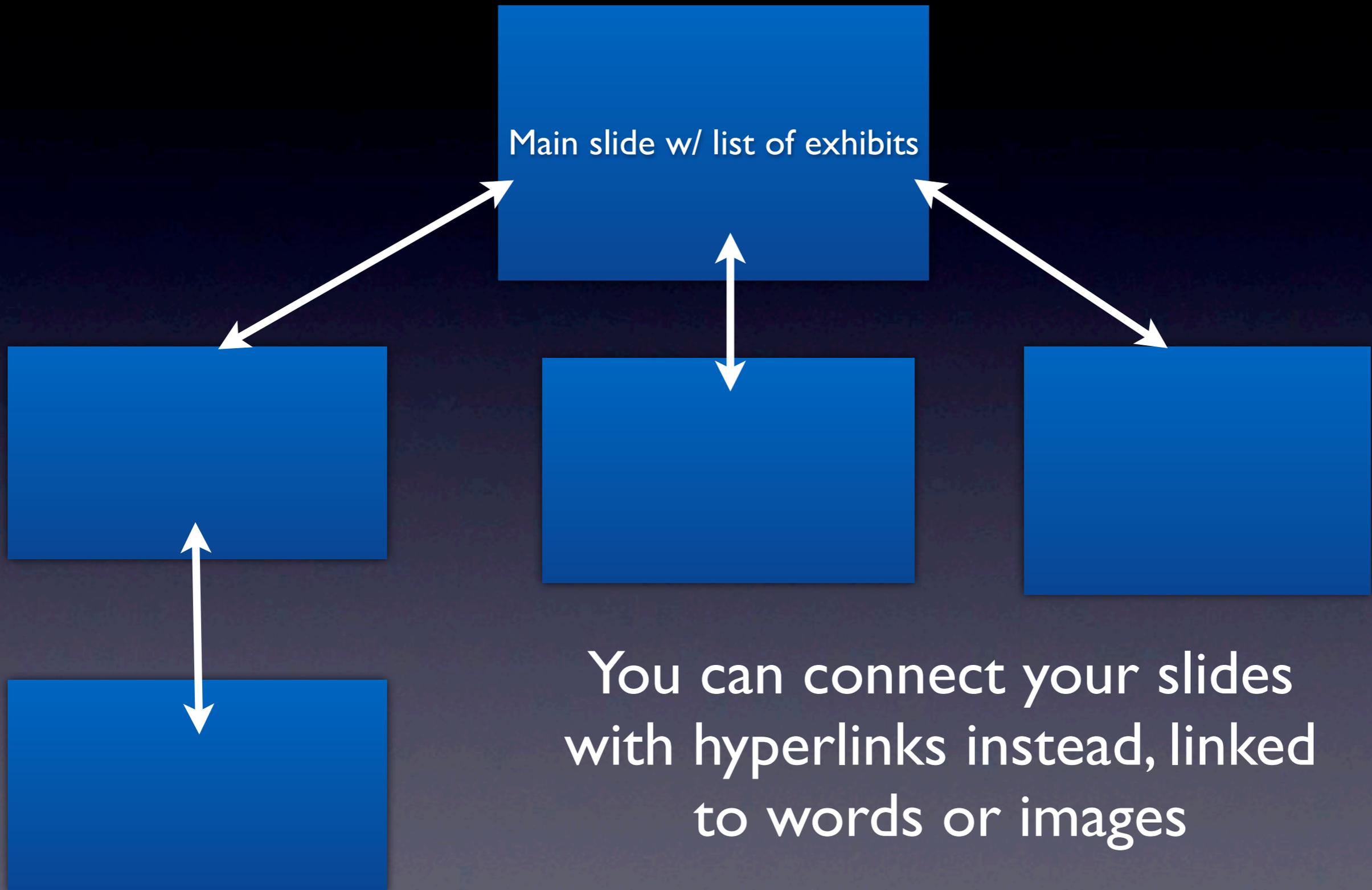
- **The existing SOFI on tile test data used to create Crater was reviewed along with STS-87 Southwest Research data**
  - **Crater overpredicted penetration of tile coating significantly**
    - ◆ **Initial penetration to described by normal velocity**
      - Varies with volume/mass of projectile (e.g., 200ft/sec for 3cu. In)
    - ◆ **Significant energy is required for the softer SOFI particle to penetrate the relatively hard tile coating**
      - Test results do show that it is possible at sufficient mass and velocity
    - ◆ **Conversely, once tile is penetrated SOFI can cause significant damage**
      - Minor variations in total energy (above penetration level) can cause significant tile damage
  - **Flight condition is significantly outside of test database**
    - ◆ **Volume of ramp is 1920cu in vs 3 cu in for test**

# Slide decks as a stack

This data structure then  
drives the structure of  
your argument



# You're not forced to use a stack



Or use software that is  
already configured that way



Exhibit A - \$10 for the iPad

My Projects

Back

Folders

All

A - Z

Filetype



## Getting Started/Legal Docs



Accident Scene



Opposition to  
MSJ



Yee v Tse

Whiteboard

Help

Dropbox

Add Exhibits

Add Folder

Back

Accident Scene.jpg

Hide Toolbar

Tools

Rotate

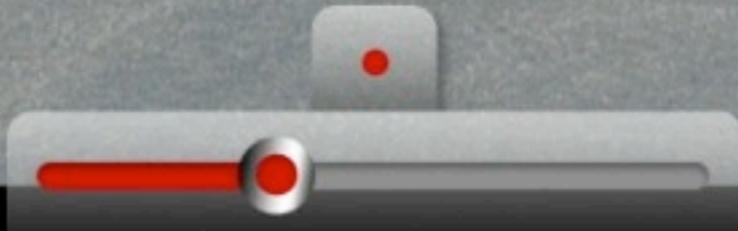
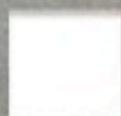
Undo

Redo

Clear

Save

Show



## THIRD DISTRICT COURT OF APPEALS LOCAL RULES

The procedures prescribed by these local rules apply in lieu of those prescribed by the Texas Rules of Appellate Procedure to the extent there are differences between the procedures; otherwise, the Rules of Appellate Procedure continue to apply with full force and effect.

### **RULE 1. CLERK'S RECORD.**

Unless otherwise stated, all references to a rule herein are to the Texas Rules of Appellate Procedure.

#### **RULE 1.1. PREPARATION OF CLERK'S RECORD.**

The trial court clerk must prepare and file the clerk's record in accordance with Rules 34.5 and 35. Even if more than one notice of appeal or request for inclusion of items is filed, the clerk should prepare only one record in a case. To prepare the clerk's record, the trial court clerk must:

- a. gather the documents required by Rule 34.5(a) and those requested by a party under Rule 34.5(b);
- b. start each document on a new page;
- c. include the date of filing on each document;
- d. arrange the documents in ascending chronological order, by date of filing or occurrence;
- e. start the page numbering **on the front cover of the first volume** of the clerk's record

# When might this make sense?

- A truly great exhibit that makes something complex (like a physical process) simpler.
- When there is disputed text in a statute or contract and this might turn an abstract discussion of grammar or a redline into something concrete (laser pointer).
- More generally, it might be helpful to have the key exhibits ready (the sort you'd attach to a physical brief).

# Room for paper notes?



Who Moved My  
Cheesy Video?

# Key "rickrolling" video taken down due to copyright claim (Updated)

You can still roll, but you'll be Rick-less—thanks to AVG Technologies.

by Cyrus Farivar - May 23 2012, 12:20pm CDT

WEB CULTURE 54



# Things Change

Pages can just disappear

- If the page is moved in a redesign, your browser may be told it is gone (404)

More subtly, the *text* of pages can change

- Some sites are versioned - Wikipedia
- Others change silently - Texas statutes

# the Supreme Court of Texas Blog

Helping Texas Appellate Counsel and Trial Lawyers Follow the Texas Supreme Court

## How to Cite to Wikipedia in Appellate Briefs

Thursday, November 17th, 2011 by Don Cruse · 3 Comments

Our speaker at today's Austin Bar Civil Appellate Lunch was Robert Dubose, whose topic was "Can I Cite *Wikipedia*? The Ethics of Citing Online Information on Appeal."

This blog post shares a tip for **how** to cite *Wikipedia*, when you've already decided that you want to refer to the largest single compendium of human knowledge ever assembled.

If a site offers full version-control (like Wikis or some blogs), then by all means use that URL format.



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# Myspace

From Wikipedia, the free encyclopedia



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[Contents](#)

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- [\(cur | prev\)](#)  14:29, 18 May 2012 [Tracer9999](#) ([talk](#) | [contribs](#)) .. (101,443 bytes) (0) .. *(→Website features: fixed out of order dates)*

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[Contents](#)

[Featured content](#)

[Current events](#)

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You want the page as it appears on screen – not the degraded version that would print.

- Mac: LittleSnapper (\$40)
- Windows/Mac: plugins for Google Chrome or for Firefox (free)
- Windows/Mac: Acrobat has this (and a special toolbar for Internet Explorer)
- iOS: Use “home + power” command.

Change can make  
research tricks obsolete

# the Supreme Court of Texas Blog

Helping Texas Appellate Counsel and Trial Lawyers Follow the Texas Supreme Court

## Researching Unpublished COA Opinions in Texas

*Thursday, June 11th, 2009 by Don Cruse · 4 Comments*

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### SEARCH THIRTEEN COURTS OF APPEALS IN ONE BOX

Texas has fourteen courts of appeals. Luckily, the opinions in thirteen of those (all but Dallas) can be quickly searched in Google by including the following operator within your search query:

`site:courts.state.tx.us/opinions`

# Electronic Briefs

Knowing how the Court's  
online data is arranged

<http://www.supreme.courts.state.tx.us/ebriefs/>

Knowing how to fine-tune  
a search engine

Tip Expires  
July 2012

- **Search within a specific website (site:)**

Google

Google allows you to specify that your search results must come from a given website. For example, the query [iraq site:nytimes.com] will return pages about Iraq but only from nytimes.com. The simpler queries [iraq nytimes.com]

`site://www.supreme.courts.state.tx.us/ebriefs/`

What if the website  
doesn't change?

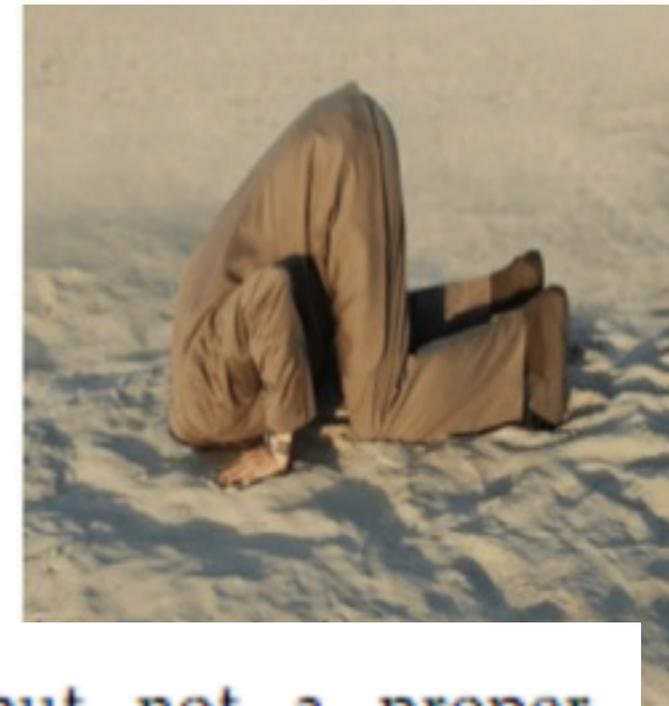


Don't let this be you.

the cases that established the precedents. Whatever the reason, such advocacy is unacceptable.

The ostrich is a noble animal, but not a proper model for an appellate advocate. (Not that ostriches *really* bury their heads in the sand when threatened; don't be fooled by the picture below.) The "ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is as unprofessional as it is pointless." *Mannheim Video, Inc. v. County of Cook*, 884 F.2d 1043, 1047 (7th Cir. 1989), quoting *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1198 (7th Cir. 1987).

The ostrich is a noble animal, but not a proper model for an appellate advocate. (Not that ostriches



David S. McKean, is especially culpable, because he filed his opening brief as well as his reply brief after the *Abad* decision yet mentioned it in neither brief despite the heavy reliance that opposing counsel placed on it in their response brief. In contrast, counsel in the blood-products appeal could not have referred to either *Abad* or *Chang* in their opening brief, did try to distinguish *Abad* (if unpersuasively) in their reply brief, and may have thought that *Chang* added nothing to *Abad*. Their advocacy left much to be desired, but McKean's left more.

AFFIRMED.

## Was Judge Posner a Dodo in His Ostrich Opinion?

By DAVID LAT

Of course not! But the headline got your attention, didn't it? The notion of Judge **Richard Posner** as being anything other than a genius will certainly make people sit up and take notice. There's a reason why there's a Facebook group called **Richard Posner for Philosopher King** (of which I am a proud member).

It should be noted, however, that Judge Posner's opinion in **Gonzalez-Servin v. Ford Motor Co.** was not 100 percent perfect. It initially contained some infelicitous wording — which has since been



Why does he repeatedly refer to forum non conveniens \*transfers\*

I have a different issue with Posner's opinion. Why does he repeatedly refer to forum non conveniens \*transfers\* to the courts of Argentina or Mexico? I've always taught students that grant of a forum non conveniens motion results in dismissal — there is no way to transfer the case (as in a 1404 transfer) to a foreign sovereign, and no way to insure that the litigation will actually proceed in the alternative forum. Am I missing something?

# ABOVE THE LAW

## Was Judge Posner a Dodo in His Ostrich Opinion?

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Nope, you're not. I reached out to Judge Posner, who responded as follows:



He's quite right. But if he looks at the Westlaw version of the opinion, he'll see that "to transfer" has been changed to "to (in effect) transfer." It is a dismissal, not a transfer as such, but it is a dismissal premised on the willingness of a foreign court to entertain a refile of the identical suit.

**But if he looks at the Westlaw version**

an order to (in effect) transfer a case  
courts of Mexico—is one of many offsh

Before [EASTERBROOK](#), Chief Judge, and [POSNER](#) and [TINDER](#), Circuit Judges.

## Opinion

[POSNER](#), Circuit Judge.

We have consolidated for decision two appeals that raise concerns about appellate advocacy. These concerns are likely to arise in similar appeals, so we have decided to address them in a published opinion. Both are appeals from grants of *forum non conveniens* in multidistrict litigation.

<sup>1</sup> No. 11–1665—an appeal from an order to (in effect) transfer a case from the U.S. District Court for the Southern District of Indiana to the courts of Mexico—is one of many offshoots of litigation arising out of vehicular accidents allegedly caused by defects in Bridgestone/Firestone tires installed on Ford vehicles in Latin America. All these cases have been consolidated for pretrial proceedings in that district court before Judge Barker.

In the  
**United States Court of Appeals**  
**For the Seventh Circuit**

No. 11-1665

MONICA DEL CARMEN GONZALEZ-SERVIN, *et al.*

2

Nos. 11-1665, 08-2792

Appeal from the United States District Court  
for the Northern District of Illinois, Eastern Division.  
No. 93 C 7452—John F. Grady, Judge.

SUBMITTED OCTOBER 27, 2011—DECIDED NOVEMBER 23, 2011

No. 11-1665—an appeal from an order to transfer a case from the U.S. District Court for the Southern District of Indiana to the courts of Mexico—is one of many offshoots of litigation arising out of vehicular accidents

No. 08-2792

IN RE:

FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS  
LIABILITY LITIGATION:

YEHUDA KERMAN, *et al.*,

*Plaintiffs-Appellants,*

v.

BAYER CORPORATION, *et al.*,

*Defendants-Appellees.*

from the U.S. District Court for the Southern District of Indiana to the courts of Mexico—is one of many offshoots of litigation arising out of vehicular accidents allegedly caused by defects in Bridgestone/Firestone tires installed on Ford vehicles in Latin America. All these cases have been consolidated for pretrial proceedings in that district court before Judge Barker.

In *Pastor v. Bridgestone/Firestone North American Tire, LLC* (decided with and under the name *Abad v. Bayer Corp.*, 563 F.3d 663 (7th Cir. 2009)), we affirmed Judge Barker's transfer of a similar case to the courts of Argentina under the doctrine of *forum non conveniens*. The appellants in

Dear Seventh Circuit,

When you approve changes to an opinion's text before its final publication, please post a fully corrected version online.

Sincerely,

The Internets

“The Internets”

# “Filter Bubble”

- Mass customization of search results based on your social network, your search history, your browsing history, etc.
- Eli Pariser book of this name gives more examples, as does <http://dontbubble.us>
- What matters to us: As researchers, you can rarely know what another user will see when they do precisely the same search.

# Search Results (Now) Are Relative

Google now offers some options

- Toggle switch  top right corner
- Manually add “&pws=0” at end of URL
- Option on sidebar to set geography



DuckDuckGo: worth playing with

# WestlawNext™

## WestSearch

WestlawNext Search Technology

- Document usage patterns. WestSearch integrates the meaningful interactions between a user and a document. For example: How often have judges, attorneys, and legal scholars cited a document while discussing an issue? How often have WestlawNext users printed a document? When did they view a KeyCite result for a document? Did they save a document to a folder or add a note to the document? These are all actions that represent significant user–document interactions. WestSearch

aggrega  
terms an  
are searc  
Docume  
related t

**Documents with usage patterns that indicate they are valuable ... are brought to the forefront of your search results.**

The algorithm retrieves legal documents of high recall, as well as high precision. Recall—a measure of completeness—is delivered by the metadata. Relevant documents are retrieved whether they contain your key words or not. Your search is, therefore, much broader than previous searches on Westlaw that were restricted to key word occurrences. To counter these broad results, WestSearch uses document usage patterns to deliver precision—a measure of exactness or accuracy. Recall and precision together retrieve not only relevant documents but also the documents important to you.

What we found were that the problems were mostly accounted for by our editorial enhancements, but there were definitely some remaining issues regarding current documents and the snowball effects of popularity. To deal with those, we reduced the weight of the customer usage in the algorithms, and we increased the threshold for when the usage patterns would be considered. In other words, to impact the algorithm, substantial numbers of other users would have needed to have provided strong relevance indications in their usage patterns, and even when they did, they couldn't override what our editorial enhancements were telling us, they could just add some documents to the result or improve the rank of documents slightly.

Beyond that, we make special accommodations for date and other factors. I can't reveal precisely how we do that, but for an example of how researchers at Carnegie Mellon have dealt with this common issue, see [here](#).