Don't Forget Your Readers:
Tips for not misplacing your modifiers…or your glasses

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Roadmap

- Helping your reader
  - Identify your audience
  - Consider them throughout the process
- Draft directly and simply
  - Choose the right verb
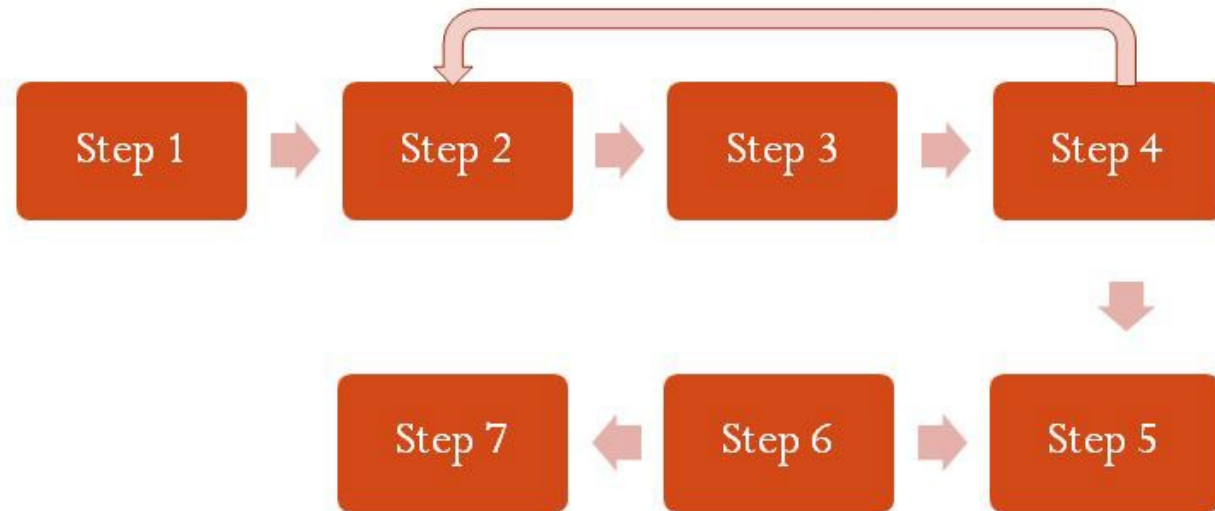 - Simplify sentence structure
  - Avoid ambiguity and vagueness

Building "Capital" with Your Reader

- Benefits of happy readers
  - Less questions
  - More agreeable
- How to cultivate happy readers
  - Help your reader navigate
  - Don't exhaust your reader
  - Don't confuse your reader

Drafting Process

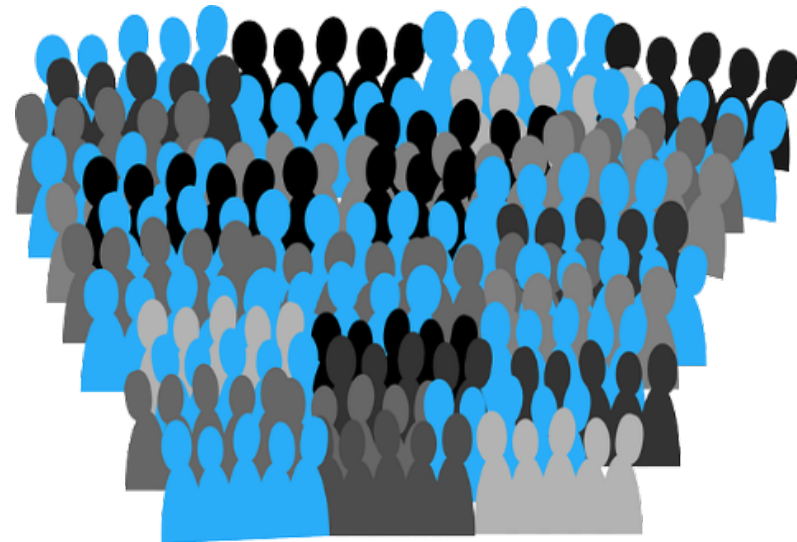- Identify goal
- Research
- Organize
- Draft
- Edit
- Review

Understand the Problem

- What problem are you trying to solve?
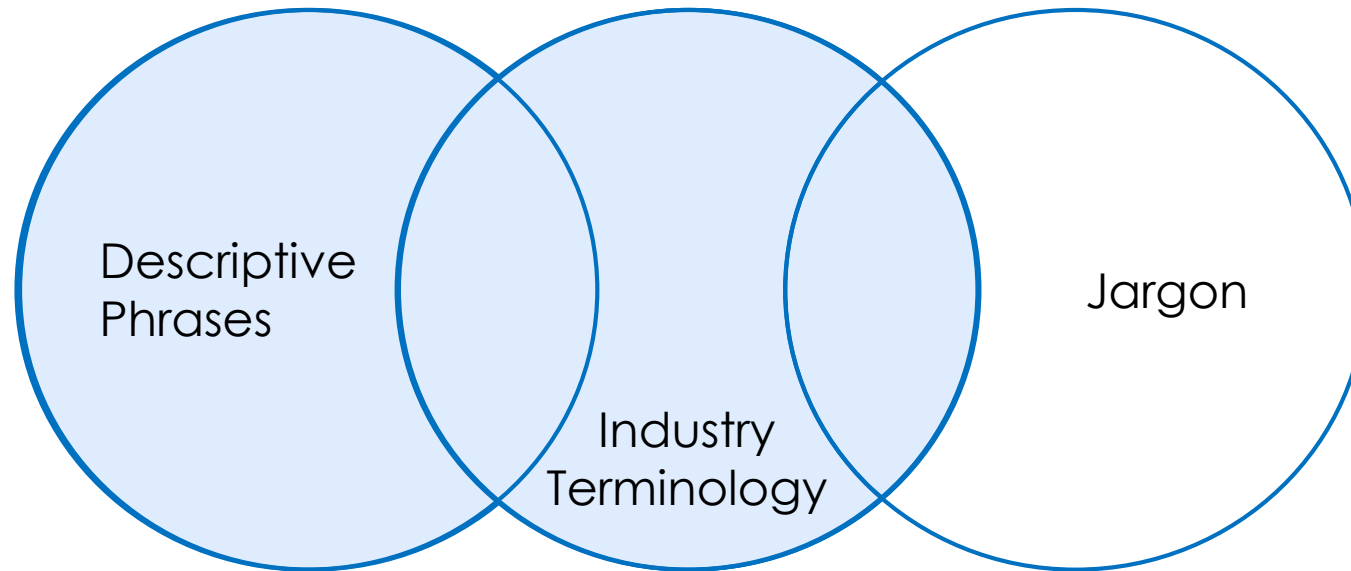- What is the source of the problem?
- What policy action can be taken?

Identify Your Audience

▶ Who needs to understand the rule?
- Knowledgeable parties that must comply
- The administrating agency
- Other government entities?
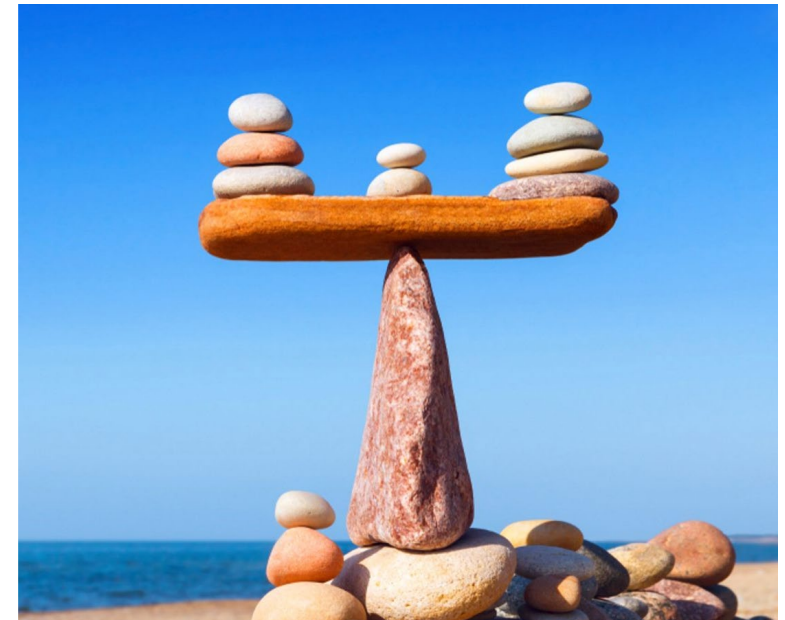- The courts?
- The public?

Vocabulary and Jargon

Jargon – "The technical terminology or characteristic idiom of a special activity or group"

Descriptive Phrases

Industry Terminology

Jargon

When audience is both the public and industry

Organize for Your Reader

- ▶ Balancing two functions
  - General understanding
  - Answering specific questions
- ▶ Lay out for general understanding
- ▶ Organizational options
  - Chronologically
  - General to specific

Keep Parts and Subparts Short

▶ The more parts and subparts you have, the more headnotes you can use. This helps users scan for information.

WARNING: Headnotes are not the law!

▶ Short blocks of text are easier to summarize meaningfully in a headnote.

▶ Short blocks of text with lots of white space are less tiring to read. This aids in comprehension.

Use Vertical Lists

▶ Lists have these advantages:

- They highlight levels of importance.
- They help users understand the order in which things happen.
- They help users see all steps in a process.
- They add blank space for easy reading.
- They're an ideal way to present items, conditions, and exceptions.
- They're citable.

Direct and Simple - 3 Basic Rules

- ▶ Draft in the present tense
  - Don't: "the commissioner will assign…"
  - Do: "the commissioner must assign…"
- ▶ Draft in the singular number
  - Don't: "all licensees must…"
  - Do: "a licensee must…"
- ▶ Draft in the active voice

Verb Voice

- Active (Actor – verb – direct object)
  - "Jim is eating bacon."
- Passive (Direct object – verb – actor)
  - "All the bacon was eaten."
- Passive-Aggressive
  - "Thanks for not sharing any of the bacon. I hope it was delicious."

Benefits to the Active Voice

► Active voice makes clear who has the duty.

► The passive voice can cause ambiguity.

► When both are written unambiguously, the active voice is shorter and more direct.
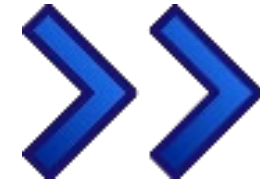
Editing for Shorter Sentences

▶ Narrow the goal for each sentence (Conceptual editing)

▶ Cut unnecessary words (Grammatical editing)

- Choose direct verbs

- Identify noun strings

- Review sentence structure

Narrowing the Goal

▶ Nonparallel phrases can often be separated into multiple sentences

- Don't: "The commissioner shall, **in writing and with a copy to the commissioner of agriculture**, report to the legislature on…

- Do: "The commissioner shall report to the legislature on... The report must be in writing. The commissioner must provide a copy of the report to the commissioner of agriculture.

Choose the Most Direct Verb

▶ Verbs like "use", "provide", and "implement" often create needless words in a sentence.

▶ Look for the more direct verb:
  - "…the process to be used for providing oversight of…"
  - "…the process for overseeing…"

▶ Forms of "be" often signify a more direct verb exists
  - "…is applicable to…" becomes "…applies to…"

Identifying Verbs in Noun Strings

▶ To avoid noun strings like this:

- "Underground mine worker safety protection procedures development"

▶ Identify the verbs that have been turned into nouns:

- "protection" and "development"

▶ Rewrite the phrase:

- "Developing safety procedures to protect underground mine workers" or
- "Developing procedures to protect the safety of workers in underground mines"

Placing modifiers

▶ Keep modifiers close to what they modify

▶ Move generally applicable modifiers to the front

- Don't: "The closed charter school must transfer the student's educational records <u>within ten business days of closure</u> to the student's school district of residence..."

- Do: "<u>Within ten business days of closure</u>, the charter school must transfer the student's education records to the student's school district of residence..."

Ambiguity: Two Senses

"In writing on the interpretation of texts, the loose norm is to refer to all uncertainties of meaning as *ambiguities*. But there is a useful and real distinction between textual uncertainties that are the consequences of verbal ambiguity...and those that are the consequence of verbal vagueness..."

-Scalia and Garner

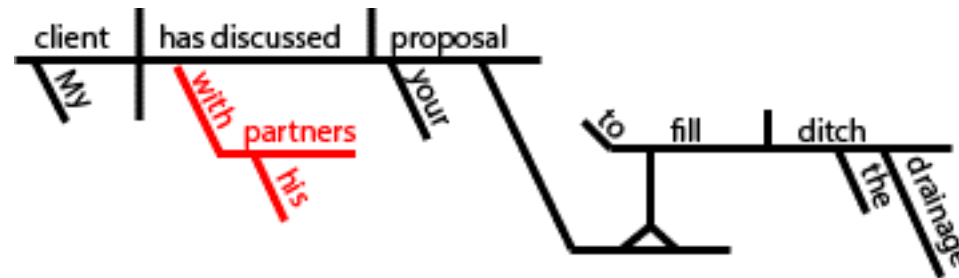# Verbal Ambiguity

► Which of these two meanings should I choose?

"She's the mother of an infant daughter who works 12 hours a day."

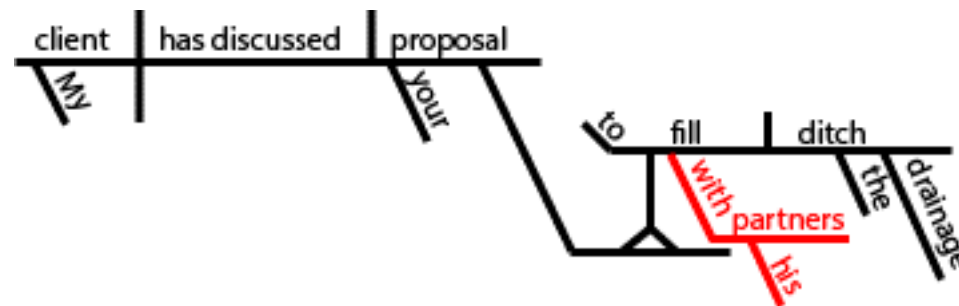"Acme sells children's apparel, footwear, and accessories."

Ambiguity diagrammed

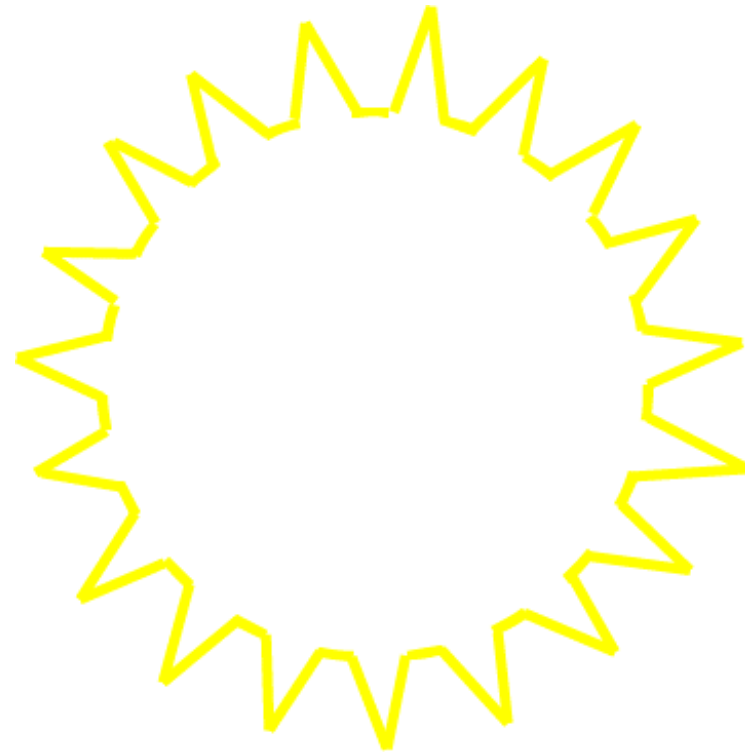"My client has discussed your proposal to fill the drainage ditch with his partners."

Verbal Vagueness

▶ What are the boundaries of this word or phrase?

- Boundaries can be too broad
- They can also be porous

"must operate in a safe manner"

Ambiguity: Useful Distinction

"In writing on the interpretation of texts, the loose norm is to refer to all uncertainties of meaning as *ambiguities*. But there is a useful and real distinction between textual uncertainties that are the consequences of verbal ambiguity...and those that are the consequence of verbal vagueness..."

-Scalia and Garner

Addressing Ambiguity

▶ Common causes

▶ Difficulties in finding them

▶ Potential solutions

General Causes of Ambiguity

▶ Modifier placement

- What does a phrase or clause modify?
- Drainage ditch example
- See 8.14 (a) in Revisor's Manual

▶ Modifying items in a series

- Does the modifier apply to all?
- "Negligent act, error, or omission"
- See 8.14 (b) in Revisor's Manual

More General Ambiguities

- Ranges
  - Are end points included?
  - "Between the ages of 17 and 45"
  - See 8.11 in Revisor's Manual

- References, including pronouns
  - What are we referring to?
  - "She's the mother of an infant daughter who works twelve hours a day."

Limiting Ambiguity

- Reducing chances
  - Good writing
  - Parallelism (8.19)
  - Breaking up sentences (8.15)
- Active management
  - Lists
  - Repetition
  - Definitions

Modifiers and Series

- One subject, one modifier: it's clear what the modifier applies to.

- Two modifiers, one subject: it's not so clear.
  - "charitable and educational institutions"

- Two subjects, one modifier: also not clear.
  - "a duck, goose, or brant that is not on the endangered list"

Options for Multiple Modifiers

"charitable and educational institutions"

▶ If one subject must satisfy two requirements, include the word *both*.

- "an institution that is both charitable and educational."
- For more than two, use "all"

▶ If the modifiers mean *two kinds of subjects,* repeat the article and use *or.*

- "a charitable or an educational institution"

Options for Multiple Subjects

"a duck, goose, or brant that is not on the endangered list"

▶ First, determine what the modifier should apply to.

▶ If only one subject, move modifier in the list:

  ▪ "a brant that is not on the endangered list, duck, or goose"

▶ If it should apply to all...

Lists

▶ Place the modifier as part of the list introduction.

"any of the following that is not on the endangered list:

    a duck;

    a goose; or

    a brant."

Breaking up Sentences

▶ "The duck, goose, or brant must not be on the endangered list."

▶ Good books for learning techniques:
  ▪ Bryan Garner
  ▪ Joseph Kimble
  ▪ General technical writing textbooks

Repetition

- "a duck that is not on the endangered list, a goose that is not on the endangered list, or a brant that is not on the endangered list"

- This is a wordy option, so its use is limited

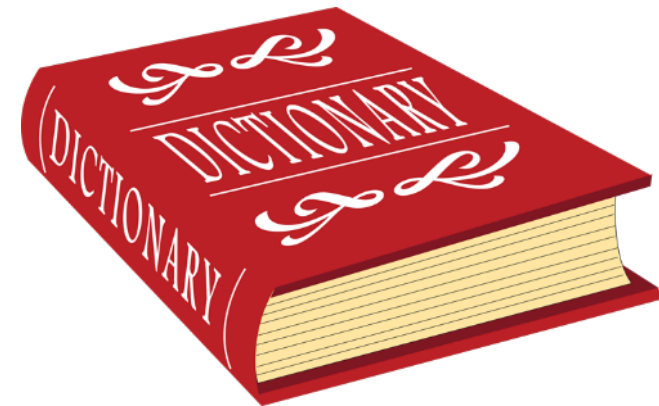- However, it is very effective for the application of "not" to multiple subjects

Definitions

"Unprotected waterfowl means any of the following that is not on the endangered list:

a duck;

a goose; or

a brant."

Working with Vagueness

- Vagueness is often desired or even necessary in law
  - You can't predict every possibility
  - Be intentional
  - Know the gray area

- Unintentional vagueness has a way of ending up in court

General Causes of Vagueness

- Definitions
  - See 2.16

- Word choice
  - See 8.23, 8.24, 8.25

- Assumptions

Weasel Words

- Acceptable
- Adequate
- Applicable
- Appropriate
- Discretion
- Encouraged
- Including but not limited to
- May
- Reasonable
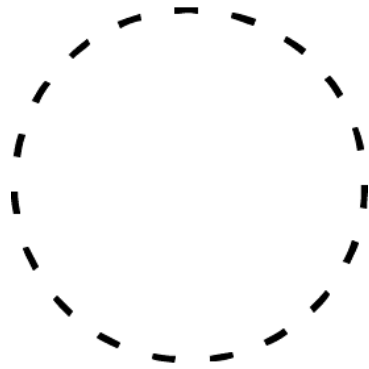- Satisfactorily
- Sufficient
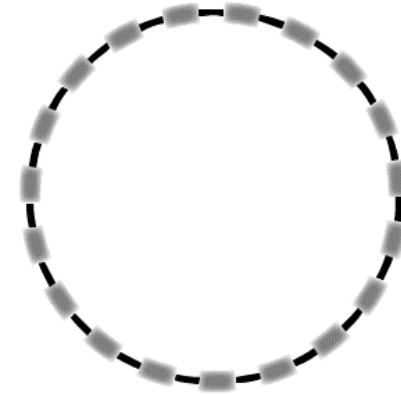- When practical
- Will

"Including but not limited to"

▶ "including but not limited to" is often called impermissibly vague in rules.

▶ "This phrase suggests that known items are part of this rule but are not being made known to the regulated public. The rule language fails to reflect the intent of the agency."

▶ "…grants unduly broad discretion to the agency to import new items that are not listed…"

Define the Gray Area

"Including but not limited to..."

"...and other products that degrade on exposure to light and air."

This structure provides a higher level of notice to the regulated entity or the public.

Ambiguity: Interpreting Texts

"In writing on the interpretation of texts, the loose norm is to refer to all uncertainties of meaning as *ambiguities*. But there is a useful and real distinction between textual uncertainties that are the consequences of verbal ambiguity...and those that are the consequence of verbal vagueness..."
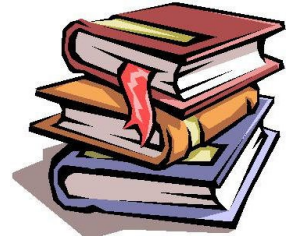
-Scalia and Garner

Interpreting versus Drafting

▶ Canons of Construction

- A set rules and principles for interpreting statutory language
- Some of these are defined in statute in chapter 645
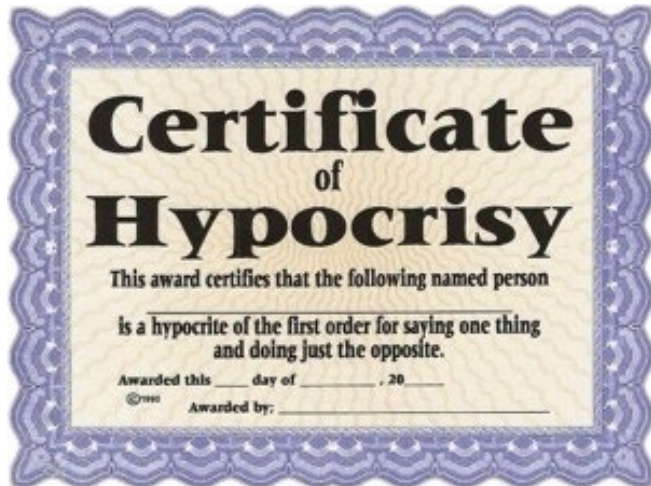- See 7.3 and 7.4 in Revisor's Manual

"Most interpretative canons apply to both ambiguity (as narrowly defined) and vagueness."

-Scalia and Garner

Summary

Do	Don't
Identify you audience(s)	Make up jargon
Use informative headnotes	Make your reader hunt for answers
Give white space	Make every sentence complex
Identify the goal of each sentence	Misplace your modifiers
Untangle noun strings	Rely on absurdity to resolve ambiguity
Define the gray areas	

…More What You'd Call…Guidelines

- Follow the rules…mostly
- For every drafting rule or principle, there are countless legitimate (and important) exceptions that have legal consequences

- <u>Remember the primary objective of drafting</u>: to fully and accurately express the desired legal principle and/or policy objective

Drafting Resources

Revisor's Office Publications

▶ Bill Drafting Manual

   https://www.revisor.mn.gov/office/2013-Revisor-Manual.pdf

▶ Minnesota Statutes, chapter 645

▶ Court Opinions Report

   https://www.revisor.mn.gov/court_opinions/2020

External Resources

▶ *Legislative Drafter's Guidebook: A Practical Guide*, Tobias Dorsey

▶ *Legislative Drafting*, Reed Dickerson

▶ "Plain Language for Lawyers", Richard Wydick, *California Law Review* 66 (1978): 727-56

▶ *Reading Law: the Interpretation of Legal Texts*, Antonin Scalia & Bryan Garner

▶ *The Art of the Statute*, Jack Stark

Questions?

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